

**AN OVERVIEW OF PUBLIC AND PRIVATE LAW CONCEPTS
FOR ENVIRONMENTAL HEALTH AND SAFETY PROFESSIONALS
AND OTHER REGULATORS**

Presented by:

Angela R. Westmacott
Lovett Westmacott
Barristers and Solicitors
Suite 300, 848 Courtney Street
Victoria, BC V8W 1C4



A. Public Law Concepts for Regulators

- The area of law known as “public law” governs the relationship between individuals and the state
- Broadly speaking, “public law” is comprised of three areas:
 - (a) constitutional law
 - (b) criminal law and regulatory law; and
 - (c) administrative law

(i) An Introduction to Constitutional Law

- Constitutional law is concerned with the limits on government to enact laws and to take action under those laws.
- The constitution explains which bodies can exercise legislative power (to make new laws), executive power (to implement laws), and judicial power (to adjudicate disputes) and what the limitations on those powers are
- As a consequence, Parliament and the legislatures must enact statutes that conform to the requirements of the constitution.
- This is the “Rule of Law” meaning that the law governs and no one is above the law.

Canada's Constitutional Documents

- Canada's constitution developed in an incremental approach. Our Constitution is not comprised of one single document.
- Our first constitutional document was the *British North America Act, 1867* (renamed the *Constitution Act, 1867* in 1982) which created the Dominion of Canada by uniting three colonies of British North America and provided a framework for admission of other colonies and territories
- The *Constitution Act, 1867* provides that we are to have “a Constitution similar in principle to that of the United Kingdom”

- The *Constitution Act, 1867* enshrines the concept of representative government with the establishment of a federal Parliament consisting of the House of Commons and the Senate, provincial legislatures, and an independent judiciary
- It establishes the rule of federalism which creates the framework for the allocation of governmental power between the various institutions (primarily Parliament and the provincial legislatures) in ss. 91 and 92

➤ Section 91 of the Constitution Act, 1867 sets out the powers of Parliament which include the power to make laws for:

- the raising of money by any mode of taxation
- militia, military and naval service, and defence
- sea coast and inland fisheries
- the criminal law

➤ Section 92 of the *Constitution Act*, 1867 sets out the powers of provincial legislatures which include the power to make laws in relation to matters such as:

- property and civil rights
- administration of justice in the province, including the constitution, maintenance, and organization of provincial courts

- The distribution of powers between the federal government and provincial legislatures has led to considerable litigation over the years over the “division of powers”
- A provincial statute cannot purport to grant a decision maker with authority over a subject matter that falls within the exclusive jurisdiction of the federal government, or vice versa: ***Actton Transport Ltd. v. Director of Employment Standards*, 2008 BCSC 1495, aff’d 2010 BCCA 272**
- Division of powers arguments can be used as a ground for challenging legislation under which regulatory decisions are made. See, for example, ***Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 (litigation concerning Vancouver’s safe injection site)**

Charter of Rights and Freedoms

- Legislation can also be challenged on the basis of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”)
- The *Charter* applies to legislature and governmental bodies, which include the federal government, provincial governments, territorial governments and bodies that exercise delegated statutory authority such as regulators
- The *Charter* does not apply to private activity. While private activity may also offend individual rights, it can be regulated by government or made subject to human rights commissions and other bodies created to protect those rights: ***McKinney v. University of Guelph*, [1990] 3 S.C.R. 229**

- *Charter* limitations extend not only to laws, but to any actions taken by governmental officials or bodies exercising authority under laws - this means that all decisions must be consistent with the limitations and protections contained in the Constitution
- For example, in ***Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*** [2000] 2 S.C.R. 1120, the Court found that Customs legislation was facially neutral and non-discriminatory but the application of that legislation by Customs officers at the administrative level was discriminatory.

- The *Charter* consists of 34 sections which set out various guarantees of civil liberties which are considered so fundamental that they receive special protection from government action enforceable through the Courts.
- The rights and freedoms guaranteed under the *Charter* are not absolute as s. 1 contains important qualifying language:
 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such **reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society**. (Emphasis added)
- If a court determines that a statute contravenes a guarantee contained in the *Charter*, it must always consider whether the law can be saved as one that is demonstrably justified in a free and democratic society under s. 1.

- The Court applies the following test from ***R. v. Oakes* [1986] 1 S.C.R. 103** to determine whether a law can be saved under s. 1:
 - Does the law or action have a sufficiently important objective?
 - Are the means chosen in legislation “reasonable”
 - Is there a rational connection?
 - Is there minimal impairment?
 - Are there proportionate effects?

- A modified test is applied in relation to constitutional challenges to administrative decisions: ***Dore v. Barreau du Quebec*, [2012] 1 S.C.R. 395** in which the SCC held that administrative decision makers must first consider the statutory objectives of its regulatory authority and then determine how the *Charter* value at issue will best be protected in view of the objective.

Types of *Charter* challenges that can arise in the regulatory context

- There are a number of specific *Charter* rights and freedoms that have been asserted with varying degrees of success in the regulatory context.

Fundamental freedoms under s. 2 of the Charter

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication;

- In ***R v. Big M Drug Mart Ltd.***, [1985] 1 S.C.R. 295, the drug store challenged *Lord's Day Act* on the basis of freedom of religion. The Court agreed that the statute infringed s. 2(a) and was not justifiable under s. 1.
- In ***Ross v. New Brunswick School District No. 15***, [1996] 1 S.C.R. 40, the Court held that a disciplinary order appointing a teacher on leave to a non-teaching position because of anti-Semitic off-duty comments violated his freedom of expression and freedom of religion but held that the expression was only tenuously connected to the core values of freedom of expression and religious belief that denigrated the religious beliefs of others eroded the very basis of the s. 2(a) guarantee. The disciplinary order was justified under s. 1.

- In ***Rocket v. Royal College of Dental Surgeons (Ontario)***, [1990] 2 S.C.R. 232, the Court held that the College's regulations restricting professional advertising infringed freedom of expression which includes commercial speech. Breadth of restrictions could not be justified under s. 1.
- In ***RJR MacDonald v. Canada*** (1995) 3 S.C.R. 199, the Court held that the *Tobacco Products Control Act* which required unattributed warnings on cigarettes violated freedom of expression and could not be saved under s. 1. While warnings could be justified, the government failed to establish the justification for non-attribution of the warnings to government.

Mobility rights under s. 6(2) of the *Charter*

Mobility Rights

6.(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

- In ***Black v. Law Society of Alberta***, [1989] 1 S.C.R. 591, the Court held that a Law Society rule prohibiting members from entering partnerships with lawyers who are not ordinarily resident in Alberta, and a rule prohibiting members from being partners in more than one firm violated s. 6(2)(b) and not justifiable under s. 1.
- In ***Canadian Egg Marketing Agency v. Richardson***, [1998] 3 S.C.R. 157, egg producers in NWT challenged federal regulation denying them right to sell eggs outside the territory on basis of s. 6. Court held that egg quota was valid basis on which to construct national marketing scheme and that discrimination against egg producers not primarily on basis of their territory of residence. Regulation upheld.

Legal Rights

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

- In ***Blencoe v. British Columbia (Human Rights Commission)***, [2000] 2 S.C.R. 307, a cabinet minister sought a remedy under s. 7 for unreasonable delay by the Human Rights Commission in disposing of sexual harassment complaint made against him. The Court held that s. 7 does not apply unless a person's right to "life, liberty and security of the person" is at stake. Court did not rule out possibility of constitutional remedy for administrative delay if there is significant stress but set bar very high.

- In *Mussani v. College of Physicians and Surgeons of Ontario* (2003) 64 O.R. (3d) 641, aff'd (2004) 74 O.R. (3d) 1 (C.A.), the Court held that the right to “liberty” under s. 7 does not include a right to practice one’s profession and the right to “security of the person” under s. 7 is not engaged by the stress, anxiety or stigma that may result from an administrative or civil proceeding.

Freedom to be secure from unreasonable search and seizure under s. 8

Search or seizure

8. Everyone has the right to be secure against unreasonable search and seizure.

- Section 8 protects the right to be secure from unjustified state intrusion upon privacy. The term “search” refers to an examination by the state of a person’s body or property to look for evidence while a “seizure” means the physical taking away of things by the state that can be used as evidence.

➤ In ***Hunter v. Southam* (1984) 11 D.L.R. (4th) 641 (S.C.C.)**, the Court held that a regulatory search would only be reasonable if it was authorized by a statute, and three conditions were met:

- (a) prior authorization was obtained in advance of the search;
- (b) the warrant to conduct the search is issued by a person who must be capable of acting judicially (i.e. someone who is not involved in the investigation); and
- (c) a requirement that a warrant only be issued after it has been established that there are reasonable and probable grounds to believe that an offence has been committed and that evidence is to be found in the place searched.

- In ***British Columbia Securities Commission v. Branch***, [1995] 2 S.C.R., the Court dismissed a s. 8 challenge to s. 128 of the *Securities Act* which provided investigators with power to summons witnesses and compel witnesses to give evidence and produce records. Court held that the *Securities Act* is regulatory legislation designed to protect the public and those involved in the securities market do not have a high expectation of privacy.
- Where, however, a regulator develops a suspicion that a criminal offence has been committed, and the predominant purpose of the inquiry shifts to the investigation of the commission of a criminal offence, any further production of documents requires a search warrant. Regulators cannot use inspection/audit powers to conduct criminal investigations: ***Baron v. Canada*** [1993] 1 S.C.R. 416.

Legal Rights under s. 11

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;...

- In *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, the Court held that s. 11(b) did not apply to disciplinary matters of a regulatory nature designed to maintain professional integrity, discipline and standards, and which do not have “true penal consequences”.
- The procedural rights listed under s. 11 do not apply directly to the administrative proceedings although some of these rights may be duplicated through other non-Charter rights that come under the rubric of procedural fairness

The Right against Self-Incrimination under s. 13

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

- Section 13 protects a witness in a proceeding from having statements given used against him or her. One can only be incriminated in proceedings of a criminal or quasi-criminal nature.
- The right of a person to avoid self-incrimination does not apply to regulatory proceedings as they lack “true penal consequences”: ***Knutson v. Registered Nurses Association (Saskatchewan) (1991), 75 D.L.R. (4th) 723 (Sask. C.A.); British Columbia (Forensic Psychiatric Services Commission) v. British Columbia (Mental Health Act Review Panel), 2001 BCSC 1658***

- In ***British Columbia Securities Commission v. Branch, supra***, the SCC held that the interests underlying the principle against self-incrimination are not suited for use in a regulatory context where the individual voluntarily participates, for his own profit, in a licensed activity.

The Right to an Interpreter under s. 14

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

- A person asserting a breach of s. 14 must establish a lapse in interpretation in respect of the proceedings themselves, concerning their vital interests, and not merely a collateral or extrinsic matter: ***R. v. Tran*, [1994] 2 S.C.R. 951.**

- The failure to provide an interpreter in the context of the provision of medical services was held to be a violation of equality rights under s. 15 of the *Charter* in ***Eldridge v. B.C. (A.G.)*, [1997] 3 S.C.R. 625.**
- In ***Caron v. Alberta (Chief Commissioner of the Alberta Human Rights and Citizenship Commission)*, 2007 ABQB 525**, the Court ordered the provincial government to pay for an English-to-French interpreter for a judicial review proceeding arising from a human rights claim.

Equality Rights

s. 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

- In ***Andrews v. Law Society of British Columbia***, [1989] 1 S.C.R. 143, the Court held that the requirement for Canadian citizenship for admission to the Law Society discriminated on grounds analogous to “ethnic origin” under s. 15 of the *Charter* and the requirement was not justifiable under s. 1.

- In *Hutton v. Law Society of Newfoundland* (1992), 96 D.L.R. (4th) 670, the Law Society determined that the applicant lacked good character based on past misconduct arising from previous mental illness. The Court “read down” the phrase “good character” in the Law Society Act to mean that conduct attributable to past mental illness does not impair one’s character or reputation, as to read it otherwise would infringe s. 15.

Enforcement of the Constitution

- All statutes must be consistent with the limitations and protections contained in the Constitution as reflected in s. 52 of the *Constitution Act, 1982*:

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

- If Parliament enacted a statute relating to a subject matter allocated to the provinces (or vice versa), and a constitutional challenge was raised, the statute (or the offending portion of it) would be struck down under s. 52(1) as a contravention of the *Constitution Act, 1867*.
- Similarly, if any level of government enacted a statute that contravened *Charter* rights, the statute (or the offending portion of it) would also be struck down under s. 52(1) as a contravention of the *Constitution Act, 1982*.

- Just as Parliament and legislatures cannot enact laws that are inconsistent with the *Charter*, any subordinate body exercising statutory authority delegated by them must also comply with the *Charter*.
- The *Charter* provides that anyone whose rights or freedoms have been infringed may apply to a “court of competent jurisdiction” to obtain a remedy under s. 24
- Section 24 of the *Charter* provides:

Enforcement

24.(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a **court of competent jurisdiction** to obtain such remedy as the court considers appropriate and just in the circumstances. (Emphasis added)

- The jurisdiction to enforce *Charter* rights falls primarily to the superior courts in each province (British Columbia Supreme Court) and, to a lesser extent, some administrative tribunals: ***Mooring v. National Parole Board* [1996] 1 S.C.R. 75**
- A statutory decision-maker will be considered a “court of competent jurisdiction” that is able to consider and enforce a *Charter* right as long as it is empowered to consider questions of law, and this power has not been explicitly limited to exclude consideration of the *Charter*: ***R. v. Conway*, [2010] 1 S.C.R. 765**

- A statutory decision-maker's power to consider questions of law need not be expressly set out in its enabling statute;
- Where it has the ability to make a decision, it will have the implied power to decide questions of law related to that decision, including issues arising under the *Charter*.

- In B.C., statutory decision-makers may be subject to certain provisions of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 which removes jurisdiction to address certain constitutional issues from tribunals to which those provisions apply:

44(1) The tribunal does not have jurisdiction over constitutional questions. ...

45(1) The tribunal does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.

- It is important to recognize that whether a statutory decision-maker is a “court of competent jurisdiction” or not, it must always act consistently with *Charter* values when exercising its statutory functions.
- Acting consistently with the *Charter* is a broader concept than having jurisdiction to consider and adjudicate *Charter* claims. It means that regulators have a duty to ensure that their bylaws, regulations, policies and standards, and the decisions that they make in the course of carrying out their regulatory functions, conform to the rights and freedoms guaranteed by the *Charter*.

- This explains why an otherwise mandatory requirement under a statute or regulation will sometimes have to give way to accommodate an individual's rights or freedoms under the *Charter* (and under human rights legislation which is quasi-constitutional in nature and also overrides other legislation)

(ii) An Introduction to Administrative Law

- The actions of statutory decision makers are also subject to review under the principles of administrative law
- Administrative law is the body of rules which govern the exercise of statutory powers and the processes and remedies that are available when those rules are not followed

- The rules which govern the exercise of statutory powers are sometimes set out in statutes themselves but are largely created by judges through the development of the common law (judge-made law)
- Although statutory decision makers are generally masters of their own procedure, they must still make decisions in a manner that conforms to the requirements of their enabling legislation and the common law rules of procedural fairness.

Grant of Statutory Authority

- It is fundamental that all government action must be supported by a grant of legal authority.
- Any actions and decisions of statutory decision makers that affect the rights of individuals will not have legal force unless authorized expressly, or by necessary implication, by statute subject to very limited exceptions
- As a consequence, every administrative decision maker derives authority from legislation which prescribes the limits of his or her authority and it is critical to ensure decisions are entirely consistent with that statutory authority

- In ***Western Forest Products Inc. v. Sunshine Coast (Regional District)***, **2007 BCSC 1508**, for example, WFP appealed an order of the Regional District requiring it to stop timber harvesting in parts of watershed. Court held that Regional District erred in law by putting onus on WFP to establish health hazard did not exist where no statutory authority to reverse onus set out in Act. (Court also found Regional District made unreasonable findings of fact by relying on lay opinion on difficult scientific questions that required expert evidence)

- Apart from powers expressly set out in legislation, decision makers have additional powers that are reasonably necessary to fulfill their statutory mandate through the doctrine of necessary implication: ***Lee v. Employment and Assistance Appeal Tribunal and Minister of Social Development, 2013 BCSC 513*** and ***Pugliese v. Clark, 2008 BCCA 130***
- Since all grants of authority are limited, it is the constitutional function of the courts to determine the scope of any power conferred by the legislature on a statutory decision maker in the event of a challenge

The Process of Statutory Interpretation and Interpreting the Scope of Authority

- Decision makers must properly interpret the scope of their authority to act both in terms of ensuring they have jurisdiction to embark on inquiry and ensuring they stay within that jurisdiction in the exercise of their authority
- When a decision is challenged, courts must also often interpret the scope of the decision maker's authority

- Courts apply the ordinary and grammatical approach to all questions of statutory interpretation:

“the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”.

***Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR. 27**

- This approach requires consideration of the context of the legislation as a whole, rather than simply focusing on the specific words of a section that may be at issue.
- Although a regulator may be interpreting and applying the same section(s) of his or her enabling legislation frequently in many different factual settings, it is prudent to always read the section again and understand its role in within the context of the scheme of the Act as a whole.

- Sometimes the words of an Act or regulation fall short of doing the job that a regulator believes was intended by the legislature. It is necessary to recognize that, apart from avoiding absurd consequences, a decision maker cannot re-write the legislation. Decision makers must apply the law as written even if they believe it leads to unsatisfactory results.

Statutory Duties

- Most legislation imposes mandatory “duties” on statutory delegates to enforce rules set out in legislation - those duties guide the exercise of the decision maker’s authority.
- Those “duties” may be expressly set out in the enabling legislation - for example, s. 16(1) of the *Health Professions Act* provides that self-regulating colleges have the following duty:

16(1) It is the **duty** of a college at all times

(a) to serve and protect the public, and

(b) to exercise its powers and discharge its responsibilities under all enactments in the public interest (Emphasis added)

- In other cases, “duties” are set out in terms of responsibilities that a statutory delegate “must” carry out - for example, s. 66 of the *Public Health Act* sets out the duties of the provincial health officer to monitor and advise on provincial health issues:

66(1) The provincial health officer **must** monitor the health of the population of British Columbia and advise, in an independent manner, the minister and public officials

(a) on public health issues, including health promotion and health protection, ...

Statutory Discretion

- Discretion exists whenever a statutory decision maker has the power to make a choice among possible courses of action or inaction.
- It is fundamental that there is no such thing as an unfettered discretion:

“In public regulation ... there is no such thing as absolute and untrammelled “discretion”, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature of the statute. ... “Discretion” necessarily implies good faith in discharging a public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.”

***Roncarelli v. Duplessis*, [1959] S.C.R. 121**

- Courts have developed principles to ensure that the exercise of discretion by statutory decision makers takes place in accordance with the law. These principles include the requirement to exercise the discretion for the proper statutory purpose and to exercise the discretion in an independent manner (unfettered by policy or dictation from a third party)

- Decision makers must exercise discretion for a proper purpose:

“... courts should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (Roncarelli v. Duplessis, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion.”

***Baker v. Canada*, [1999] S.C.R. 817**

- Decision makers may be try to act in the public interest but still act for purposes that are legally improper: ***Carrier Lumber Ltd. v. British Columbia* [1999] B.C.J. No. 1812 (S.C.)**.

- As well, statutory limits on discretion must always be observed. For example, s. 14(1) of the *Drinking Water Protection Act* contains a condition precedent to the exercise of the drinking water officer's discretion:

14(1) The drinking water officer **may** request or order a water supplier to give public notice in a manner approved by the drinking water officer, or in accordance with the direction of the drinking water officer **if**

- (a) the drinking water officer has received a report under section 12,
- (b) the drinking water officer has received a report under section 13, or
- (c) the drinking water officer considers that there is, was or may be a threat to the drinking water provided by a water supply system. (Emphasis added)

- Similarly, a health officer's discretion to suspend, cancel or vary an operator's licence or permit under s. 20(2) of the *Public Health Act* can only be exercised if certain conditions are met:

20(2) In addition to any other action that may be taken under this Act, a health officer **may** suspend, cancel or vary an operator's licence or permit **if**

- (a) the operator has contravened a term or condition of the licence or permit, or an order made under this Act,
- (b) the operator has contravened a requirement of this Act or the regulations made under it, or
- (c) the health officer reasonably believes that the operator, in engaging in a regulated activity, has caused or is causing a health hazard. (Emphasis added)

- Grants of discretion may also set out a list of general or specific factors that must guide the statutory delegate in the exercise of his or her discretion
- A failure to consider relevant factors or consideration of irrelevant factors may constitute a reviewable error

Fettering of Discretion/Acting under Dictation

- A delegate must ensure that he/she exercises independent judgment in relation to the grant of discretion
- A “fettering of discretion” occurs whenever a delegate mechanically applies a policy without considering whether it is appropriate to the particular facts of a case
- Policies, guidelines and rules do not have legally binding effect unless statute indicates otherwise

- Policies do not have to be expressly authorized by statute but their non-binding nature must be recognized and they cannot contradict legislation. In ***Ainsley Financial Corp. v. Ontario Securities Commission***, [1994] O.J. No. 2966, the Court observed:

“... A non-statutory instrument can have no effect in the face of a contradictory statutory provision or regulation... Nor can a non-statutory instrument pre-empt the exercise of a regulator’s discretion in a particular case. ... a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue de facto laws disguised as guidelines. ...”

- In ***Fahlman v. Community Living BC***, [21007] B.C.J. No. 23, the BC Court of Appeal held that Community Living BC could not use an IQ limit set out in policy as a mandatory criteria for establishing eligibility of benefits as it amounted to fettering of discretion:

“... courts have admonished against informal policies and guidelines becoming invariable rules applied automatically in every case. Individual matters warrant individual attention. Accordingly, a statutory authority’s discretion should not be so fettered as to preclude individualized consideration of particular cases.”

- Only the legislature can give binding effect to policies through legislation. For example, s. 4(1) of the *Drinking Water Protection Act* provides:

4(1) The minister may establish

- (a) guidelines that **must** be considered, and
- (b) directives that **must** be followed

by drinking water officers and other officials in exercising powers and performing duties or functions under this Act and the *Health Act* in relation to drinking water. (Emphasis added)

- If a statute provides that a policy is to have binding effect, then it has the force of law and must be followed.
- If the statute is silent, the policy should be considered but cannot be treated as binding without consideration of the circumstances of the individual case.

- Decision-makers must also ensure that any comments or “directions” they receive from other agencies do not fetter their own discretion:
- In *Koopman v. Ostergaard* (1995), 34 Admin. L.R. (2d) 144 (BCSC), the Court struck down a Ministry of Forests decision to issue a licence to cut based on a policy to issue approvals whenever well authorizations are issued by the Ministry of Energy, Mines & Petroleum Resources and notwithstanding the decision maker’s own objection to the proposed project. The matter was remitted back for reconsideration.

- In *Chetwynd Environmental Society v. British Columbia (Ministry of Forests)*, [1995] BCJ No. 2241 (S.C.) the Court subsequently upheld the issuance of the same licence to cut as it was satisfied that the decision maker had properly considered his discretion on reapplication.
- There is an important difference between providing feedback to other agencies (e.g. inter-ministry consultation) and exercising statutory authority under one's own statutory scheme.
- A decision-maker can never abdicate responsibility for making a decision by acting under the dictation of another person or body.

Limits of Proper Consultation

- The rules with respect to fettering of discretion and dictation do not prevent a delegate from consulting with others in the course of deliberations.
- Discussing a case with a colleague to receive input does not constitute improper sub-delegation nor does it contravene the rules of procedural fairness provided the delegate exercise his or her judgment in an independent manner.

- In International *Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, the Court held that a panel of the Ontario LRB did not contravene rules of procedural fairness when it met with the full Board to discuss policy and legal issues relating to draft reasons.
- The Court cautioned, however, that discussions on factual matters would contravene the rules of procedural fairness because individuals cannot assess facts if they have not heard the evidence.

The Common Law Duty of Procedural Fairness

- As important as it is for a decision maker to properly interpret and act within the proper scope of his/her statutory authority, it is equally important to act in accordance with the principles of procedural fairness.
- In administrative law, procedural fairness (also referred to as “natural justice” or the “opportunity to be heard”) refers to a process that, in all the circumstances, provides an affected individual with notice and an opportunity to be heard before an impartial decision maker.

- The principle of procedural fairness is engaged whenever a statutory decision maker takes action that may be detrimental to an individual's interests:

“This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual”.

***Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643**

- The failure to provide procedural fairness renders the decision invalid:

“... 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 have resulted in a different decision. The right to a fair hearing must be regarded as an independent unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

Cardinal, supra

- The question is rarely whether procedural fairness applies (as it almost universally does) but rather the extent to which the duty applies in a particular context:

“It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs, and fair.”

***Knight v. Indian Head School District*, [1990] 1 S.C.R. 653**

- The requirements of procedural fairness are therefore variable, and can range from providing the full panoply of procedures associated with judicial proceedings to providing informal and simple procedures such as an opportunity to be notified and to make written submissions.

- The content of the duty of fairness in a particular situation is determined by:
 - the nature of the decision to be made and the decision-making process employed by the public body
 - the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates
 - the importance of the decision to the individual(s) affected
 - the legitimate expectations of the party challenging the decision; and
 - the nature of the deference accorded to the public body.

- The duty of fairness will be engaged at every stage of a decision maker's process, including at the investigative stage and requires that an adequate investigation be carried out.

Participatory Rights - Notice and Disclosure

- In order to have a meaningful opportunity to participate in the decision-making process, the duty of procedural fairness requires that affected individuals must have sufficient information to:
 - make representations on their own behalf
 - understand the case they have to meet
 - appear at a hearing (if one is held) or have the opportunity make written submissions

- Prior notice must be given to those entitled to participate that a decision is going to be made or that administrative action is going to be taken
- Any statutory notice requirements must be complied with - see, for example, s. 20(3) of the *Public Health Act*:

20(3) Before suspending, cancelling or varying an operator's licence or permit, a health officer must provide to the operator

(a) a written notice stating

- (i) the action the health officer proposes to take,
- (ii) the reason for taking the action,
- (iii) the date the action is to take effect, and
- (iv) how the operator may respond to the proposed action, and

(b) a reasonable opportunity to respond, in writing, to the proposed action.

- Absent statutory notice requirements, the general principle is that notice must be adequate in all the circumstances to afford those concerned a *reasonable* opportunity to respond.
- This means that notice must be given sufficiently in advance of the decision to allow affected parties adequate time to prepare.
- The length of time required will depend on factors such as the importance of the interest at stake, the potential seriousness of an adverse decision, the complexity of the issues in dispute, the parties' conduct, and the costs of delay.

➤ In ***Miel Labonte Inc. v. Canada (Attorney General)***, 2006 FC 195, the Court upheld a Minister's decision to quickly recall honey based on CFIA's concern that there were banned antimicrobial drugs in sample. Miel argued Minister had breached duty of fairness by failing to give adequate time to respond to proposed recall order. Court held that where public health at stake, duty of procedural fairness limited. Company was given opportunity to cooperate, told of nature of contemplated decision and sent result of analysis and reasons supporting decision and nothing more required because of emergency nature of concerns. See ***Archer v. Canada (Canadian Food Inspection Agency)***, 2001 F.C.J. No. 46 where procedural fairness requirements higher where product not yet in circulation and less emergency.

- In addition to providing information about the timing of the decision making process and the nature of the proceeding, it is also necessary to provide adequate notice of the “particulars” of the case.
- The duty to provide particulars is most rigorous where the exercise of the statutory power may lead to adverse findings against the individual that lead to damage to reputation, liability or denial of an important right or benefit.
- Conversely, the duty to provide particulars is attenuated where the decision to be made is discretionary in nature and likely to be based on policy considerations.

- The notice should also contain information on the type of proceeding being conducted, and the potential consequences that the individual faces, including any penalty, liability or other possible adverse consequences.
- The remedy for inadequate notice is generally an adjournment.
- The discretion to adjourn a matter should be based on the reason for the adjournment request, the impact of refusing or granting the adjournment on the respective parties, and the impact of the adjournment on the public interest. The guiding principle is whether the adjournment is necessary for the proceeding to be conducted in a procedurally fair manner.

Impartiality in Decision-Making

- The principles of procedural fairness also require that decisions be made by impartial decision makers - often referred to as the rule against bias.
- The rule against bias requires that decision makers maintain an open mind and manifest neither bias nor interest in the exercise of their decision making functions.
- A charge of bias implies that a decision maker will not decide the case on the basis of the evidence but rather on the basis of some other improper considerations.

- The conduct of decision makers is measured against a standard of reasonable apprehension of bias rather than “actual bias”
- This reflects the underlying policy that “justice should not only be done, but should manifestly and undoubtedly be seen to be done”.

- The test for determining whether a reasonable apprehension of bias exists is an objective one:

“... 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. In the words of the Court of Appeal, the test is “what would an informed person, viewing the matter realistically and practically, and having thought the matter through - conclude”

Committee for Justice & Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369

- Courts have held that mere suspicion of bias is not enough and that allegations of bias ought not to be made unless supported by sufficient evidence to demonstrate to a reasonable person that there is a sound basis for apprehending that the decision maker will not bring an impartial mind to bear.
- An apprehension of bias, real or apprehended, may arise from personal attitudes, interests, relationships or the institutional framework within which the decision maker operates.

Nature of Hearing Process

- By definition individuals who are entitled to participatory rights have a “right to be heard”
- The format in which that “right to be heard” is given will depend on the statutory and administrative context in which the decision maker operates
- Although oral (in-person) hearings reflect the highest standard of fairness, the duty of fairness does not guarantee an unqualified right to an oral hearing in every situation.

- The nature of the issue will be an important consideration in determining whether an oral hearing is necessary. If the issue is solely a question of law and there are no evidentiary issues, a written hearing will likely suffice.
- Decision makers that perform essentially adjudicative functions determining a dispute between parties generally must follow an oral hearing process that resembles a civil trial.
- An oral hearing enables participants to have a better opportunity to know and to respond to the issues that the decision maker considers important.

- Where there are conflicts in the evidence, those conflicts are more readily resolved in an oral hearing through the process of cross-examination
- Oral hearings are required where there are significant credibility issues that must be resolved in making a decision
- Oral hearings will also likely be required where a regulatory decision may result in the infringement of a *Charter* right (such as the liberty interest engaged in a parole hearing or the deportation of a refugee) or where an individual's livelihood is at stake.

- In other situations, a far less formal opportunity to be heard may be sufficient such as an interview, or a meeting, or a written hearing process.
- Absent statutory direction, the decision maker has the discretion to decide on the form of the hearing although courts will review the propriety of that exercise of discretion in the event of a judicial review challenge.

Reasons for Decision

- Many statutes require decision makers to provide reasons for their decisions. For example, s. 21(5) of the *Public Health Act* provides:

21(5) A health officer must provide written reasons for an action taken under subsection (4)(c), and a person may not request further reconsideration.

- Even in the absence of a statutory requirement, the duty of procedural fairness will require that reasons for a decision be given where a decision has important significance for an individual or there is a statutory right of appeal:

“... 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, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. ...”

***Baker v. Canada (Minister of Citizenship and Immigration)*, [1999]
2 S.C.R. 817**

➤ The Court explained the rationale for providing reasons in this way:

“Reasons ... foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review.... Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given...”

- Where reasons are required by statute or common law, the decision maker cannot simply recite the submissions and evidence of the parties and state a conclusion.
- The decision maker must set out his or her findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue and clearly set out the decision maker's reasoning process: ***VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (Fed. C.A.)**

- When making an adverse credibility finding against a person, it is important to explain the basis for that decision: ***Harley v. B.C. (Employment and Assistance Appeal Tribunal)*, 2006 BCSC 1420**
- The failure to provide adequate reasons will render the decision invalid. In ***MC Imports Ltd. v. Canada (Canadian Food Inspection Agency)*, 2010 FC 994**, for example, MCI challenged a reclassification of its imported fish products to a “ready-to-eat” designation which carried a much higher inspection fee than the initial classification. CIFA did not explain why the designation was changed beyond saying the product was mistakenly classified at the Vancouver office. Court found decision to reclassify was not transparent or intelligible and sent it back for redetermination.

- Decision makers are not required to address every argument made by the parties, or to demonstrate that they considered all aspects of the evidence - they must simply provide a sufficient, rationale explanation for the decision that is made.
- Providing reasons will make the decision less vulnerable to being set aside by a reviewing body or court. If the reviewing body or court understands the basis for a decision, there will be greater deference to that decision and they will be less inclined to interfere.

Appeals, Statutory Reviews and Statutory Reconsideration

- There is no automatic right to “appeal” a statutory decision - such a right can only be created by statute.
- Where a statute provides for a right of appeal, it may limit who may bring an appeal (i.e. standing), the grounds on which an appeal may be taken (e.g. on questions of law alone), and the nature of the appeal

- There is a distinction between a “true appeal” and a trial *de novo*. In ***Dupras v. Mason (1994), 99 BCLR (2d) 266 (C.A.)***, the Court explained that a trial *de novo* virtually ignores the original decision while a true appeal focuses on the original decision and examines it to determine whether it is right or wrong. A true appeal has regard to the evidence on which the original decision was based subject to the ability to call fresh evidence.
- Some statutes also create “statutory reviews” and give decision makers the power to “review” their own decisions which is a statutory exception to the principle of *functus officio* (which provides that the decision maker’s authority is spent once it has issued a final decision)

- Some statutes create a statutory right of reconsideration upon certain conditions being met. For example, s. 21(2) of the *Public Health Act* provides:

21(2) On receiving notice of a decision from a health officer, a person may request the health officer to reconsider the decision **if the person has additional relevant information that was not reasonably available when the person first**

(a) submitted the application under section 19, or

(b) responded under section 20, if the person responded before the decision took effect. (Emphasis added)

- Other statutes create an independent review body (an independent tribunal of second instance) to review the initial decision. For example, in B.C., the Health Professions Review Board reviews decisions of committees of colleges of health professions.
- These second instance review or appeal bodies have the powers conferred on them by their enabling legislation - they may be given broad powers to hear a case anew or much more limited powers to only hear certain types of issues

- For example, the Employment and Assistance Appeal Tribunal which conducts appeals from Ministry of Social Development decisions concerning income assistance has a very limited ability under s. 24 of the *Employment and Assistance Act* to review the “reasonableness” of Ministry decisions:

24(1) After holding the hearing required under section 22(3), the panel must determine whether the decision being appealed is, as applicable,

- (a) reasonably supported by the evidence, or
- (b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

Judicial Reviews

- Judicial review is always available to challenge any statutory decision because the superior courts of each province exercise inherent jurisdiction to oversee inferior tribunals
- Where an appeal may be concerned with the “merits” of a decision, a judicial review is only concerned with the “legality” of a decision.
- The role of the court on judicial review is to supervise the jurisdiction exercised by a statutory decision maker to ensure that the decision maker acted within the jurisdiction bestowed upon it by the legislature and in accordance with the requirements of procedural fairness: ***Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244**

➤ In ***New Brunswick (Board of Management) v. Dunsmuir***, 2008 SCC 9, Justices Bastarache and LeBel explained:

27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoid undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

- The Court's role is to ensure that the tribunal: (a) acted within its jurisdiction by deciding what it was directed to decide by its enabling legislation; (b) did not lose jurisdiction by failing to provide a fair hearing, or by making a decision that falls outside the degree of deference owed by the reviewing court.
- The Court's authority to grant relief on judicial review is discretionary

Standard of Review

- The threshold question that the reviewing body or court must determine on every statutory appeal, statutory review and judicial review is the appropriate standard of review.
- Standard of review refers to the lens through which a reviewing body or court will examine the decision and the amount of deference that it will extend to that decision (the degree of intensity with which the courts will examine the decision of statutory delegate to determine whether there is a reviewable error).
- Standards of review may be established by statute (such as the *Administrative Tribunals Act* in British Columbia) or, where there is no legislation, by the common law standard of review test

- In B.C., the *Administrative Tribunals Act* legislates the standard of review for certain tribunals on the basis of whether or not they are protected by a privative clause:

58(1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

- There are only two “common law” standards of review: (a) reasonableness; and (b) correctness.
- Reviewing courts will normally apply the standard of “correctness” to four categories of questions: (a) constitutional questions; (b) true questions of jurisdiction or vires; (c) questions concerning the division of jurisdiction between competing administrative regimes; and (d) a question of general law that is both of central importance to the legal system as a whole and outside the decision-maker’s specialized area of expertise.

- Reviewing courts will normally apply the reasonableness standard where the question relates to: (a) the interpretation of the decision-maker's own legislation or statutes closely related to its function with which it will have a particular familiarity; (b) issues of fact, discretion or policy; and (c) intertwined legal and factual issues.
- Correctness standard applies to questions of procedural fairness

- The standard of “reasonableness” is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible acceptable outcomes that are defensible in respect of the facts and the law.
- If reasonableness standard applies, courts are directed that they should not closely parse the decision maker’s chain of analysis or place undue emphasis on the precise articulation of the decision if the underlying logic is sound.

SUMMARY OF GROUNDS ON WHICH DECISIONS CAN BE CHALLENGED

- Statutory decisions can be challenged on both substantive and procedural grounds.
- Substantive challenges may include consideration of the following types of questions:
 - Is the enabling statute constitutional?
 - Are the regulations under the enabling statute *intra vires*?
 - Has the decision maker observed the limits of authority set out in the enabling statute?
 - Has the decision maker observed the limits placed on authority in any external statutes (e.g. *Administrative Tribunal Act*, *Human Rights Code*)?

- Is the decision itself (as distinct from the statute under which it is made) consistent with constitutional constraints?
- Has the decision maker erred in interpreting a statute or common law rule?
- Has the decision maker made unreasonable findings of fact based on the evidence?
- Has there been an improper sub-delegation of authority to the decision maker?
- Has the decision maker exercised his or her authority in good faith?
- Has the decision maker exercised his or her discretion for proper purposes and on the basis on relevant considerations?
- Has the decision maker exercised his or her discretion in an independent manner?

- Procedural challenges may involve consideration of the following types of questions:
 - Has the decision maker conducted a fair and adequate investigation?
 - Has the decision maker provided adequate notice of the proposed administrative action?
 - Has the decision maker provided adequate particulars of the case to be met?
 - Has the decision maker provided a fair opportunity to be heard?
 - Is the decision maker impartial and free from an apprehension of bias?
 - Is the decision maker required to provide reasons for decision and, if so, has he or she provided adequate reasons?

NATURE OF RELIEF

- Monetary damages are not available as a remedy on judicial reviews or appeals. A party seeking damages must initiate a civil action in tort, contract or breach of trust.
- The remedies available on judicial review are governed by the *Judicial Review Procedure Act*
- The remedies are limited to orders in the nature of *certiorari* (an order to quash or set aside a decision), prohibition (an order to prevent the decision maker from making a decision), mandamus (an order compelling the decision maker to fulfill a duty), declarations and injunctions

- Courts may also direct a decision maker to reconsider a decision - a court does not have authority to substitute its decision for that of the decision maker.
- A reviewing court may decline to grant relief (even where an error on the part of the decision maker has been established) in a broad range of circumstances including where, for example, there has been delay in bringing the challenge, the applicant does not come to court with clean hands, the applicant has failed to exhaust his or her internal appeal remedies, or the applicant does not have sufficient standing to challenge the decision.

- If a reviewing court determines that a decision maker has made a reviewable error, it will typically issue an order quashing the decision and remitting the matter back to the decision maker (or to a new decision maker) with or without directions.

Thank you.

Lovett Westmacott, Lawyers & Mediators

<http://lw-law.ca>