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# ADMINISTRATIVE LAW

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## Contents

<b>I. INTRODUCTION .....</b>	<b>2</b>
1. WHAT IS ADMINISTRATIVE LAW? .....	2
2. CONSTITUTIONAL ISSUES .....	2
3. FOCUS OF ADMINISTRATIVE LAW .....	3
4. BY WHAT ROUTE DOES AN ADMINISTRATIVE DECISION COME BEFORE A COURT? .....	3
5. WHAT COURT IS AUTHORIZED TO HEAR AN APPEAL OR APPLICATION FOR JUDICIAL REVIEW? ..	4
6. WHO CAN CHALLENGE AN ADMINISTRATIVE DECISION? .....	5
7. ON WHAT GROUNDS MAY AN ADMINISTRATIVE DECISION BE CHALLENGED? .....	7
<b>II. PROCEDURAL ERRORS .....</b>	<b>7</b>
1. LEGISLATION, COMMON LAW AND THE CHARTER .....	8
2. COMMON LAW THRESHOLD FOR PROCEDURAL REVIEW .....	8
3. LEGITIMATE EXPECTATIONS .....	11
4. CONSTITUTIONAL THRESHOLD FOR PROCEDURAL REVIEW .....	11
5. CONTENT OF PROCEDURAL FAIRNESS .....	12
6. SUMMARY / STANDARD OF REVIEW .....	22
7. EFFECT OF PROCEDURAL BREACH .....	23
<b>III. SUBSTANTIVE ERROR .....</b>	<b>23</b>
1. GROUNDS .....	23
2. THE STANDARDS OF REVIEW .....	23
A. THE (NEW) LEADING CASE: <i>VAVILOV</i> .....	23
B. IDENTIFYING THE STANDARD OF REVIEW POST- <i>VAVILOV</i> .....	24
C. APPLYING THE STANDARDS OF REVIEW POST- <i>VAVILOV</i> .....	27
D. A FURTHER NOTE ON STATUTORY STANDARDS OF REVIEW .....	31
3. ADMINISTRATIVE AUTHORITY TO DECIDE A CONSTITUTIONAL CHALLENGE .....	32
4. REVIEW OF DISCRETIONARY DECISIONS ENGAGING CHARTER VALUES .....	33
<b>IV. REMEDIES .....</b>	<b>35</b>
1. APPEALS .....	35
2. COMMON LAW JUDICIAL REVIEW .....	36
3. STATUTORY JUDICIAL REVIEW .....	36
4. CHARTER REMEDIES .....	37
<b>V. ADMINISTRATIVE LAW AND THE RIGHTS OF INDIGENOUS PEOPLES .....</b>	<b>38</b>
1. INTERSECTIONS: COMMON LAW AND CONSTITUTION, PROCEDURE AND SUBSTANCE .....	38
2. EXAMPLE: DUTY TO CONSULT .....	38

## I. INTRODUCTION

### 1. *What is administrative law?*

Administrative law is concerned with the relationship between courts and those who make decisions in the course of exercising administrative powers. In particular, administrative law focuses on the way in which and the extent to which courts review or oversee administrative decision making.

Administrative powers are largely created by statute. Such legislation is often referred to as the "enabling legislation". An action taken under the Crown's prerogative powers is also considered to be administrative action; however, the focus of these materials is on action taken under enabling legislation.

Frequently an administrative statute not only creates certain powers, but also establishes the agency, board, commission, tribunal or other entity that is to exercise those powers. Thus, labour relations legislation creates a labour relations board and then bestows certain powers on that board; legislation dealing with the self-regulation of professional groups will establish a disciplinary committee for that profession and give it certain powers; human rights legislation establishes a human rights commission and sets out its powers.

It is also possible for administrative powers established by statute to be given to an already-existing part of government, rather than to a newly created administrative decision maker (ADM). For instance, an individual Minister or Cabinet as a whole might be statutorily authorized to make certain administrative decisions.

While administrative law provides for judicial review of the public decisions of ADMs, it leaves space for a subset of ADM decisions to be classed as "private" and so governed instead by private law (torts and contract). *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018 SCC 26](#); *Air Canada v. Toronto Port Authority*, [2011 FCA 347](#).

### 2. *Constitutional issues*

#### **Division of powers**

An ADM may be created by either the provincial government or the federal government; however, the authority given the ADM cannot be contrary to the division of powers in [sections 91 and 92](#) of the *Constitution Act, 1867*; thus the federal government cannot create an ADM to decide matters that fall within the provincial sphere, and *vice versa*.

#### **Section 96 courts**

A province cannot create an ADM that is, in effect, a section 96 court. Thus, in *Crevier v AG (Quebec)*, [\[1981\] 2 SCR 220](#), the Supreme Court of Canada (SCC) held that Quebec had actually created a section 96 court when it established a tribunal whose only function was to hear appeals from disciplinary committees of various professions, and which was intended to be completely insulated from judicial review.

#### **Privative clauses**

Provisions in the enabling legislation may attempt to insulate ADMs from judicial intervention; such clauses are called privative clauses. (A clause that is less strongly worded but still intended to give

some protection from judicial intervention has traditionally been called a finality clause.) The SCC has held that such clauses cannot completely preclude judicial review of administrative actions. In *Crevier*, *supra* it was held that provincial legislatures cannot prevent courts from reviewing whether an ADM had made an error on a jurisdictional issue; this restriction has also been applied to federally created ADMs. (*MacMillan Bloedel v. Simpson et al*, [1996] 2 SCR 1048).

As discussed below, recent case law has challenged the idea that there are distinct “jurisdictional questions” that may be distinguished from other questions requiring interpretation of the home statute, and so determination of the scope and limits of a decision-maker’s statutory authority. (See *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61 [ATA]). However, the principle from *Crevier* – that not even the strongest of privative clauses can shield administrative decision makers from the inherent power of [section 96](#) courts to supervise the actions of “inferior tribunals” -- remains in place, even though classification of issues into jurisdictional or non-jurisdictional is no longer a central focus of judicial review.

### 3. Focus of administrative law

Since administrative law is concerned with the relationship between courts and ADMs, it responds to the following question: if someone is not happy with a decision of an ADM, can that person have the matter reviewed by a court and if so, on what grounds? This question raises several issues, each of which is examined below:

- By what route does an administrative decision come before a court?
- What court is authorized to hear an appeal or application for judicial review?
- Who can challenge an administrative decision?
- On what grounds may an administrative decision be challenged?
- What remedies are available when an administrative decision is successfully challenged?

### 4. By what route does an administrative decision come before a court?

There are two routes by which the decision of an ADM might come before a court on administrative law principles:

- appeal (sometimes referred to as “statutory appeal”); and
- judicial review.

#### Appeals

A right to appeal the decision of an ADM, whether to another administrative body or to a court, exists only if such a right is explicitly created in the enabling legislation; thus, there is no such thing as a common law right of appeal.

If there is an appeal section, it will identify who may bring the appeal and who may hear the appeal, and will also set out the grounds on which an appeal may be brought (for instance: on questions of law alone, on questions of law and mixed fact and law, or on any issue before the ADM).

The appeal section may also give some information about how the appeal court is to approach its task: is it to hold a full hearing *de novo* or something less? May it

substitute its own decision for that of the ADM, or only quash a decision and send it back for reconsideration?

### **Judicial review**

Not all administrative statutes provide for a right of appeal. Some enabling legislation is simply silent on the issue, while other statutes contain privative clauses intended to shield the functioning of the ADM from judicial intervention.

The lack of an appeal section does not mean that the decisions of the ADM are completely immune from judicial oversight. As noted above, even the existence of a full privative clause does not give such immunity.

Because the concept of judicial review did not originate with legislation, but from section 96 courts' interpretations of their own inherent authority, the phrase "common law judicial review" has come to be used.

The federal government, British Columbia, Ontario and Prince Edward Island have codified the common law principles of judicial review, thus giving rise to the term "statutory judicial review" for those jurisdictions. Judicial review of federally created ADMs is done by way of the [Federal Courts Act](#), (RSC 1985, c F-7, as amended).

Since there is no codification in Nova Scotia, review of provincially created ADMs is still done through the application of the principles of common law judicial review. The focus of these materials is therefore on common law judicial review, with references to the [Federal Courts Act](#) where relevant.

### **Non-administrative law options: The civil suit (in contract or tort)**

Apart from the above-noted mechanisms for challenging an administrative decision on administrative law principles, it is important to note that administrative decisions may also or alternatively be the subject of civil actions based in principles on the liability of public authorities in tort or contract.

Until recently, the Federal Court of Appeal decision in *Canada v. Grenier*, [2005 FCA 348](#) was relied upon for the holding that a civil action against the federal Crown, based in harms or losses flowing from a federal administrative decision, could not be launched without having made a prior application for judicial review in the federal court. But in *Canada (Attorney-General) v. Telezone*, [2010 SCC 62](#), the Supreme Court of Canada held that the [Federal Courts Act](#) does not supplant the jurisdiction of the provincial superior courts to deal with civil suits of this nature, even in the absence of a judicial review determination by the federal court.

## ***5. What court is authorized to hear an appeal or application for judicial review?***

### **Appeals**

As noted above, where there is a statutory right of appeal, the appeal section will state the forum in which the appeal is to be held.

### **Judicial review of provincially created ADMs**

For common law judicial review, the application must be brought in the [section 96](#) court of the province: in Nova Scotia, the Supreme Court of Nova Scotia.

### Judicial review of federally created ADMs

Review of federal ADMs is done by either the Federal Court Trial Division or the Federal Court of Appeal, depending on whether the ADM in question is covered by [section 18](#) or [28](#) of the *Federal Courts Act*. [Subsection 18 \(1\)](#) states that subject to [section 28](#), the Trial Division has exclusive jurisdiction over applications for judicial review regarding federal ADMs. [Section 28](#) then lists a number of federal ADMs, and judicial review of these is done by the Federal Court of Appeal.

In addition, where there is a constitutional challenge to federal legislation, [section 96](#) courts have discretionary concurrent jurisdiction. (*Reza v. Canada*, [\[1994\] 2 SCR 394](#).)

## 6. Who can challenge an administrative decision?

### Standing as of right

[Section 18.1\(1\)](#) of the *Federal Courts Act* provides that an application for judicial review of a federal ADM may be made “by anyone directly affected by the matter in respect of which the relief is sought”.

Similarly, at common law, a person whose rights or interests are substantially affected by an administrative decision will have standing to challenge that decision. That said, the legal tests established for private as well as public interest standing in civil matters must not be rigidly applied in administrative settings: the question is always whether the determination of standing reflects a reasonable interpretation of the enabling statute. (*Delta Air Lines Inc. v. Lukács*, [2018 SCC 2](#) [*Delta Air Lines*])

### Public interest standing

Even where a person does not have standing as of right, that person may be able to argue for standing based on the concept of public interest. Between 1975 and 1981, the SCC recognized the possibility of public interest standing where the constitutionality of legislation was challenged. In *Finlay v. Canada (Minister of Finance)*, [\[1986\] 2 SCR 607](#), the SCC expanded the concept beyond the constitutional sphere to allow for public interest challenges to administrative action. The grant of public interest standing is discretionary. The criteria in light of which the discretion is exercised were set out in *Finlay and Canadian Council of Churches v. Canada*, [\[1992\] 1 SCR 236](#) as follows:

- There must be a serious justiciable issue.
- The applicant must have a demonstrated genuine interest in the issue.
- The applicant’s case must constitute a reasonable and effective way of getting the issues before the court.

Until recently, these criteria were interpreted strictly and failure to meet one of them was considered fatal. However, this strict approach was rejected in *Canada (Attorney General) v. Downtown Eastside Sex Workers Against Violence Society*, [2012 SCC 45](#).

That case concerned public interest standing to bring a constitutional challenge to a law. However, the same principles may apply in administrative law matters, on the argument that the exercise of public power must not be immune from judicial review. In his reasons, Justice Cromwell, writing for the Court, stated of the traditional three-factor test:

These factors, and especially the third one, should not be treated as hard and fast requirements or free standing, independently operating tests. Rather they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes. (at para 20)

Yet ADMs must not simply adopt the tests for public interest standing developed in civil (or constitutional) law matters. Where the ADM has discretion on this point, its analysis must reflect a reasonable interpretation of its statutory purposes (*Delta Air Lines, supra*).

### **Standing of the ADM / tribunal to defend the decision**

As with public interest standing on the part of potential litigants, the approach of the courts to the standing of ADMs where their decisions are challenged on review has in recent years been significantly relaxed.

Traditionally, the law on point reflected a concern that both the finality of administrative decisions and the perceived impartiality of ADMs would be compromised if ADMs were allowed to participate in judicial review proceedings in an adversarial capacity. In the rare instances where tribunal standing was granted (for instance, where it was provided for in legislation), participation was restricted “to an explanatory role with reference to the record before the Board and to making representations relating to jurisdiction” (*Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 SCR 684). However, over the years, the case law reflected increasing efforts to balance the rationales for restricting ADM participation on review against the public interest in ensuring that the court fully understands the decision under review: a consideration that may be less than fully served where there is no party seeking to defend the decision.

In *Ontario (Energy Board) v. Ontario Power Generation Inc.*, [2015 SCC 44](#), the principles informing judicial discretion to grant or refuse tribunal standing on review were consolidated and restated with an emphasis on ensuring that the court is fully informed. Rothstein J, writing for the majority, articulates three factors that should inform the discretion:

- (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
- (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.

- (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

As to the content of the arguments an ADM may make, Rothstein J is careful to stipulate that no new issues or arguments may be raised by an ADM on review (“no bootstrapping”). This would offend against the principle of finality. However, ADMs are able “to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons”.

## ***7. On what grounds may an administrative decision be challenged?***

### **Appeals**

Where there is a right of appeal, the grounds of appeal will be set out in the appeal section.

### **Judicial review**

[Subsection 18.1\(4\)](#) of the [Federal Courts Act](#) sets out the grounds for judicial review of federal ADMs. These include that the ADM:

- (a) acted without jurisdiction, acted beyond jurisdiction or refused to exercise its jurisdiction;
- (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- (c) erred in law in making its decision or order, whether or not the error appears on the face of the record;
- (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Paragraphs (a), (b) and (c) can all be classified as errors of law, with (a) and (c) focusing on substantive errors and (b) focusing on procedural error. Paragraph (d) provides for review based on error of fact.

Common law judicial review provides for review on the basis of procedural errors of law, substantive errors of law, errors of fact and misuse of discretion. In the past, the jurisprudence on judicial review provided a separate approach for each of these four categories; now, however, the same analytical framework is used for all substantive errors, whether involving law, fact or discretion, although procedural review is still treated as a separate category.

## **II. PROCEDURAL ERRORS**

A challenge to the procedures followed by an ADM involves several stages of analysis:



- Is this the kind of decision where a court should or can get involved to review procedures? This involves a consideration of whether the decision crosses the **common law threshold** or **constitutional threshold** for review of procedures.
- Even if the decision does not meet the threshold criteria, can the courts take account of the **legitimate expectations** of a party?
- If the decision is over the common law or constitutional threshold, what procedures should the ADM have followed, and did it do so? I.e., what were the **procedural entitlements** of the person affected by the ADM's decision, and were those entitlements met?
- If a procedural issue is raised, what **standard of review** will the court apply to the ADM's decision?
- What are the **consequences** of a breach of the required procedures?

Each of these questions is discussed below.

### ***1. Legislation, common law and the Charter***

Before examining the thresholds developed at common law, and more recently under the *Charter*, it is necessary to consider the relationship between these and the enabling legislation. Let us assume that a person appearing before a particular board wants to be represented by counsel. The first step in determining whether a right to counsel exists is to review the enabling legislation. If the Act states that persons appearing before the board may be represented by counsel, then the right exists.

However, if the legislation is silent on the issue and the ADM refuses to allow counsel, then one turns to the common law, to see if an appeal or judicial review on this point is likely to be successful. That is, is the decision to be made by the ADM likely to cross the common law threshold for procedural entitlements and if so, is the right to counsel likely to be seen as one of the procedural consequences flowing from that crossing of the threshold?

It is also possible that the enabling legislation, rather than being silent on the issue, will specifically state that there is no right to counsel. This would then oust the common law, and the only possible approach would be to ask if the decision crosses the constitutional threshold and if so, whether that would bring with it entitlement to counsel.

### ***2. Common law threshold for procedural review***

By requiring that a threshold be crossed, the courts are asking: is this the kind of decision where a court should get involved to review procedures? Until 1979, in Canada, the threshold issue depended on whether an ADM was acting judicially or quasi-judicially, in which case, parties affected by the decision had certain procedural rights referred to as "natural justice". If an ADM was not carrying out a judicial or quasi-judicial function, courts would not impose any procedural requirements.

In 1979, the SCC decision in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [\[1979\] 1 SCR 311](#) held that a **duty of fairness** could apply to

decisions that previously would not have been open to judicial review of procedures. The content of the duty of fairness is discussed below.

Courts list a number of factors, none of which appears to be completely determinative, for consideration in deciding whether an administrative decision is subject to judicial review regarding the procedures followed by the ADM (or to rephrase it, in order to determine whether the decision has crossed the threshold such that the ADM will be under a duty of fairness). Courts have tended to focus their discussion on four factors (each of which is discussed more fully below):

- Is the decision legislative and general? If so, it is **less** likely to be over the threshold.
- Does the decision affect rights, interests, property, privileges or liberties? If yes, the decision is **more** likely to be over the threshold.
- Does the decision have serious consequences? If yes, then it is **more** likely to be over the threshold.
- Is the decision final? The more final (or close to final) that a decision is, the **more** likely that it will be over the threshold.

**i) Legislative or general**

The issue here is whether the ADM is making a fairly individualized decision, such that those individuals most affected will have certain procedural entitlements, or whether the decision maker is actually making law or broad general policy, in which case courts are less willing to impose procedural requirements.

In *AG (Canada) v. Inuit Tapirisat of Canada*, [\[1980\] 2 SCR 735](#), a decision of the federal Cabinet to uphold an increase in telephone rates was characterized as legislative and so it did not cross the procedural threshold. Because the threshold test had not been met, the SCC would not review the procedures followed by Cabinet in coming to its decision. The SCC gave several reasons for characterizing Cabinet's action in this case as legislative: Cabinet was carrying out a function previously belonging to the legislature, there was no individualized dispute, and the challenging party was no more affected by the decision than any member of the general public.

Similarly, it has been held that where a Minister is setting policy, rather than deciding on an individual case, the threshold has not been crossed. The mere fact that certain identifiable parties would be economically harmed by the policy decision does not change the nature of the decision. (*Canadian Association of Regulated Importers v. Canada (AG)*, [\[1994\] 2 FC 247](#)).

On the other hand, although passing a municipal bylaw is a legislative function, where a particular bylaw targets only one individual's property rights because of a long-standing dispute between that individual and the municipality, such a decision is no longer general and does cross the threshold for procedural entitlements. (*Homex Realty v. Wyoming*, [\[1980\] 2 SCR 1011](#)).

**ii) Rights, interests, property, privileges, liberties**

This is an expansion from pre-*Nicholson* days, when the decision had to affect legal rights in order to cross the threshold. Now, it is sufficient if the decision affects one's

“rights, interests, property, privileges, liberties”. (*Martineau v. Matsqui Inmate Disciplinary Board*, [\[1980\] 1 SCR 602](#)). Even a decision regarding an initial application for a benefit (such as a physician’s application for hospital privileges) might cross the threshold, depending on the circumstances. (*Hutfield v. Board of Fort Saskatchewan General Hospital District No. 98* [\(1986\), 49 Alta LR \(2d\) 256 \(Alta QB\)](#)).

**iii) Significance of consequences**

*Nicholson* (*supra*) identified the serious consequences for the individual (in that case, the loss of employment) as one of the reasons for extending procedural entitlements beyond the previous threshold. Later cases reiterate that an administrative decision with only trivial consequences will not pass the procedural threshold. (*Knight v. Indian Head School Division No. 19*, [\[1990\] 1 SCR 653](#)).

**iv) Preliminary v. final decision**

While some cases have stated that preliminary decisions will not cross the threshold for procedural entitlements, this is not an absolute rule. If there is proximity (i.e., the earlier stage is likely to have a significant influence on the final outcome) and potential exposure to harm, it may be possible to review the procedures followed at the preliminary stage. (*Re Abel and Director, Penetanguishene Mental Health Centre* [\(1979\), 24 OR \(2d\) 279, 97 DLR \(3d\) 304 \(Ont Div Ct\)](#) aff’d [\(1980\) 31 OR \(2d\) 520, 119 DLR \(3d\) 101 \(Ont.CA\)](#)). However, a court will not review for procedure at a preliminary investigation, where information is simply being gathered, and where any determination of rights will occur only after parties have had an opportunity to make their case. (*Irvine v. Canada (Restrictive Trade Practices Commission)*, [\[1987\] 1 SCR 181](#))

**v) Relationship between the ADM and the individual**

The case *Knight v. Indian Head School Division No. 19*, [\[1990\] 1 SCR 653](#) involved a decision of a Board of Education to dismiss its director of education. In its common law threshold analysis, the SCC took note of “the relationship existing between [the ADM] and the individual” as a matter of relevance to whether procedural fairness was owed. In *Knight*, the SCC further adopted the principle that public office holders – those whose office and/or duties are established under statute – are owed procedural fairness when subject to dismissal.

This holding from *Knight* was recently revisited in *Dunsmuir v. New Brunswick*, [2008 SCC 9](#), a decision that, as we will see, also made important changes to the law on substantive review. *Dunsmuir*, a former employee of the New Brunswick Department of Justice, sought to challenge his dismissal. A labour arbitrator determined that, as a public office holder, Mr. *Dunsmuir* was due procedural fairness guarantees which had not been accorded. In overturning that decision, the SCC rejected the distinction between public office holders and contractual employees on which the decision in *Knight* had relied. That is, while the majority in *Dunsmuir* took account of “the nature of the employment relationship between the public employee and the public employer” as a threshold consideration in determining whether any common law procedural fairness guarantees were due, it concluded that the presence of an employment contract in *Dunsmuir*’s case removed his right to those protections. Therefore, any dispute

attendant to *Dunsmuir*'s dismissal "should be viewed through the lens of contract law rather than public law."

This decision has important implications for public employees, who, so long as they are under a contract of employment, now are unlikely to be owed procedural fairness guarantees upon dismissal. However, *Dunsmuir* indicates that procedural fairness obligations will remain in the case of "judges, ministers of the Crown, and others who 'fulfil constitutionally defined state roles'". In addition, procedural fairness protections may apply where "the terms of appointment . . . expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office 'at pleasure'." (*Dunsmuir, supra*) In reference to the latter sort of case, the *Dunsmuir* majority states: "[B]ecause an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously."

### 3. *Legitimate expectations*

If a decision does not meet the criteria for review of procedures (that is to say, it does not cross the procedural threshold), courts may still impose certain procedures on the ADM where a party had a legitimate expectation of procedural rights, based a promise by a public official, or the past practice of the ADM. (*Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [\[1990\] 3 SCR 1170](#)). It has, however, been emphasized that this doctrine can at most create procedural rights, not substantive rights. (*Reference Re. Canada Assistance Plan*, [\[1991\] 2 SCR 525](#), *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013 SCC 36](#)). Moreover, the force of this doctrine as a means of securing procedural fairness where it would otherwise be unavailable at common law appears to have been significantly diminished, with the statement of the SCC that the doctrine cannot ground procedural fairness obligations on the part of "a body exercising purely legislative functions," nor in the case of "[a] purely ministerial decision, [made] on broad grounds of public policy" (*Reference Re. Canada Assistance Plan, ibid.*).

### 4. *Constitutional threshold for procedural review*

If the enabling legislation precludes the procedural entitlement being sought, one cannot ground a claim for that procedure in the common law. Therefore, in such cases, one must ask whether the decision is over the *Charter* threshold (for both provincial and federal ADMs) or over the *Bill of Rights* threshold (for federal ADMs).

#### *Charter*

On procedural review, the most frequently argued section of the *Charter* is [section 7](#). If the ADM's decision affects life, liberty, or security of the person, the *Charter* threshold has been passed. (*Singh v. Minister of Employment and Immigration*, [\[1985\] 1 SCR 117](#))

The SCC has indicated that [s.7](#) of the *Charter* extends to regulate state action beyond the criminal or custodial setting. However, the [s.7](#) guarantees of "life, liberty and security of the person" will be engaged only rarely in administrative proceedings. This is because the s.7 threshold requires state action that threatens the subject's life, liberty, or physical integrity, that threatens to have "a serious and profound effect" on the subject's psychological integrity, or that threatens to interfere with the subject's ability to make decisions of fundamental personal importance (*Blencoe v. British Columbia (Human Rights Commission)*, [\[2000\] 2 SCR 307](#)). Courts have held that decisions which have

chiefly economic consequences (for instance a refusal to grant certain social benefits) do not affect “life, liberty, or security of the person”, and so are not over the [s. 7](#) threshold.

If a decision does affect life, liberty or security of the person, then in accordance with the wording of s. 7 of the *Charter*, the procedures followed by the ADM must be in keeping with the **principles of fundamental justice**. The content of these principles is discussed below. Any failure to meet the principles of fundamental justice would have to be justified under [s. 1](#) of the *Charter*.

### ***Bill of Rights***

The *Bill of Rights* may impose certain procedural requirements on federal ADMs, if the decision in question affects life, liberty, security of the person or enjoyment of property (s. 1(a)), or determines rights and obligations ([s. 2\(e\)](#)). As with the common law and *Charter* thresholds, “rights” has been broadly construed to cover more than strict legal entitlements. (*Singh, supra*)

If a decision passes the [s. 1\(a\)](#) threshold, then the ADM must act in accordance with “due process of law” and if it passes the 2(e) threshold, parties are entitled to “a hearing in accordance with the principles of fundamental justice”.

## ***5. Content of procedural fairness***

If the decision is over the common law or constitutional threshold, what procedures should the ADM have followed? What were the procedural entitlements of the person affected by the ADM's decision, and were those entitlements met? Just because a decision is found to be “over the threshold” and subject to a duty of fairness (if we are dealing with the common law threshold) or subject to the principles of fundamental justice (s. 7, *Charter* threshold), this does not mean that the applicant will automatically get whatever procedural entitlements are being argued for. The courts have held that the “content” of the duty of fairness and the principles of fundamental justice is flexible, spanning a spectrum of procedures, and is dependent on context.

The case *Baker v. Minister of Citizenship and Immigration*, [\[1999\] 2 SCR 817](#) draws on prior case law to articulate a non-exhaustive list of considerations to assist in determining the type or level of procedural protections due where the common law threshold is met. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [\[2002\] 1 SCR 3](#), the court looked to the factors discussed in *Baker* to determine what procedural protections were required under s.7 of the *Charter* in the circumstances of that case.

*Baker*'s (non-exhaustive) list of factors for determining what is required by the duty of fairness includes: (1) “the nature of the decision made and the process followed in making it” – that is, “the closeness of the administrative process to the judicial process”; (2) “the role of the particular decision within the statutory scheme” (*e.g.*, whether or not an internal appeal procedure is provided in the statute); (3) “the importance of the decision to the individual or individuals affected”; (4) “the legitimate expectations of the person challenging the decision”, *i.e.*, whether the ADM made representations as to the procedures to be followed or the outcome of the case; and (5) “the choices of procedure made by the agency itself”.

Using the *Baker* factors as guidance, then, whether a particular procedure is required as part of the decision-making process will depend on the circumstances. The basic principles that underlie the duty of fairness and the principles of fundamental justice are:

- an affected party must have an opportunity to know the issues and to make representations;
- the deliberative process followed by the ADM must meet the duty of fairness or be in keeping with the principles of fundamental justice; and
- the decision must be made by an unbiased, independent decision maker.

Each of these principles will be discussed in turn.

### i) Choice of procedures

With regard to the principle that an affected party must have an opportunity to know the issues and to make representations, the question becomes whether the procedural choices made by the ADM achieved this. Where a particular procedure is sought by an affected party, the ADM must consider whether that procedure is required in order to afford the party an adequate opportunity to make representations, or whether sufficient participation can be ensured in some other way. If the former, then *in that context*, a denial of the procedure in question means that the ADM failed to meet the duty of fairness or the principles of fundamental justice. (Remember, though, if a violation of [s. 7](#) is found, one still has to consider s. 1 of the *Charter*.)

With each of the procedural issues raised in this section, the point is to get a sense of what factors are likely to move the court toward placing greater or lesser procedural requirements on an ADM.

#### Notice

Some form of notice will always be required to inform affected parties of the fact that a particular decision is about to be made. The notice should also set out the legislation that authorizes the decision, the issues involved, how representations may be made, and the possible consequences or penalty if the decision is adverse.

#### Pre-hearing discovery/ disclosure

In some circumstances, complete discovery from other parties or disclosure by the ADM may be required. (*Ontario Human Rights Commission v. Ontario Board of Inquiry Into North Western General Hospital* (1993), [115 DLR \(4<sup>th</sup>\) 279](#) (Ont Div Ct)) In other circumstances a more limited provision of information may suffice. (*CIBA-Geigy Canada Ltd. v Canada (Patented Medicine Prices Review Board)*, [\[1994\] 3 FC 425](#)). ADMs require express statutory authority to make pre-hearing discovery orders. This may be distinguished from the common law right to disclosure of material in the hands of the decision maker itself (which requires a contextual analysis to determine the level of disclosure owed). However, ADMs with express power to order production of evidence at the hearing may effectively grant rights to discovery by making such a production order while granting an adjournment at the commencement of the hearing.

Factors that have been seen as expanding the need for pre-hearing information include:

- more information is needed in order to meet the case against you (*Re Napoli and Workers' Compensation Board* ([1981](#), [126 DLR \(3d\) 179 \(BC CA\)](#)); and
- the proceeding is analogous to a criminal trial (*Ontario (Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital)* (1993), [115 DLR \(4<sup>th</sup>\) 279](#) (Ont Div Ct)).

There may be less entitlement to disclosure or discovery where:

- the rights of participants must be balanced against the public interest or the need to protect others (*Gallant v. Canada (Deputy Commissioner Correctional Service)*(1989), 36 Admin LR 261 (FCA), *Gough v. Canada (National Parole Board)* (1990), 45 Admin LR 304 (FCTD));
- the ADM's decision is simply part of its broader regulatory function; or
- full discovery or disclosure would impede the functioning of the ADM (*CIBA-Geigy Ltd. Canada (Patented Medicine Prices Review Board)*, [\[1994\] 3 FC 425 \(FCA\)](#)).

Legal advice of in-house counsel to an ADM is not subject to disclosure (it is protected by solicitor-client privilege); however, given the various functions of in-house counsel within administrative agencies, determination of whether the advice in question is properly characterized as “legal” or “non-legal” must be determined on a case-by-case basis, with reference to “the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered”. *Pritchard v. Ontario (Human Rights Commission)*, [\[2004\] 1 SCR 809](#); see also *Slansky v. Canada (Attorney General)*, [2013 FCA 199](#).

### Delay

Delay on the part of the ADM will undermine the duty of fairness or the principles of fundamental justice only if the party complaining of the delay can show that the delay prejudiced their interests in some way; for instance, witnesses are no longer available (*Nisbett v. Manitoba (Human Rights Commission)* ([1993](#), [101 DLR \(4<sup>th</sup>\) 744 \(Man CA\)](#)); or the delay itself, as opposed to other external factors, caused severe psychological distress (*Blencoe, supra*).

### Oral hearing

A fundamental aspect of the duty of fairness and the principles of fundamental justice is that the affected party must be given an opportunity to “make representations”, “meet the case against them”, “be heard”. Much of the discussion on this issue focuses on whether there must be an oral hearing.

*Nicholson (supra)* established that an oral hearing is not necessarily required for every decision that crosses the common law threshold. (Also see *Baker, supra*). The same has been held for s. 7 *Charter* cases. (*Singh, supra*; *Suresh, supra*)

If parties were not given an oral hearing, the reviewing court must consider whether the procedures followed by the ADM allowed the parties an adequate opportunity to make their case. Situations that might require an oral hearing include those where credibility is an issue (*Singh, supra*) or where the consequences of the decision are very serious.

An oral hearing may not be a requirement where there are other factors to be balanced against the party's claim for an oral hearing, such as public safety (*Hundal v. Superintendent of Motor Vehicles* (1985), [20 DLR \(4<sup>th</sup>\) 592 \(BC CA\)](#)) or ensuring a harassment-free workplace. (*Masters v. Ontario* (1994), [18 OR \(3d\) 551](#) (Ont Div Ct))

One case has suggested that an oral hearing is not required where such a hearing would have been unlikely to change the outcome (*Hundal, supra*); however, other jurisprudence suggests that this factor should not be relevant.

### Right to counsel

There is no automatic entitlement to counsel in the context of administrative decision making. One must ask whether participation of lawyers is required in order for parties to be able to "make their case".

Factors to consider include:

- the complexity of the case (*Ontario Men's Clothing Manufacturers Assn. v. Arthurs* (1979), [104 DLR \(3d\) 441 \(Ont Div Ct\)](#));
- whether points of law are likely to arise (*Howard v. Stony Mountain Institution* (1985), [19 DLR \(4<sup>th</sup>\) 502 \(FCA\)](#));
- the seriousness of the decision (*Men's Clothing, supra, Howard, supra, Parrish (Re)* [\[1993\] 2 FC 60 \(FC TD\)](#));
- the potential impact of lawyers' participation, in terms of time, cost and efficiency; and
- the capacity of the individual involved to present the case without counsel (*Howard, supra; Parrish, supra*).

### Cross-examination

The opportunity to cross-examine adverse witnesses is not automatically part of the duty of fairness or principles of fundamental justice in every context. The real issue is whether one has been afforded sufficient opportunity to respond to or challenge adverse evidence that is before the ADM. The form that this opportunity takes may vary from full cross-examination as in a court, to responding in writing to the evidence or opinions of other side. While some cases (*Re Toronto Newspaper Guild, Local 87, American Newspaper Guild (CIO) and Globe Printing Company*, [1951] OR 435, [3 DLR 162](#) (Ont HC)) suggest that cross-examination is usually the most effective way to test the merits of the opposing case, others (*Re County of Strathcona No. 20 and MacLab Enterprises* (1971), [20 DLR \(3d\) 200](#) (Alta SCAD)) note that the purpose of cross-examination is to try to weaken the case against one, and that if a party has been provided with another, but equally effective way of doing so, cross-examination may not be necessary.

### Official notice

To what extent can an ADM rely in its decision making on past experience, previous cases, expertise, etc.? An ADM does have greater leeway than a court, to rely on facts or knowledge that have not been proven by one of the parties by evidence put before the ADM; however, where an ADM is going to rely on specific facts or information that were not in evidence, it must inform the parties so that they have opportunity to



respond. There may be less need for this if the ADM is simply relying on a general principle, or using a previous case as an example.

## ii) Deliberative process

Under “Choice of Procedures” we discussed the extent to which the duty of fairness or principles of fundamental justice require that an ADM extend certain procedural entitlements to persons affected by its decisions. So far, then, the focus has been on parties’ participatory rights. The duty of fairness and the principles of fundamental justice go beyond this, however. Procedural concerns also involve a consideration of the deliberative process itself. This includes:

- how ADMs go about deciding (which raises issues of delegation and consultation); and
- whether an ADM’s reasons, as opposed to simply the outcome, must be provided to those affected.

## Delegation

A general principle of administrative law states that an entity that is required by statute to decide cannot appoint another to decide in its place. Therefore, there is a *prima facie* rule of statutory construction against an ADM delegating its powers, unless this is authorized by the enabling legislation. However, courts will balance the theory of non-delegation against an assessment of how decision makers actually work. Generally, there is fairly wide latitude for delegation of administrative functions by Ministers or Cabinet (*Local Government Board v. Arlidge*, [1915] AC 120 (Eng. HL)) but less so for statutorily created ADMs, such as agencies, boards and tribunals.

## Those who hear must decide

The principle that “those who hear must decide” means that members of an ADM who did not participate fully in hearing evidence or argument should not decide the case. (*Ramm v. Public Accountants Council (Ontario)*, [1957] OR 217, [7 DLR \(2d\) 378](#) (Ont CA)). Concerns regarding this issue could arise in a number of contexts – for instance one member of an ADM might be absent for some of the hearing. As a Nova Scotia case makes clear, however, the principle only applies to an actual hearing and does not attach simply because an ADM is required to seek public input by way of a public meeting. (*Potter v. Halifax Regional School Board*, [2002 NSCA 88](#), 215 DLR (4th) 441)

In recent years, the issue of “those who hear must decide” has arisen chiefly in the context of determining what consultation, if any, an ADM may have with others, such as panel members who were not involved in the actual hearing, or ADM staff including agency counsel.

The limits of such consultation are explored in *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [\[1990\] 1 SCR 282](#). This case examined the decision-making process of the Ontario Labour Relations Board, where the tripartite panel which heard a case could ask for a meeting of the full Board to discuss the policy aspects of an upcoming decision. (This full Board meeting was not provided for in the enabling legislation).

The majority of the SCC in *Consolidated-Bathurst* upheld the full Board meeting process, rejecting the argument that the hearing panel would be improperly influenced

or pressured by those who were not part of hearing. The Court accepted that the hearing panel remained responsible for deciding the outcome. Safeguards included the fact that full Board meetings were voluntary and only held at the request of the hearing panel; attendance was voluntary and not recorded; no minutes were taken; no matters were voted on; discussion was limited to policy; and facts were taken as determined by the panel. (The Court held that it would be a procedural breach if those who had not heard the evidence could debate findings of fact). The SCC accepted that the purpose of the full Board meetings was to call on the experience of other members and to encourage consistency of approach, and held that it would be unrealistic to expect ADMs to operate exactly like a court.

Where the *Consolidated-Bathurst* safeguards are not present, and it appears to the reviewing court that the process of consultation undertaken by the ADM might interfere with the ability of those who heard the case to decide freely, the consultation would be seen as a breach of procedural fairness, thus invalidating the decision. (*Tremblay v. Quebec (Commission des affaires sociales)*, [\[1992\] 1 SCR 952](#))

## Reasons

### *Duty to give reasons*

Some enabling legislation requires an ADM to give reasons for its decision; the issue here is whether a duty to give reasons exists in the absence of such a provision in the legislation.

The general rule at common law is that there is no universally applicable duty to give reasons for an administrative decision. Traditionally, exceptions to this general rule provided that reasons could be required in situations of successive applications, or where a failure to give reasons might prevent a person from exercising a statutory right of appeal or other statutory right of rehearing. Although this general rule has not been overturned by the courts, the SCC has expanded the situations in which reasons will be required as a matter of common law.

A 1997 decision of the Nova Scotia Court of Appeal, *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)* (1997), [160 NSR \(2d\) 241](#), 4 Admin LR (3d) 248 (NS CA), accepted the general rule but widened the exceptions to it, by stating that an ADM should provide written reasons whenever there are substantial issues to be resolved. The Court also suggested that where an ADM is protected by a privative clause, there might be a greater need to give reasons.

*Baker* (supra), a 1999 decision of the SCC, is generally recognized as having expanded the situations in which an ADM must give reasons, while at the same time stating that there is no general duty at common law. There, the SCC held that the duty of fairness will require the provision of written reasons in several contexts: where there is a statutory right of appeal, where the decision has significant importance for the individual (the language of “profound importance” was used elsewhere in the case), or in “other [as yet unspecified] circumstances”.

There is conflicting case law on the *constitutional* duty to give reasons, *i.e.*, on the issue of whether it would offend the principles of fundamental justice to deprive a person of life, liberty or security of the person, without providing reasons. It seems likely that the

constitutional requirements are much in keeping with the common law as set out above. (See *Suresh (supra)*).

### **Content of reasons**

If there is a duty to give reasons, how much information must be provided to meet that duty? The answer will require a contextual analysis. In *Baker (supra)*, the SCC indicated that in some settings, the duty to give reasons may be met quite informally. There, the SCC held that the Department of Immigration had met its duty to give reasons by providing the informal notes of an immigration officer, where another officer's decision was based on these notes.

It should be noted that "adequate" reasons (sufficient to meet the duty to give reasons as a matter of procedural fairness) are not necessarily "good" or "acceptable", or "reasonable" reasons. In *Baker (supra)*, while the immigration officer's notes were adequate to meet the requirement that reasons be given, the decision was quashed because the reasons revealed bias as well as substantive unreasonableness.

Some appellate court decisions since *Baker* have held that, in order to satisfy the duty to give reasons, an ADM must address the principal issues, provide a review of evidence, and set out its reasoning process or the basis on which conclusions were reached, including findings on important issues of fact. However, this line of case law must be qualified by a recent statement from the SCC about what will suffice to meet the duty to give reasons. In a unanimous judgment in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011 SCC 62 \[Newfoundland Nurses' Union\]](#), the Court indicated that a low threshold will apply when determining whether reasons have been given (and so whether the duty to give reasons has been met, as a matter of procedural fairness). Questions about the "quality" of reasons or "alleged deficiencies or flaws" in reasons should be pursued in accordance with the law on substantive review.

In *Suresh (supra)*, the duty to give reasons was addressed as part of a [s.7](#) procedural analysis ("informed by" the common law duty of fairness). There, the reasons for the impugned decision – involving deportation in the face of possible torture upon return – were required to "articulate and rationally sustain" the bases of decision and to "emanate from the person making the decision rather than take the form of advice or suggestion". This apparently elevated constitutional standard for meeting the duty to give reasons stands in some tension with the low threshold stated in *Newfoundland Nurses' Union (supra)*.

### **iii) Impartiality and independence**

An integral component of the duty of fairness and the principles of fundamental justice is that the decision must be made by an impartial and independent decision maker.

#### ***Impartiality***

An impartial ADM is one that is neither biased nor seen to be biased. As explained below, the standards applied to determine whether an ADM should be disqualified for lack of impartiality will depend on the circumstances of the case, including whether the function of the ADM is classified as adjudicative, regulatory or legislative.

*Adjudicative functions*

Where an ADM serves an adjudicative function (applying law to a particular set of facts in order to determine individual rights, privileges or penalties), s/he may be disqualified for lack of impartiality where s/he is shown to have a material interest in the outcome of an issue, or where there is a reasonable apprehension of bias.

Disqualification on the basis of material interest is based on the maxim that no person shall be a judge in his or her own cause, and according to the House of Lords “that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest”. (*Dimes v. Proprietors of the Grand Junction Canal*, (1852) 10 ER 301 (Eng. HL))

Reasonable apprehension of bias has been defined as follows: “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]hat test is “what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude?” (*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 at 394-95).

Depending on what factors raise the apprehension of bias, they may be classified as raising concerns regarding individual impartiality or concerns regarding institutional impartiality.

A reasonable apprehension of **individual** bias is raised when the concerns relate to the attitudes or characteristics of the ADM in question, such as:

- Attitudinal bias or antagonism toward one of the parties (for instance, in the context of a labour arbitration, if the arbitrator was known to have made consistently anti-union or anti-management comments);
- Prior association between the ADM and one of the parties (for instance, if the ADM is related to, or close friends with, or perhaps even had a previous professional relationship with one of the parties appearing before it (*Turpin v. Wilson* (1995), 130 DLR (4<sup>th</sup>) 158)).

A reasonable apprehension of **institutional** bias is raised when the way in which the ADM carries out its duties would make the reasonable bystander question whether the ADM could decide fairly as between the parties. This arises most frequently in the context of overlapping functions. For instance, if the same person investigates a complaint and decides that there is sufficient merit in the complaint to proceed, and then adjudicates the complaint, it might be feared that this person, having found merit in the complaint, will be too ready to side with the complainant at the hearing.

One defence to an allegation of reasonable apprehension of bias based on overlapping functions is that the dual role being complained of is clearly (expressly or implicitly) authorized in the enabling legislation (*Brosseau v. Alberta Securities Commission*, [1989] 1 SCR 301). Thus, if the ADM is carrying out its functions in strict accordance with the enabling legislation, an allegation of reasonable apprehension of bias should not be successful, unless the legislation itself is subject to a successful constitutional challenge.

The impact of a successful constitutional challenge, in removing the defence of statutory authorization, is seen in *MacBain v. Canada (Human Rights Commission)*, [1985] 1 FC 856, 22 DLR (4th) 119 (FCA). There, the provisions in federal human rights legislation for the appointment of human rights tribunals were found to violate the *Bill of Rights* and therefore, although the process was statutorily authorized, the allegation of reasonable apprehension of bias was upheld.

When there is an allegation of institutional bias, it is not simply a matter of one or more individuals asking themselves: is it appropriate for me to decide this particular matter? Instead, the ADM as a whole must consider whether it needs to change the way in which it carries out its duties – for instance, does it need to put safeguards in place to ensure that one person cannot act as both complaint investigator and adjudicator on the same file?

### *Regulatory and legislative functions*

The standard for determining whether the duty of impartiality is met in a particular case may depend on the nature of the decision maker (elected official, interest group representative, political appointee), the nature of the decision (legislative, regulatory, adjudicative) and the stage of decision (investigative vs. adjudicative).

Where an ADM is carrying out a legislative or policy function but is required by statute to hold a hearing in the course of those functions (e.g., municipal councillors passing or amending bylaws), the hearing must be impartial. However, the test for reasonable apprehension of bias is noticeably different from that applied in the adjudicative setting; with regard to legislative or policy decisions, it is the “closed mind test” that is relevant. Thus, reasonable apprehension of bias will exist in the legislative or policy setting only if it can be shown that the decision maker had completely made up its mind, and could not have been persuaded to a different view. (*Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 SCR 1170 )

The case *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 involved statements made by a member of a regulatory board expressing his view of the matter in issue before and after the matter had been set down for a hearing. The statements made before the hearing date was set were evaluated on the “closed mind” standard (at that stage, the member was treated like a municipal councillor, expected to have strong views on matters of policy); however, the statements made after the hearing date was set were evaluated on the more stringent “reasonable apprehension of bias” test.

In *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 SCR 624, the SCC addressed the application of the duty of impartiality to a Minister’s exercise of “discretionary political power” under environmental protection legislation. The Court affirmed that the duty of impartiality, “like that of all of the rules of procedural fairness, may vary in order to reflect the context of a decision-maker's activities and the nature of its functions.” Despite the Minister’s prior involvement in the matter in issue (which had given rise to civil litigation against government), and despite the fact that his decision had consequences for

government's position in that ongoing litigation, the Court held that the Minister should not face disqualification for lack of impartiality or conflict of interest, as he held no personal interest in the matter and the duty of impartiality did not otherwise have bearing in this highly politicized context. More generally, the Minister's decision was deemed to conform with his statutory duty to make political decisions in the public interest.

### ***Independence***

Independence and impartiality are separate concepts. (2747-3174 *Quebec Inc. v. Quebec (Regie des permis d'alcool)*, [1996] 3 SCR 919; *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 SCR 884). Independence relates to the ability of the ADM to decide free from outside pressure, while impartiality relates to the ADM's ability to remain neutral as between the parties.

Where independence is at issue, the question is whether the decision maker is assured the "adjudicative freedom" to decide matters free from outside interference. Usually (but not always) the threat of outside interference is seen as coming from the level of government that established the ADM. (*Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 SCR 3.)

The concept of independence for ADMs draws on the jurisprudence on judicial independence, particularly a 1985 decision of the SCC that identified the requirements for judicial independence as "security of tenure, financial security and the institutional independence of the tribunal bearing on the exercise of its function". (*R. v. Valente*, [1985] 2 SCR 673 at 169-70.) However, the courts have been clear in stating that the independence required of ADMs is not equivalent to that required of the judiciary.

Thus, if the level of pay for members of an ADM were determined after each hearing on an *ad hoc* basis, this might lead to the perception that members could be pressured by government to decide in a particular way, or risk getting a smaller paycheque. The argument would be that the ADM lacked sufficient financial security to enable it to operate independently of government.

Similarly, very short-term appointments with a chance of reappointment might lead to the concern that members of the ADM would be tempted to decide issues in ways favourable to the appointing government, to increase the chance of being reappointed.

The protections required as a matter of common law will vary depending upon the nature of the decision and decision-making context, with more adjudicative decisions demanding higher protections than those that are closer to the legislative or policy-making end of the decision-making spectrum.

However, even where the decision is adjudicative and affects significant individual interests, common law protections of administrative independence may be displaced by express statutory authorization. That is to say that, in contrast to the law on judicial independence, administrative independence is not protected as a matter of constitutional principle (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 SCR 781; *Saskatchewan Federation of Labour v. Government of Saskatchewan*, 2013 SKCA 61.)

## 6. Summary / Standard of review

To summarize thus far, where the procedure to be followed by an ADM is not fully set out in the enabling statute, an ADM may be required to make various choices about procedures in the course of carrying out its administrative functions. Whether those procedural choices might be successfully challenged on judicial review engages a number of questions:

- whether a particular function of the ADM is over the common law threshold such that a duty of fairness applies, or over the constitutional threshold such that the principles of fundamental justice apply;
- if the duty of fairness or the principles of fundamental justice do apply, what procedural entitlements that creates (*i.e.*, the content of duty of fairness or principles of fundamental justice in that context);
- whether the deliberative process followed by the ADM is in keeping with the duty of fairness or the principles of fundamental justice;
- whether an allegation of bias or lack of independence has merit, such that the ADM should withdraw or reconstitute itself.

Where an ADM's decision on one of the above questions is challenged, what standard of review will be applied by a court? Identification of the "standard of review" is an important step in the analysis where an ADM's decision is challenged on substantive grounds; however, there is controversy within the courts as to whether there may be said to be a standard of review applied in procedural fairness matters, and if so, what standard.

On the dominant account, when review for procedural fairness is in issue, the standard of review is invariably "correctness" (*Mission Institution v. Khela*, [2014 SCC 24 at para 79](#)). One should be aware, however, of developments in the appellate case law indicating support for the principle that a standard of reasonableness (incorporating "deference" to or respect for tribunal decisions) rather than correctness should be applied on matters of procedure – at least where the tribunal has expertise concerning the procedures appropriate to its specific decision-making context. (See, *e.g.*, *Re: Sound v. Fitness Industry Council of Canada*, [2014 FCA 48](#); *Maritime Broadcasting System Ltd. v. Canadian Media Guild*, [2014 FCA 59](#); *Risseeuw v Saskatchewan College of Psychologists*, [2017 SKQB 8](#)). The Nova Scotia Court of Appeal has indicated that no standard of review analysis is required where procedural fairness is in issue; instead the question is simply whether the procedure followed was unfair given all the circumstances: *Jono Developments Ltd. v. North End Community Health Association*, [2014 NSCA 92](#); *Nova Scotia Public Service Long Term Disability Plan Trust Fund v Hyson*, [2017 NSCA 46](#)).

In any case, *Baker*'s formulation of contextual factors to assist in determining the requirements of procedural fairness (particularly the fifth factor, requiring consideration of the choices and expertise of the agency on matters of procedure, and any legislative signals in this regard) may introduce into the evaluation of procedural error an element of "deference": the centerpiece of a reasonableness standard of review, which we look at further upon turning to substantive review.

Again note that where the allegation is that an ADM failed to follow the principles of fundamental justice (assuming the s. 7 *Charter* threshold has been met), courts not only have to

consider whether the principles of fundamental justice were violated, but also whether this can be upheld under [s. 1](#).

### **7. Effect of procedural breach**

If courts find a breach of the common law duty of fairness, or a breach of s. 7 of the *Charter* (which is not justified under s. 1), this will usually result in the court's quashing the decision. Occasionally a case will suggest that this should be done only if it can be shown that adherence to correct procedure would have been likely to affect the outcome, (*Hundal v. Superintendent of Motor Vehicles* (1985), 20 DLR (4<sup>th</sup>) 592 (BC CA)) but the more usual perspective places an emphasis on ADMs functioning correctly irrespective of the impact on outcome: "The denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision." (*Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643). It should be borne in mind however, that the prerogative remedies are discretionary and therefore such factors as acquiescence to the alleged procedural breach at the tribunal stage, or reprehensible behaviour by the party claiming the procedural breach may lead the court to refuse the remedy sought. (*Homex Realty v. Wyoming*, [1980] 2 SCR 1011).

## **III. SUBSTANTIVE ERROR**

The materials above deal with procedural requirements that a court may place upon an ADM. This section examines how courts respond to allegations that an ADM has made a substantive error.

### **1. Grounds**

If there is a right of appeal in an ADM's enabling legislation, this will set out the grounds upon which an appeal may be brought; almost certainly on issues of law, and perhaps on issues of fact or mixed fact and law.

The [Federal Courts Act](#) provides for judicial review of federal ADMs on substantive grounds in paragraphs 18.1(4)(a) (error of jurisdiction), 18.1(4)(c) (error of law), and 18.1(4)(d) (error of fact).

At common law, the substance of an administrative decision can be challenged on the ground that the ADM made an error of law, fact, or mixed fact and law, or that the ADM exercised its discretion improperly. However, as noted below, these ways of classifying decisions may be less important when review is conducted on a reasonableness standard. In such cases, a set of contextual considerations aid in the assessment of whether the decision is unreasonable.

### **2. The standards of review**

#### **A. The (new) leading case: *Vavilov***

The law on judicial oversight of substantive administrative decisions has undergone significant change over the past few decades. The most recent major shift occurred in December, 2019, when the former leading case on the standards of review in substantive review (*Dunsmuir*, *supra*) was displaced by *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] released together with *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66 [*Bell Canada*].



The frequent changes in this area of law have been frustrating for students, practitioners and judges alike. They reflect ongoing attempts on the part of judges to reconcile their duty to uphold the rule of law with their duty to respect the decision-making authority delegated by legislatures to ADMs.

With *Vavilov*, it appears the court has simplified some things (how to pick the standard of review), and clarified, if not quite simplified, others (how to recognize “unreasonableness” on reasonableness review). And of course, much has been left to the future as the case law unfolds.

## **B. Identifying the standard of review post-*Vavilov***

There are two main steps involved in substantive review, per *Vavilov*. These are:

- 1) Identification of the appropriate standard of review (the “standard of review analysis”);
- 2) Application of the standard to the decision on review.

In this section, we briefly describe the guidance that the majority gives on identifying the appropriate standard. The following section takes up the question of how the standards are to be applied.

### **i) Standards of review at common law versus statutory appeal**

*Vavilov* (like *Dunsmuir*) endorses two standards of review at common law: correctness and reasonableness. By way of introduction, these standards may be understood as follows:

#### **Correctness**

On a correctness standard, the reviewing court is to undertake an independent analysis of the question. If the decision of the ADM does not accord with the court’s opinion, then the ADM’s decision is incorrect. The central value and purpose of the correctness standard is to preserve consistency and certainty in the law.

#### **Reasonableness**

The reasonableness standard is distinguished from the correctness standard on the one hand in terms of the method to be adopted by the reviewing court. This involves paying close and respectful attention to ADM reasoning, and only quashing decisions that are demonstrably unjustified. As to purpose, the *Vavilov* majority writes: “Reasonableness review [. . .] is informed by the need to respect the legislature’s choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court.”

Beyond the common law standards, *Vavilov* tells us that where there is a statutory right of appeal, the appellate standards from *Housen v. Nikolaisen*, [2002 SCC 33](#) apply. These are: correctness on questions of law and “palpable and overriding error” on all other questions (fact, mixed law and fact, discretion).

#### **Palpable and overriding error**

In *Housen*, the “palpable and overriding error” standard is said to be

premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge. [*Housen* at para 4]

Justice Stratas in *South Yukon Forest Corp. v. R.*, [2012 FCA 165](#) (at para 46) adds that “‘Overriding’ means an error that goes to the very core of the outcome of the case.” So, once again, deference – but under a slightly different description than at common law.

## ii) The standard of review analysis

The first step in a substantive review problem is to identify the standard of review that the reviewing court must apply. The *Vavilov* majority has provided a new analysis; *Dunsmuir* is no longer the authority on this point.

### Presumption of reasonableness

The foundation of the *Vavilov* standard of review analysis is a presumption of reasonableness review. This is true no matter what kind of question is under challenge – a question of law, fact, mixed law and fact, or discretion – and whether or not there is a privative clause.

### Rebuttal of the presumption

There are two broad bases on which one may rebut the presumption: a) where there is a “clear indication of legislative intent” that the reasonableness standard does not apply; and b) where the rule of law so requires.

#### a) “a clear indication of legislative intent”

According to the *Vavilov* majority, the two clear indicators that the legislature intends a standard other than reasonableness are the presence of a statutory standard of review (e.g., stating that the decision should be reviewed for “patent unreasonableness”) or, alternatively, the presence of a statutory right of appeal.

In the first case, one must interpret and apply the standard that the legislator has identified. In the second case (statutory right of appeal), the appellate standards from *Housen* (supra) apply: as noted above, correctness on questions of law and “palpable and overriding error” on all other questions.

The new significance given to statutory rights of appeal presents an important change to the law on the standards of review. It means that many ADMs that, until *Vavilov*, enjoyed deference on questions involving interpretation of their enabling statutes will now (because of a statutory right of appeal) have those questions reviewed for correctness. Some will be ADMs accustomed to deference in recognition of their non-judicial functions and expertise. (An example is the Canadian Radio-television and

Telecommunications Commission (CRTC), the ADM under challenge by way of a statutory right of appeal in *Bell Canada*, supra). At the same time, discretionary or fact-finding decisions that may be challenged under a statutory right of appeal will now be reviewed on a standard not of reasonableness but of “palpable and overriding error” – calling into question whether or how the two standards are distinct.

**b) “where the rule of law so requires”** The following categories of question constitute exceptional instances in which the standard of correctness is instead attracted because of the rule of law concern for coherence and constituency in the legal order:

1. **constitutional questions** (division of powers and s.35 Aboriginal rights cases, as well as *Charter* challenges to enabling legislation; however, discretionary decisions “engaging *Charter* values” attract reasonableness review – see discussion below);
2. **questions of “general law” that are “both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise”** (e.g., interpretation of common law principles such as *res judicata*, where this is not an issue commonly arising before the tribunal (*Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487); interpretation of “the scope of the state’s duty of religious neutrality that flows from the freedom of conscience and religion protected by the Quebec *Charter*” (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16)).

**questions about the “jurisdictional lines between two or more competing specialized tribunals”** (e.g., *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39);

While this list is not necessarily closed, the majority is clear that additions to it will be rare. Note that the *Vavilov* majority did away with a correctness category from *Dunsmuir*: “true questions of jurisdiction or *vires*.” Although the *Dunsmuir* majority had attempted to clarify that “[j]urisdiction’ is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry,” subsequent case law expressed skepticism that a clear line could be drawn between “true” questions of jurisdiction and other questions involving interpretation of statutory language (i.e., the scope and limits of statutory powers). Thus it threatened unprincipled expansion of correctness review.

Another change as between *Dunsmuir*’s correctness categories and those endorsed in *Vavilov* relates to the “questions of general law of central importance to the legal system as a whole.” Here the *Vavilov* majority removed the requirement (from *Dunsmuir*) that to attract correctness the question also be “outside the adjudicator’s specialized area of expertise.” In other words, expertise cannot function as a basis for reclaiming deference on matters otherwise fitting this category.

### Segmentation

It is important to be aware that, while this was not the case in *Vavilov* itself, some decisions may attract different standards of review, to be applied to different aspects of the decision. For example, a decision may encompass a question of constitutional legality (reviewed, per *Vavilov*, on a correctness standard) that is deemed to be severable from an accompanying factual determination and/or exercise of discretion (attracting reasonableness review). See, for instance, *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, [2009 SCC 53](#); *Beckman v. Little Salmon/Carmacs First Nation*, [2010 SCC 53](#).

This type of analysis was applied – along with the concept of the “question of general law of central importance to the legal system (“and outside the ADM’s area of expertise”) — in *Mouvement laïque québécois v. Saguenay (City)*, [2015 SCC 16](#). The case involved a challenge, under Quebec’s *Charter of Human Rights and Freedoms*, CQLR c C-12, to the recitation of prayer at public meetings of a municipal council. The majority “segmented” the matter into a set of sub-issues for the purpose of identifying and applying the standard of review. The correctness standard was applied to “the question of law relating to the scope of the state’s duty of religious neutrality that flows from freedom of conscience and religion”. The majority concluded that

the importance of this question to the legal system, its broad and general scope and the need to decide it in a uniform and consistent manner are undeniable. Moreover, the jurisdiction the legislature conferred on the Tribunal in this regard in the *Quebec Charter* was intended to be non-exclusive; the Tribunal’s jurisdiction is exercised concurrently with that of the ordinary courts.

However, the reasonableness standard was applied to “the question whether the prayer was religious in nature, the extent to which the prayer interfered with the complainant’s freedom, the determination of whether it was discriminatory,” and “the qualification of the experts and the assessment of the probative value of their testimony.”

### **C. Applying the standards of review post-*Vavilov***

The above section introduced the way courts are to identify the standard of review. The section that follows addresses how a court is to conduct review in accordance with the two common law standards, *i.e.*, how the standards are to be applied.

#### **i) Correctness review**

The majority in *Vavilov* is clear that review for correctness has not undergone any change. It states: “When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker’s determination or to substitute its own view: *Dunsmuir*, at para. [50](#). While it should take the administrative decision maker’s reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.” (at para 54).

#### **ii) Reasonableness review**

***Method of review (deference)***

The *Vavilov* majority confirms that reasonableness review requires deference on the part of the reviewing court. That is, the court is to pay respectful attention to the reasoning of the ADM, in light of the full record, the “institutional context,” and “the history of the proceedings” (para 91). It is only to quash where, despite such efforts at understanding, the court concludes that the decision cannot be justified in light of the relevant legal and factual context. The majority writes:

What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker’s place. (para 15)

The point was memorably articulated in a 2014 decision of Fichaud JA, in *Egg Films Inc. v. Nova Scotia (Labour Board)*, [2014 NSCA 33](#):

Reasonableness isn’t the judge’s quest for truth with a margin of tolerable error around the judge’s ideal outcome. Instead, the judge follows the tribunal’s analytical path and decides whether the tribunal’s outcome is reasonable. *Law Society v. Ryan* [*Law Society of New Brunswick v. Ryan*, [\[2003\] 1 S.C.R. 247](#)], at paras. 50-51. That itinerary requires a “respectful attention” to the tribunal’s reasons...

***Evaluating reasonableness (justification)***

Perhaps the most valuable contribution of *Vavilov* is the guidance it gives on the sorts of considerations (or “contextual constraints”) that are relevant to the evaluation of administrative decisions on a standard of reasonableness. The majority indicates that there are “two types of fundamental flaws” one should watch out for.

**1. internally incoherent reasoning**

The first “fundamental flaw” is internal incoherence (i.e., reasons that “fail to reveal a rational chain of analysis”: paras 102-104). The majority in *Vavilov* writes:

While . . . formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, 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: see *Wright v. Nova Scotia (Human Rights Commission)*, [2017 NSSC 11](#).

**2. Failure to establish the decision is justified in light of the factual and legal constraints that bear on the decision**

The second “fundamental flaw” is “failure to establish the decision is justified in light of the factual and legal constraints that bear on the decision”: *Vavilov*, paras 105-135. The majority writes:

In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision. [ . . . ] Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

Here the majority offers guidance in the form of a set of non-exhaustive considerations “contextual constraints,” including:

- the governing statutory scheme;
  - other relevant statutory or common law;
  - the principles of statutory interpretation;
  - the evidence before the decision maker and facts of which the decision maker may take notice;
  - the submissions of the parties;
  - the past practices and decisions of the administrative body; and
  - the potential impact of the decision on the individual to whom it applies.
- (*Vavilov* at para 106)

The majority emphasizes: “These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.” (*ibid*)

There are tensions here. While the considerations in question are not a “checklist,” an ADM’s failure to justify its decision in light of any one of these considerations is a basis for arguing that the decision is unreasonable.

This is not the place for an exhaustive account of the above contextual constraints, essential to evaluating reasonableness. What we know is that a court must pay respectful attention to the ADM’s reasoning, viewed in light of these considerations.

We can add the following general observations. Of the considerations noted, the first three (the statutory scheme, other relevant statutory or common law, and the principles of statutory interpretation) draw attention to constraints sourced in formal law. In light of those sources, the reviewing court is to evaluate the “scope” or breadth of the ADM’s powers. The question is whether the ADM has (unreasonably) failed to consider, or “fundamentally misapprehended,” a potentially determinative aspect of the statutory text or wider legal context (including, e.g., judicial precedent, principles of common law or international law).

The last four considerations (evidence before the decision-maker and facts of which it may take notice, submissions of the parties, past practices of the ADM, potential impact of the decision) turn the reviewing court’s attention to other contextual constraints, discernable on the record or

from a reading of the decision in its wider institutional and factual context. Thus where the decision maker appears to have “fundamentally misapprehended or failed to account for the evidence before it,” or failed to “meaningfully account for the central issues and concerns raised by the parties,” this may establish unreasonableness. Moreover, where the decision departs from “longstanding practices or established internal authority,” the ADM “bears the justificatory burden of explaining that departure in its reasons.” (*Vavilov* at para 131).

The *Vavilov* majority reminds us that this is not “a line-by-line treasure hunt for error,” (*Nurses Union, supra* at para. 14, cited in *Vavilov* at para 102). Reviewing courts should not expect ADMs “to respond to every argument or line of possible analysis.” (*Nurses Union, supra* at para. 25, cited in *Vavilov* at para 128). Rather, determining whether lack of express mention of one or more such considerations in formal reasons constitutes unreasonableness on the ADM’s part requires sensitive evaluation of the reasoning in light of the record and wider institutional context. The *Vavilov* majority writes (at para 94):

For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker’s work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker’s reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

However, the majority is clear that courts should not “fill gaps” in administrative reasoning where there is no support in the record establishing that the ADM’s decision resolved the matter in a way that may be reasonably inferred from the wider context:

Where a decision maker’s rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility. (*Vavilov* at para 94)

### ***Habeas corpus and reasonableness review***

The writ of *habeas corpus* is a powerful mechanism for contesting the legality of detention/confinement. Its power rests in part in timely access to the court (in most jurisdictions, applications accepted by the court have at least initial contact with a judge within a week). Its power also rests in shifting the legal burden: once the inmate establishes a deprivation of liberty and raises a legitimate legal ground on which to question the legality of detention, the burden shifts to detaining authorities to justify the deprivation of liberty.

Until recently, the appellate case law was inconsistent on whether an application for *habeas corpus* with *certiorari* in aid – the traditional writ for challenging the legality of a deprivation of liberty – could support an assessment of the reasonableness of the impugned

decision, or whether the writ was restricted to review for procedural fairness and excess of jurisdiction, *i.e.*, inquiry into whether the challenged decision fell outside the decision-maker's lawful authority. Traditionally, the writ was understood to engage a correctness standard of review.

In *Mission Institution v. Khela*, [2014 SCC 24](#), the SCC held that “‘reasonableness’ is a ‘legitimate ground’ upon which to question the legality of a deprivation of liberty in an application for *habeas corpus*”. In practical terms, this means that federal inmates have the flexibility of accessing review of substantive reasonableness either in the federal court or through the comparatively streamlined process of bringing a *habeas corpus* application to a provincial superior court.

The SCC defended reasonableness as the appropriate standard for review of substantive legality in *habeas* applications on the basis that decisions such as the one in *Khela* (involving transfer to a higher security institution) engage decision-makers’ “expertise in the environment of a particular penitentiary”. On the application of a reasonableness standard in this context, the Court elaborated as follows:

A transfer decision that does not fall within the ‘range of possible, acceptable outcomes which are defensible in respect of the facts and law’ will be unlawful (*Dunsmuir*, at para 47). Similarly, a decision that lacks ‘justification, transparency and intelligibility’ will be unlawful (*ibid.*). For it to be lawful, the reasons for and record of the decision must ‘in fact or in principle support the conclusion reached’ (*Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, [2011 SCC 62](#). [. . .]”

These conventional trappings of reasonableness review are supplemented in the unique circumstances of a *habeas corpus* application by the SCC’s determination in *Khela* that “[t]he traditional onuses associated with the writ will remain unchanged.” Therefore, “[o]nce the inmate has demonstrated that there was a deprivation of liberty and casts doubt on the reasonableness of the deprivation, the onus shifts to the respondent authorities to prove that the [decision] was reasonable in light of all the circumstances.”

The SCC in *Khela* adds that “the ability to challenge a decision on the basis that it is unreasonable does not necessarily change the standard of review that applies to other flaws in the decision or in the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be “correctness”.”

#### **D. A further note on statutory standards of review**

We know from *Vavilov* that one basis for rebutting the presumption of reasonableness review is the presence of a statutory standard of review in the governing legislation. A final question to be posed to the standards of review post-*Vavilov* is the significance to be given statutory standards of review, on application by the reviewing court. For instance, the provisions of British Columbia’s [Administrative Tribunals Act](#), stipulate that a “patent unreasonableness” standard is to be applied where courts are engaged in review of certain tribunal decisions. Yet in *Dunsmuir*, *supra*, this standard was rejected as conceptually incoherent and inconsistent with the rule of law.



The significance to be given statutory standards of review was addressed in part in *Khosa* (*supra*). There, one of the issues in dispute was the significance of s.18.1(4)(d) of the *Federal Courts Act*, which permits review of a tribunal decision on the grounds that it was based on “an erroneous finding of fact that [the tribunal] made in a perverse or capricious manner or without regard for the material before it.” Did this section articulate a standard of review, such that the common law standard of review analysis should be bypassed in favour of the statutory standard?

The majority reasoned that while the legislature can exclude the common law standard of review analysis “by clear and explicit language,” s.18.1(4)(d) of the *Federal Courts Act* did not meet that requirement. Rather, that section sets out “grounds” of review or bases on which review may be sought, rather than the standard of review to be adopted. In *obiter* the majority further stated that where a standard is simply stated but not defined (as is the case in certain sections of B.C.’s *Administrative Tribunals Act*), the common law will supply the interpretation of the standard.

The Supreme Court of Canada has not yet squarely addressed the question of how to interpret and apply a statutory standard of patent unreasonableness, which the majority in *Dunsmuir* proclaimed conceptually incoherent and contrary to the rule of law. The Ontario Court of Appeal, following the *obiter* statements in *Khosa*, has indicated that statutory standards of “patent unreasonableness” should be interpreted in accord with the common law on reasonableness review (see, e.g., *Toronto (City) Police Service v. Phipps*, [2010 ONSC 3884](#), *aff’d* [2012 ONCA 155](#)). However, the BC Court of Appeal has taken the position that the statutory standard of patent unreasonableness stated under that province’s *Administrative Tribunals Act* is to be interpreted and applied in accordance with the pre-*Dunsmuir* case law: *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, [2014 BCCA 496](#) (application for leave to the SCC dismissed [2015 CanLII 69424](#)).

### 3. Administrative authority to decide a constitutional challenge

The approach to judicial review or a statutory appeal where the issue decided by the ADM involves a constitutional challenge to the ADM’s enabling legislation merits separate attention. Here, the main question is whether the ADM has the authority to decide the constitutional question. If it does, any challenge to the ADM’s decision will attract a standard of correctness (per *Dunsmuir*).

The law on tribunal authority to decide a constitutional challenge to enabling legislation has undergone a significant shift in recent years. The leading authority is *Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur*, [2003 SCC 54](#) [*Martin*]. The background to *Martin* includes a trilogy of cases decided in the early 1990s, in which the SCC held that an ADM has the authority to hear and decide a constitutional challenge to its own legislation, if the enabling legislation expressly or impliedly authorizes the ADM to hear such a challenge. (*Douglas/Kwantlen Faculty Assn. v. Douglas College*, [\[1990\] 3 SCR 570](#); *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [\[1991\] 2 SCR 5](#); *Tetreault-Gadoury v. Canada (Employment and Immigration Commission)*, [\[1991\] 2 SCR 22](#)).

Several years later, in *Cooper v. Canada (Human Rights Commission)*, [\[1996\] 3 SCR 854](#), a majority of the SCC adopted a restrictive interpretation of the trilogy, distinguishing between “adjudicative” tribunals with authority to decide “general questions of law” and “purely

administrative” tribunals that merely “interpret and apply” their enabling legislation. Only the former type of tribunal could be understood to have the authority to hear a *Charter* challenge to its enabling legislation. However, McLachlin J., in dissent, was of the view that any ADM that has the ability to decide issues of law (here she rejected the restrictive delineation of “general” versus more narrowly sector-specific questions of law) has the authority to determine whether its legislation violates the *Charter*.

*Martin* (*supra*) vindicates the dissenting position of McLachlin J. in *Cooper*. The case grounds its approach to determining the authority of ADMs to apply the *Charter* in [s.52](#) of the *Constitution Act, 1982* (which states that the Constitution is the supreme law of Canada, and any law that is contrary to it is of no force and effect). The Court additionally endorses the principle that “Canadians should be able to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts.” The salient question according to *Martin* is whether the ADM has authority, express or implied, to decide “questions of law”. Absent express statutory language vesting the tribunal with such authority, implicit authority may be inferred from i) the ADM’s mandate (*i.e.*, whether its mandate requires it to decide questions of law), ii) its interaction with other elements of the administrative system (*e.g.*, whether some other body within the administrative agency is better placed to decide such questions), iii) whether it is an adjudicative body (which is suggestive of this implicit authority), and/or iv) its capacity to decide such questions (*e.g.*, whether tribunal members have legal training). This last consideration, however, is not to “override a clear implication from the statute itself”.

If express or implied jurisdiction to decide questions of law is made out, the ADM is presumed to have jurisdiction to decide those questions in light of the *Charter* unless that power is expressly removed. *Martin* further confirms that an ADM’s decisions involving application of the *Charter* (or, as later cases establish, the Constitution more broadly) are subject to review on a standard of correctness.

We address ADM authority to grant constitutional remedies in section IV (Remedies), below.

#### **4. Review of discretionary decisions engaging Charter values**

It is a fundamental principle of both constitutional and administrative law that administrative discretion must be exercised within the limits of constitutional law, including the rights and freedoms guaranteed under the *Charter*. A final topic of relevance to judicial review of ADMs’ substantive decisions is what mode of analysis the courts should adopt in cases where a substantive exercise of administrative discretion is challenged based on its inconsistency with one or more *Charter* guarantees. In such cases, the *Charter* challenge is not directed at a statutory enactment or law *per se*, but rather at an administrative decision made under the authority of an imprecise grant of discretion.

Until recently, there was conflicting case law on whether administrative decisions in which discretion implicated *Charter* rights or values should be analysed according to administrative law principles guiding review of discretion, or alternatively, in accordance with s.1 of the *Charter*, as elaborated by the *Oakes* test (*R. v. Oakes*, [\[1986\] 1 SCR 103](#)). The latter test is aimed at determining whether a law that infringes a *Charter*-protected right is nonetheless justified as a “reasonable limit”. Some cases took the administrative law approach (*e.g.*, *Baker*, *supra*), while others took the [s.1](#) approach (*e.g.*, *Multani v. Commission Scolaire Marguerite-Bourgeois*, [2006 SCC 6](#)).

In *Doré v. Barreau du Québec*, [2012 SCC 12](#), a unanimous Supreme Court (Abella J writing) addressed “whether the presence of a *Charter* issue calls for the replacement of [the] administrative law framework [for review of discretionary decisions] . . . with the *Oakes* test, the test traditionally used to determine whether the state has justified a law’s violation of the *Charter* as a “reasonable limit” under s. 1.” The Court concluded that an administrative law framework should govern such analyses, rather than s.1 / *Oakes*. That is, as a matter of common law administrative law principle, administrative discretion must be exercised in a manner consistent with the guarantees and values of the *Charter*.

What standard of review applies to the review of discretionary decisions affecting *Charter* values? Abella J confirms that “when a tribunal is determining the constitutionality of a law, the standard of review is correctness.” However, where a court is to determine “whether an administrative decision-maker has taken sufficient account of *Charter* values in making a discretionary decision,” the correctness standard does not necessarily apply. Rather, Abella J in *Doré* suggests that discretionary decisions – at least, “adjudicated” discretionary decisions, involving the application of legal discretion to specific facts – will generally attract reasonableness review regardless of the fact that *Charter*-protected interests are in issue.

Abella J suggests that there are good reasons for deference to the discretionary decisions of ADMs required to balance *Charter* and other values in adjudicating legal disputes. For “[a]n administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values.” However, “both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.”

According to the Court in *Doré*, the central concern in reasonableness review of administrative discretion for consistency with *Charter* values (like the central concern of the [s.1](#) analysis per *Oakes*) is *proportionality*. Abella J writes:

As this Court has noted, most recently in *Catalyst Paper Corp. v. North Cowichan (District)*, [2012 SCC 2](#) (CanLII), [2012] 1 S.C.R. 5, the nature of the reasonableness analysis is always contingent on its context. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

Abella J. offers some further guidance about the expectations placed upon ADMs’ discretionary decisions implicating *Charter* values. Such decisions are to “balanc[e] the *Charter* values with the statutory objectives.” Abella J. continues: “In effecting this balancing, the decision-maker should first consider the statutory objectives.” Next, the decision-maker “should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the

core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.”

Where a court applies a reasonableness standard to such decisions, “the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play.” As is the case at the minimal impairment stage of the *Oakes* analysis, “‘courts must accord some leeway to the legislator’ in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure ‘falls within a range of reasonable alternatives,’” or (per *Dunsmuir*) the “range of possible, acceptable outcomes”.

In *Doré*, the Court determined that the disciplinary tribunal’s decision to reprimand a lawyer for critical comments to a judge met the criterion of proportionality, in justifiably balancing the *Charter*-protected value of freedom of expression (along with “the fundamental importance of open, and even forceful, criticism of our public institutions”) against the statutory objective of ensuring professional civility.

This analysis was applied by a majority of the SCC in *Loyola High School v. Quebec (Attorney General)*, [2015 SCC 12](#). There, all members of the Court agreed that the Minister had acted contrary to the Charter’s guarantee of freedom of religion in refusing to exempt a Catholic School from terms of a mandatory ethics and religious culture program in order that it might deliver the program in a way that reflected Catholic beliefs and ethics. However, while the majority adopted the administrative law analysis from *Doré* (starting from the principle that, as a matter of common law, discretion engaging *Charter* values must be exercised reasonably and so in a manner that reflects proportionality), a substantial minority applied the s.1 / *Oakes* analysis after first expressly assessing the question of *Charter* breach.

However, uncertainty about the mandatory nature of the *Doré* (now commonly termed the *Doré* / *Loyola*) framework has been eased with the SCC judgments in the Trinity Western University matter (*Law Society of British Columbia v. Trinity Western University*, [2018 SCC 32](#); *Trinity Western University v. Law Society of Upper Canada*, [2018 SCC 33](#)). There, the *Doré* / *Loyola* analysis was applied to uphold decisions of two Law Societies to refuse to accredit a law school which required students to sign a “community covenant” committing to abstention from homosexual sex or other “sexual intimacy that violates the sacredness of marriage between a man and a woman”. In these judgments, substantial majorities indicated that courts reviewing administrative decisions which engage or limit Charter rights or values must conduct a “robust proportionality analysis” which includes, inter alia, consideration of “whether there were other reasonable possibilities that would give effect to Charter protections more fully in light of the [statutory] objectives”

## IV. REMEDIES

### 1. Appeals

If there is an appeal section in the enabling legislation, this will identify the types of relief available if an appeal is successful.

## 2. Common law judicial review

The remedies available on common law judicial review fall into two categories: the prerogative writs (sometimes referred to as "extraordinary remedies"), and remedies derived from private law (declarations and injunctions).

### Prerogative writs

The prerogative writs most frequently used in common law judicial review are the writs of *certiorari*, *mandamus* and prohibition. In Nova Scotia, the Rules of Court allow one to apply for "an order in the nature of [*certiorari*, *mandamus*, etc.]". These remedies are:

- discretionary,
- available only against public authorities;
- not available against the Crown. This is not as broad a limit as it may first appear, however:

"While the prerogative writs ... may still not be technically available against the Crown in the sense of the Queen in right of the governments of Canada and the provinces, to the extent that the modern day powers of the Crown (or the governments of Canada and the provinces) are in very large measure exercised by officials or agencies named in statutes, the restriction is generally avoided by naming the designated official as the respondent or defendant." [*Administrative Law*, 4<sup>th</sup> ed. by Evans *et al*, at 1181]

*Certiorari* is used to quash or set aside a decision of an ADM.

**Prohibition** is used to prevent an ADM from making an unlawful decision or taking an unlawful action.

*Mandamus* is used to command the performance of a duty. For *mandamus* to be available, the enabling legislation must clearly place a duty on the ADM to act in a particular way with regard to the individual seeking the remedy, and there must have been a demand that the ADM perform its statutory duty, and a refusal by the ADM.

A claim for damages cannot be brought in conjunction with an application for a prerogative writ.

*Habeas corpus*, described above, is used to contest the legality of detention.

### Declarations and injunctions

These are private law remedies that in time were extended into the area of administrative law. A declaration is available against the Crown; however an injunction is not (see however the comments above regarding the scope of this limitation).

## 3. Statutory judicial review

[Sections 18](#) and 28 of the [Federal Courts Act](#) provide that the Federal Court has exclusive original jurisdiction, with regard to federal ADMs, "to issue an injunction, writ of *certiorari*, writ of *mandamus*, or writ of *quo warranto*, or grant declaratory relief." It is no longer necessary to identify which remedy is being sought, however, since one simply makes an application for judicial review (subsection 18(3)).

[Subsection 18.1\(3\)](#) sets out the relief that may be obtained under the [Federal Courts Act](#). On an application for judicial review, the court may:

- (a) order a federal [ADM] to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
- (b) declare invalid or unlawful, or quash, set aside, or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act, or proceeding of a federal [ADM].

Thus, paragraph (a) provides the relief obtainable at common law through *mandamus*, while paragraph (b) mirrors or expands the relief obtainable with *certiorari*, prohibition, a declaration or an injunction.

#### 4. Charter remedies

If an ADM upholds a *Charter* challenge to its enabling legislation, [s. 52](#) of the *Constitution Act, 1982* allows the ADM to suspend the application of the offending section in the case before it, but does not allow the ADM to make a general declaration of invalidity.

There is recent case law on an ADM's ability to award remedies under s.24(1) of the *Charter*. The SCC decision in *R. v. Conway*, [2010 SCC 22](#) [*Conway*] draws on three lines of authority: 1) that proceeding from the *Cuddy Chicks* trilogy (see section III.3, above: tribunals with authority to decide questions of law are presumed to have jurisdiction to decide constitutional challenges to enabling legislation); 2) that proceeding from *Slaight Communications Inc. v. Davidson*, [\[1989\] 1 SCR 1038](#) (statutory decision makers must exercise their discretion within the limits of legality, including the limits of constitutional law); and 3) that proceeding from *Mills v. The Queen*, [\[1986\] 1 SCR 863](#) (a tribunal is a "court of competent jurisdiction" for the purposes of granting remedies under [s.24\(1\)](#) of the *Charter* if it has jurisdiction over the parties, the subject matter, and the remedy sought).

In bringing these authorities together, the SCC in *Conway* (*supra*) states that as long as a tribunal has authority to decide questions of law (as established on the *Martin* analysis, *supra*), then it "will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate. The tribunal is, in other words, a court of competent jurisdiction under s. 24(1) of the *Charter*."

However, there is a second step to the analysis. That is, once it is established that the tribunal has general authority to grant *Charter* remedies under s.24(1), there must be an inquiry into whether the tribunal has the specific authority to grant the *Charter* remedy sought in a given case. That inquiry "is necessarily an exercise in discerning legislative intent, namely, whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal."

On the reasoning in *Conway*, then, even if it is established that a tribunal has general authority to award *Charter* remedies, there remains the question of whether it may grant the specific remedy sought. The answer to the latter question is said to flow from an analysis of the tribunal's statutory mandate and function.

## V. ADMINISTRATIVE LAW AND THE RIGHTS OF INDIGENOUS PEOPLES

### 1. *Intersections: Common Law and Constitution, Procedure and Substance*

Administrative law interacts with the rights of Indigenous peoples in Canada in multiple, complex ways. Administrative law may be used to challenge decisions of the executive branch or their delegated decision-makers where these adversely affect Indigenous communities, it may be used to challenge the decisions of Indigenous governance entities, or it may be used to inform the design of Indigenous self-governance institutions. For detailed discussion, see Janna Promislow and Naomi Metallic, “Realizing Aboriginal Administrative Law” in *Administrative Law in Context*, 3<sup>rd</sup> ed., Flood & Sossin eds (Emond Montgomery, 2017).

### 2. *Example: Duty to Consult*

One of the more active areas of intersection between the rights of Indigenous peoples and administrative law – and, moreover, between constitutional and administrative law – is the law on the duty to consult. Federal, provincial and territorial governments have a duty to consult Aboriginal peoples where their conduct may affect established or potential Aboriginal or treaty rights protected under s.35 of the *Constitution Act, 1982*. The duty is “an essential corollary to the honourable process of reconciliation that [s. 35](#) demands” (*Haida Nation v. British Columbia (Minister of Forests)*, [2004 SCC 73](#) at para 38). The SCC confirmed the general principles relevant to assessing the content of the duty in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017 SCC 40](#):

[20] The content of the duty, once triggered, falls along a spectrum ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right. Each case must be considered individually. Flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light (*Haida*, at paras. 39 and 43-45).

The duty to consult may be triggered by the exercise of statutory or prerogative powers by or on behalf of the Crown. It may also be triggered by a prospective regulatory decision, “when the Crown has knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal’s decision” (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017 SCC 41](#); *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010 SCC 43](#)). While the Crown remains responsible to ensure that the duty to consult is met, it may rely on a regulatory process in order to meet the duty in whole or in part. What is required in order to meet the duty will depend on the circumstances of each case, and will be informed by common law administrative law principles.

Whether a given regulatory tribunal has the capacity to implement the duty to consult requires an analysis of whether it has 1) the procedural powers to meet the duty to consult and 2) the remedial powers to accommodate the concerns of Aboriginal communities in the circumstances (*Clyde River*, *supra* at paras 30-34). Where a tribunal is empowered to determine questions of law, it must generally hear and decide a challenge to the adequacy of the Crown’s consultation before making a final decision, and “must usually address those concerns in reasons.” (*Clyde River*, *supra* at paras 35-42).

As noted, the actions required to meet the duty to consult will depend on the context, including “the strength of the Aboriginal claim, and the seriousness of the potential impact on the right” (*Chippewas of the Thames*, citing *Haida* at paras 39 and 43-45). But in general terms, in order for the Crown’s duty to be met where a regulatory process is engaged, 1) the Crown’s intention to rely on the regulatory process as a vehicle for meeting its duty to consult must be made clear to the affected Indigenous community (*Clyde River*, *supra* at para 23); 2) the regulatory tribunal must adequately consider the impact of the proposed action on the affected rights; and 3) the regulatory process must accord adequate opportunities for participation and consultation to the affected Indigenous group.

Among the aspects of the regulatory process taken into consideration by the SCC in concluding that the duty was met in *Chippewas of the Thames* (*supra*) were: early notice, provision of an oral hearing, funding of representatives of the affected Indigenous community to facilitate the tendering of evidence and argument, facilitation of formal requests for information from other parties, allowance for closing submissions, provision of reasons for decision that expressly considered the impact on the affected Aboriginal and treaty rights, and provision of binding conditions aimed at accommodating the affected rights.