Slide 1

Administrative Law Principles

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Slide 2

Administrative Law

- Focus on judicial supervision of decision-makers who operate under statutory mandate
- Since 1970s, Supreme Court has been engaged in
  - generalizing
  - synthesizing
  - clarifying

Slide 3

Two Types of Judicial Review

- Procedural review
  - consideration of whether there has been a "fair hearing"
  - consideration of whether the decision-maker is impartial and independent
- Substantive review
  - mostly consideration of whether decision reasonable

Slide 4

Sources of Procedural Protections

- - Constitutive statutes
- - Regulations ("subordinate legislation")
- - Policies and guidelines - "soft law"
- - General procedural statutes
- - Common law - principles of natural justice/fairness
- - *Bill of Rights, Charter of Rights, Quebec Charter*

Duty of Fairness

- *Nicholson* [1979] 1 SCR 311
  - Moved away from idea that "natural justice" only applied in quasi-judicial proceedings
  - New duty of fairness required that procedural fairness be observed across wide range of types of decision-making
  - Now applies to all decisions except "truly legislative" decisions

Slide 6

Fairness has Variable Content

- L'Heureux-Dube, J. in *Baker* [1999] 2 SCR 817

- I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, **appropriate to the decision being made and its statutory, institutional and social context**, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

Two Basic Components

- Notice
  - Sufficient to give those affected by decision indication of nature of decision, “case they have to meet”
  - Law Society discipline charges document fills this function
- Opportunity to be heard
  - Doesn’t always entail oral hearing
  - Need to have clear notice of nature of opportunity, when it will occur

Criteria for "Trial" Model

- *Baker*

...the more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required by procedural fairness.

Law Society Discipline Hearings

- Law Society has chosen a formal adjudicative process
- This attracts fairly high level of procedural protection (representation by counsel, cross-examination, disclosure of information etc.)
- Similarity to trial model

Slide 10

Investigative v Adjudicative Stage

MK Engineering 2014 ABCA 58

- It is well established that duties of fairness at the investigative stage are qualitatively lower than duties owed at the adjudicative stage and that errors at the investigative stage can be corrected.

Slide 11

Bias (Impartiality)

* One of branches of natural justice - now clearly associated with duty of fairness

* State of mind of decision-maker, but use proxy of "reasonable apprehension" instead of actual state of mind

* Has to do with credibility of decision-making

Slide 12

Impartiality

* Began with concern about pecuniary interest or material interest, now covers range of other kinds of influences, associations, etc.

* Principles can be modified by statute or by type of decision-maker

* Generally concepts applied to accommodate practical realities of decision-making context

* Impartiality distinct from independence

Slide 13

Reasonable Apprehension

Old St. Boniface Residents Association [1990] 3 SCR 1170

Would a reasonably well-informed person consider that the interest might have an influence on the exercise of the official's public duty? If that duty is to hear and decide, the test is expressed in terms of reasonable apprehension of bias.

Slide 14

Pearlman [1991] 2 SCR 869

- Allegation that Law Society discipline committee biased because of ability to award costs
- Affirmation of appropriateness of having "peer review" of lawyer conduct by those "who are themselves subject to the rules and standards that are being enforced"

Pearlman

- Finding that no reasonable apprehension of bias
  - Costs assessed to reimburse actual expenditures
  - Costs do not accrue to individual members of the committee
  - Potential impact on fees extremely small

Impartiality - Prejudgment

- *Merchant* (1972), 32 DLR (3d) 178 (Sask CA)
  - Court upheld process in which members of discipline committee making recommendations were present at meeting of Benchers - characterized as one-stage proceeding
  - Confirmed by SCC in *French* [1975] 2 SCR 767
  - Nonetheless most law societies have subsequently reorganized their discipline procedures to separate one decision-making body from another

Attitudinal Bias

- *Newfoundland Telephone* [1992] 1 SCR 623
  - Investigative or preparatory stage:
    - "Closed mind" test – only bias if can show not prepared to entertain alternative
  - Adjudicative stage:
    - Reasonable apprehension of bias

Slide 18

Independence

- Bias/impartiality: State of mind of decision-maker by proxy of reasonable apprehension
- Independence: Question of structural autonomy of tribunal, ability to make decisions without political or other interference

Independence

- Renewed focus on judicial independence in 1980s and 1990s
- Articulation of hallmarks of judicial independence:
  - Security of tenure
  - Security of remuneration
  - Administrative control

Slide 20

Independence

- *Ocean Port Hotels* 2001 SCC 52
- Historically the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges - both in fact and perception - by insulating them from external influence, most notably the influence of the executive...

Slide 21

Ocean Port Hotels

- Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government.

Slide 22

Ocean Port Hotels

- While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.

Independence

- SO:
  - The same indicators apply to administrative decision making – security of tenure, security of remuneration and administrative control
  - BUT they apply differently than in courts – e.g. part-time membership, limited remuneration
  - Degree of independence may be defined by statute

Substantive Review

- Prior to 1979, focus on whether a question within a decision-maker's jurisdiction
  - If within jurisdiction, not amenable to review
  - If outside jurisdiction, no authority to make decision

Slide 25

Watershed One

- *CUPE v. New Brunswick Liquor Corporation* [1979] 2 SCR 227

  Like *Nicholson* (on procedural issues), this case created a more flexible approach

  Review of decisions made within jurisdiction if patently unreasonable

Slide 26

Impact of *CUPE*

Acceptance of administrative decision-making as legitimate part of legal landscape - not a "second rate" form of decision-making

In fact administrative decision-making in certain ways better for certain purposes than judicial decision-making

Development of criteria for deference to administrative decision-makers

“Pragmatic and functional" approach - contextual application of criteria

Watershed Two

- *Dunsmuir v. New Brunswick* [2008] 1 SCR 190
  - Streamlining of standard of review analysis
  - Acknowledged two standards of review: correctness and reasonableness

Slide 28

Reasonableness in *Dunsmuir*

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result.... In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Slide 29

Criteria for Choosing Reasonableness

- Existence of a privative clause
- "Discrete and special administrative regime" where decision-maker has special expertise
- Nature of the question of law involved

Correctness

- Correctness standard reserved in *Dunsmuir* for four situations:
  - "True" questions of jurisdiction
  - Constitutional questions
  - Questions of law of a general nature
  - Questions involving jurisdictional lines between tribunals

Slide 31

Impact of *Dunsmuir*

- Reasonableness has become default standard
- Correctness standard further restricted in subsequent cases – e.g. reasonableness applied to statutory interpretation of related statutes
- Development of concept of "deference as respect" urges confidence in administrative decision-makers

Slide 32

Standard for Law Society Hearings

Merchant 2014 SKCA 56

The standard of review to be applied to decisions of the H[earing] C[ommittee] respecting misconduct and D[iscipline] C[ommittee] respecting penalty is common ground and has been authoritatively established as reasonableness.

Slide 33

Reasons

- *Baker* (1999)

  - Traditional position at common law that fairness does not as general rule require provision of reasons

  - Usefulness of reasons in ensuring "fair and transparent decision-making"

  - Tension with concerns about encumbering administrative process

Reasons as Aspect of Fairness

- *Baker*

In my opinion, it is now appropriate to recognize that in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, where there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.

Adequacy of Reasons

VIA Rail v NTA [2001] 2 FC 25 (Fed CA)

- Duty to give reasons only fulfilled if reasons adequate

- The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

Reasons as Substantive Issue

- *Newfoundland Nurses* 2011 SCC 62

  - *Dunsmuir* criteria of "justification, transparency and intelligibility"

  - Where *no* reasons, may be question of procedural fairness

  - Where question *adequacy* of reasons, part of substantive review

Slide 37

Adequacy of Reasons

- Decision makers may use concepts and language unique to their areas, "counter-intuitive to a generalist"
- Adequacy of reasons not a stand-alone basis for review - organic approach - reasons read together with outcome
- David Dyzenhaus: court must seek to "supplement [reasons] before it seeks to subvert them"
- Not writing for court, but for own audience

Slide 38

Application of the *Charter*

- *Cooper* [1996] 3 SCR 854
- McLachlin J in dissent:

The Charter is not some holy grail which only judicial initiates of the superior courts may touch. The Charter belongs to the pepople. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the Charter is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.

Questions under Section 52

- *Martin* [2003] 2 SCR 504

...the question becomes whether the tribunal's mandate includes jurisdiction to rule on the constitutionality of the challenged provision...This question is answered by applying a presumption, based on the principle of constitutional supremacy outlined above, that all legal decisions will take into account the supreme law of the land.

Slide 40

Questions under Section 24

- *Weber* [1995] 2 SCR 99
- McLachlin J
- It follows from *Mills* that statutory tribunals created by Parliament or the Legislatures may be courts of competent jurisdiction to grant Charter remedies, provided they have jurisdiction over the parties and the subject matter of the dispute and are empowered to make the orders sought.
- Citizens can assert Charter rights "in a prompt, inexpensive, informal way"
- Parties not required to duplicate process, before tribunal and before a court
- Tribunal can "compile a record" for reviewing court

Slide 41

Synthesis in *Conway* 2010 SCC 22

- Abella J
- The jurisprudential evolution has resulted in this Court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of *Charter* issues, but also that in exercising their statutory discretion, they must comply with the *Charter*….
- If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under s. 52 of the *Constitution Act 1982*, there is no reason by such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under s. 24(1) of the *Charter*.

Slide 42

Doré v Barreau du Québec 2012

- Abella J

The issue …is whether this standard [of reasonableness] should be different when what is assessed is the disciplinary body's application of Charter protections in the exercise of its discretion. In my view, the fact that Charter interests are implicated does not argue for a different standard