2016

Transubstantiation in Canadian Public Law: Processing Substance and Instantiating Process

Mary Liston
Allard School of Law at the University of British Columbia, liston@allard.ubc.ca

Citation Details

Mary Liston, "Transubstantiation in Canadian Public Law: Processing Substance and Instantiating Process" in John Bell et al, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016) 213.

Transubstantiation in Canadian Public Law:
Processing Substance and Instantiating Process

Mary Liston*

I. INTRODUCTION

Canadian public law blurs process and substance, a result confirming the prevailing view that this dichotomy ought never to be conceived as a simplistic bright-line distinction. Recent developments have created more than just a blurring but, rather, a strong linking or even fusion of the two. This paper probes the implications of these developments in public law. Section two briefly presents the historic and jurisprudential distinctions between process and substance and assesses its current legal import. Here I argue that judicially created analytic frameworks could assist by bringing a process-substance problem to the surface and constraining its potentially pernicious effects. Section three grounds this initial discussion in Canadian public law by showing how the distinction generally appears in judicial review of procedures in administrative law. The decisional framework employed in procedural fairness is examined. Sections four and five turn to two significant new developments in Canadian public law. Section four considers how the duty to consult and accommodate in public law completely fuses process and substance. Aboriginal administrative law currently provides the most vibrant and dynamic jurisprudential example of the conceptual puzzles that the distinction raises and its decisional framework exemplifies many of the tensions discussed in the paper as a whole. Section five examines the new Canadian approach to the substantive review of discretionary decisions and how the current decisional framework may fall short in terms of rights protection. The paper concludes that the 'transubstantiation' of process and substance is conceptually and legally desirable due to the cross-fertilization of rule of law and democratic norms in public law and that improved decisional frameworks could fruitfully assist in this cross-fertilization.

II. SIGNIFYING PROBLEMS: PROCESS VERSUS SUBSTANCE IN GENERAL JURISPRUDENCE AND IN PUBLIC LAW

A. Two conventional approaches to the separation of process and substance and why they don't work

The distinction between process and substance was never as conceptually bright-line as traditional jurisprudence would have it.[1] The difficulty of rendering a clear distinction has long

* Assistant Professor, Peter A. Allard School of Law, University of British Columbia. I am grateful to John Bell, Mark Elliott, Philip Murray, and Jason Varuhas for their constructive and incisive feedback. I would also like to thank the chair and co-presenters at the 2014 Public Law Conference panel where this chapter was originally presented—Cora Hoexter, Anashri Pillay and Tom Hickman—and audience members for helpful insights.

[1] See the discussion concerning the division between substance and procedure (or 'adjective' law), arguably created by Jeremy Bentham and criticized by John Austin in A Kocourek, 'Substance and Procedure' (1941) 10 *Fordham Law Review* 157.

been noted, despite the fact that law schools continue to teach as if the dichotomy remains crystal clear.[2] Even the strongest defender of the distinction—Jeremy Bentham—conceded that neither could conceptually exist without the other. He may, however, have firmly agreed with Thomas Hobbes that any suggestion that the two might be fused or co-exist in legal doctrines and analytic frameworks would amount to utter nonsense not unlike that absurd religious claptrap called transubstantiation.[3]

Traditional jurisprudence therefore relegates matters that affect the existence, extent, or enforceability of rights and duties of the parties to a legal action as substance, not procedure. Procedure would then encompass all matters relating to the fairness or efficiency of the litigation and the evidentiary process (such as facts, judgments, and evidentiary rules). Alternatively, a second traditional approach relegates issues concerning the manner and means needed to access courts, the availability of remedies, and matters relating to justiciability as procedure. But fuzzy boundaries rapidly arise.

Regarding the first approach—historically understood as a practical allocation—we quickly come to an imprecise demarcation when the distinction is broadly considered from an institutional and systemic perspective. We value procedural law in and of itself because it conforms to the ideal of the rule of law (ie, a norm-governed process). The ideal of the rule of law animates our collective hope that we can value, uphold, and legitimize a certain procedure because it will more likely to lead to a just outcome.[4] This potentially just outcome is partly legitimated because it is the product of a fair procedure.[5] The connection between procedure and substance as a matter of procedural justice, in turn, validates the institution of the judiciary and its associated legal practices. Substance and process are therefore inextricably entangled as a matter of procedural justice and just institutions.[6]

---

[2] Kocourek (n 1) 160-62 canvassed older jurisprudence proposing various 'solutions' to the conceptual problem by: (1) suggesting that procedural rules are wholly equivalent to substance (John W Salmond); or (2) subsuming process entirely into substance (Charles Frederic Chamberlayne); or (3) offering the notion of a penumbra or 'twilight zone' between process and substance (Walter Wheeler Cook in his seminal 1933 *Yale Law Journal* article entitled '"Substance" and "Procedure" in the Conflict of Laws'). Kocourek (n 1) 164 re-characterized the problem by suggesting the use of 'telic rights' instead of substance, and 'instrumental rights' instead of procedure, with the result that: '"Telic" rights are those abstract rights whose realization is effected by the concrete application, directly or indirectly, of "instrumental" rights'.

[3] He writes: 'And words whereby we conceive nothing but the sound, are those we call *Absurd* … and *Non-sense*. And therefore if a man should talk to me of a *round Quadrangle*; or *accidents of Bread in Cheese*; or *Immaterial Substances* … but are taken up, and learned by rote from the Schooles, as *hypostatical*, *transubstantiate*, *consubstantiate*, *eternal-Now*, and the like canting of Schoole-men.' R Tuck (ed), *Leviathan* (Cambridge, Cambridge University Press, 2002) I.V, 19 at 35.

[4] See O Malcai and R Levine-Schnur, 'Which Came First, the Procedure or the Substance? Justificational Priority and the Substance-Procedure Distinction' (2014) 34 *Oxford Journal of Legal Studies* 1. See also André Nollkaemper discussing the contemporary view in international criminal law that procedure does not merely enforce substance, but represents its own values that are not merely instrumental: A Nollkaemper, 'International Adjudication of Global Public Goods: the Intersection of Substance and Procedure' (2012) 23 *European Journal of International Law* 769, 782.

[5] Lawrence Solum argues that a complex view of the relationship between procedure and substance appreciates the 'ineliminable and inherent entanglement' between them. He suggests that the real work of procedure is to 'provide particular action-guiding legal norms' across all areas of law for individuals and public actors: 'Procedural Justice' (2004) 78 *Southern California Law Review* 181, 224-25, 320.

[6] See Rawls's conception of just institutions on this point: J Rawls, *Political Liberalism* (New York, Columbia University Press, 1993) 72.

The second approach encompasses several discrete points of fusion between process and substance. Standing and other justiciability doctrines, for example, procedurally regulate the initial stages of engaging the judicial process for accessing rights and enforcing duties. But, they also contain a significant element of substance because they affect the ultimate result.[7] Alexander Bickel noted that when a court declines to hear a case on its merits, and provides little explanation, it indirectly validates the government's action as a matter of substance.[8] Moreover, by obtaining standing, a person is recognized as having legal status and a potentially valid legal claim requiring judicial resolution. The litigant gains a substantive right of access to a further protected right or enforceable duty. Standing is therefore an end in itself as a form of legal status, but also entails the recognition that one's claim is justiciable and one can therefore make use of the available procedures to vindicate the right or enforce the duty. Standing further validates the courts as the appropriate forum in which to hear the legal matter thereby confirming their jurisdiction. In the way that many process and substance issues seem nested within each other, jurisdiction itself is also a further matter of substance (ie, the lawful and legitimate exercise of judicial power) *and* also of procedure (ie, the process used to structure a court's discretionary control over its own processes).[9]

To take another example, remedies combine process and substance because the substance of remedial principles is closely connected to the procedures of the particular court in which they are applied and because of their close connections with procedural doctrines of standing and justiciability.[10] Without standing and a justiciable claim, a complainant cannot use procedures to access a remedy. And, finally, procedure may also include—if broadly construed—matters of interpretation and rules originating in the democratic process, both of which are often labelled substance.[11]

Contemporary legal scholars emphasize that the consequences of the process/substance distinction are complex. Some consequences are concrete and relate only to the specific parties in the case, while others are more general and concern the operation of the overall legal system in terms of fairness, efficiency or justice.[12] A difficulty arises, then, when we try to define the scope of the outcome of the legal process. A narrow view of a legal matter will see the consequences—and the process-substance dichotomy—differently than a broader scope that may engage considerations of jurisdiction and just institutions. At its broadest, the distinction orients us towards and grounds a conception of judicial review and its appropriate contours as expressed

[7] Malcai and Levine-Schnur (n 4) 7.
[8] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven and London, Yale University Press, 1986) 69.
[9] See *R v Inland Revenue Commissioners, ex p. National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 where the House of Lords rejected the possibility of determining standing without reference to the substance of the claim for judicial review.
[10] Nollkaemper (n 4) 775. Michael Risinger cites Bentham for the view that the availability of remedies for a violation of a right is part of substantive law. See M Risinger, '"Substance" and "Procedure" Revisited (with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions")' (1983) 30 *UCLA Law Review* 189, 191.
[11] Malcai and Levine-Schnur (n 4) 9.
[12] Ibid, 12.

in the principle of the rule of law, the principle of legality, the doctrine of the separation of powers, and the institutional demands of deference.[13]

We therefore must confront a legal characterization puzzle inevitably involving judicial interpretation and issue framing.[14] A formalistic approach will wish to see issues 'naturally' belonging to a particular category differentiated by form and function.[15] Over time, these distinctions, if regularly applied and followed, will become a recognizable jurisprudential pattern with set expectations. This process in law possesses some similarity with how 'genres' are used to classify literary texts and other artistic works. Established authorities will rely on prior characterizations of the distinction such as the two approaches outlined above, however different institutions and areas of law contain the possibility of upsetting past characterizations and generating different legal consequences. A legal issue or rule might be characterized as procedural for one purpose, substantive for another, or even both at the same time. Does this blurring raise the Hobbesian view that we are talking about a legal absurdity? The answer is again no, but for a different reason than the categorization problem just discussed.

B. A pragmatic and functional approach to the distinction

Many legal scholars who acknowledge the intractable nature of the categorization problem also concede that the legal distinction provides tactical and functional import in the management of legal disputes. Blurred therefore does not mean muddled and muddy and it becomes incumbent on courts to develop methods that help them navigate this difficult terrain, while exhibiting transparency in the methods that they themselves devise. Judges must therefore strive to faithfully apply the artificial reason and common law methods of reckoning that make use of logic, proportionality, principles of equity, and justice.

In their article on the process-substance dichotomy, public law scholars David Dyzenhaus and Evan Fox-Decent suggest that the process/substance distinction is fraught with difficulty partly because the term 'substance' is itself ambiguous.[16] Dyzenhaus and Fox-Decent raise the tantalizing suggestion that the traditional dichotomy is completely illusory—it is substance all the way down—but ultimately reject this conclusion.[17] They instead argue that the distinction is not likely to disappear any time soon, that it does functionally serve to demarcate jurisdictional issues between other branches and the judiciary, and that it involves a necessary complication that points toward a defensible conception of judicial review in a democratic legal order. According to them, substance designates a legal area where judges are less likely to intervene, thereby engaging the principle of deference within a conception of the separation of powers. Substance serves as a criterion to legitimate the activity of judicial review or its denial. 'Process', on the other hand, indicates areas that the judiciary considers itself to be constitutionally charged or deems itself capable of supervising.

---

[13] D Dyzenhaus and E Fox-Decent, 'Rethinking the Process/Substance Distinction: *Baker v Canada*' (2001) 51 *University of Toronto Law Journal* 193, 196.
[14] On categorization in law generally, see AG Amsterdam and J Bruner, *Minding the Law* (Cambridge and London, Harvard University Press, 2002) ch 2.
[15] See K Petroski, 'Statutory Genres: Substance, Procedure, Jurisdiction' (2012) 44 *Loyola University Chicago Law* 189, 240–43. The
[16] Dyzenhaus and Fox-Decent (n 13) 195.
[17] Ibid, 196.

Traditionally in public law, judges left substance to the legislature and the executive while nominating themselves the guardians of procedure.[18] Since the late 1970s and early 1980s in Canadian administrative law, the dichotomy has tracked the changes from the traditional 'Diceyan' model of the judiciary with monopoly over adjudication, law interpretation and supervision through a correctness standard in administrative law (for both procedure and substance) to a more respectful judiciary that ought to exhibit 'deference as respect'[19] towards the legislative and executive branches.

We can see this interplay at work in Canadian administrative law. Reviewing courts examine administrative procedures for fairness, but elements of procedure also act as justifying norms for the review of substance. The key link here—which will be discussed more fully in the section three—is the provision of reasons. Reasons may be required as part of the content of procedural fairness. But substantive review (ie judicial review of the decision or policy) also relies on reasons. The outcome of the decision may be justified as reasonable if the result stems from fair procedures and intelligible reasons. Here the legal dichotomy relies on an underlying philosophical distinction between procedural and substantive norms, but reasons simultaneously embody both types of norms. In Canadian administrative law (similar to administrative law in other common law countries), the process-substance distinction therefore indicates two avenues to access judicial review as well as at least two justificatory grounds for judicial deference to another branch of government: 1) the recognition of fair procedure; and, 2) the recognition of sound decision-making or policy application.

Moreover, the process-substance dichotomy also engages questions of jurisdiction in public law, resolution of which in some respects operates in a manner akin to a conflict of laws.[20] In a conflict of laws matter where an inter-state legal dispute involves both domestic and foreign law, the law of the forum governs matters of procedure, and matters of substance are governed by a choice of law rule that could privilege either domestic or foreign law. In Canadian administration law, a presumption of reasonableness has emerged in reasonableness review. This strong presumption of deference applies to <u>all</u> administrative decision-makers operating within their home statute in terms of process, interpretation, and substance.[21] At judicial review, procedure is generally governed by judge-made common law, while substance is largely informed by the statutory objectives and norms applied by administrative actors (subject to common law judicial constraints on the scope of decision-making). In substantive review, the administrative decision-maker's authority is generally viewed robustly, but judges can use common law principles to shape the exercise of discretion,[22] to confirm or reject interpretive

[18] Ibid,195.
[19] Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in M Taggart (ed), *The Province of Administrative Law* (Oxford, Hart Publishing, 1997) 279, 286 is the source for the idea of 'deference as respect'. The Supreme Court of Canada has cited this article, from whence the phrase comes, in several landmark cases.
[20] See Nollkaemper (n 4) on this point where he discusses how questions of jurisdiction are treated either as questions of substance or procedure depending on the territory, on the context, and also on the particular area of law.
[21] *Agraira v Canada (Public Safety and Emergency Preparedness)* [2013] 2 SCR 559 (presumption applies to all administrative actors, not just adjudicative tribunals, and includes ministers and other statutory delegates).
[22] *Mission Institution v Khela* 2014 SCC 24 ('*Khela*') (procedures involving discretionary choices may be owed deference by a reviewing court).

choices,[23] to conclude that a decision does not exhibit rationality or proportionality,[24] and to reject unreasonable outcomes[25]. In sum, the (rebuttable) presumption of reasonableness automatically privileges the interpretations and conclusions regarding substance, but also often the procedures used, by administrative decision-makers thereby averting institutional conflict.

Dyzenhaus and Fox-Decent argue that, despite its inherent ambiguity, the notion of 'substance' can serve a variety of functions including: 1) facilitating access to the remedy when process serves to deny a particular outcome because substance indicates the possibility of a right to a particular outcome; 2) indicating which body can define the content of procedural fairness thereby legitimating the actions used by administrative body to render a decision; 3) pointing to the form and content of procedural fairness when the statute leaves that determination to the administrative body and its judgment about the weight of factors that it uses; 4) supplying the justification requirement in procedural fairness, usually met by the provision of reasons, which blurs into the substance or reasonableness of the decision; and, 5) indicating political morality—understood in a conception of fairness—which informs legal conceptions of procedural fairness.[26]

C. Good principles and proper methods

Instead of striving for a clear *a priori* distinction between process and substance, then, contemporary thinking suggests that judges, lawyers, and administrative decision-makers develop decisional frameworks and other higher-order legal rules that operate as a cognitive process to bring these kinds of process-substance problems to the surface of legal thought and judgment.[27] While a comprehensive discussion of cognitive or analytic frameworks is not possible in this chapter, several insights from this growing literature are highly relevant.

A key text from cognitive science is *Thinking, Fast and Slow* by Daniel Kahneman, a book that illustrates the inescapable effects that experience, assumption, values, emotions, and unconscious biases have on our ability to think clearly and come to 'right reason'.[28] According to Kahneman, our mind is a dual-process model that contains two interactive modes of thinking, both of which produce the 'thinking I'. System 1 is like the operation of automatic pilot, operating quickly and continuously with little effort and producing intuitive, unconscious thought. It is impressionistic, metaphorical, associative, and cannot be switched off. It 'authors' our thought without us even being aware of its activity. System 2 is slower, deliberative and

[23] *McLean v British Columbia (Securities Commission)* [2013] 3 SCR 895, 2013 SCC 67 (administrative decision-makers have the 'interpretive upper hand' in their home statute).
[24] *Loyola High School v Quebec (Attorney General)* 2015 SCC 12 ('*Loyola*') (reasonableness review requires proportionality and the minister must exercise discretion to advance the freedom of religion enjoyed by a Catholic high school).
[25] *Canada (Attorney General) v PHS Community Services Society* [2011] 3 SCR 134, 2011 SCC 44 ('*Insite*') (the minister's decision not to grant an exemption for a provincial safe injection facility was arbitrary in substance and disproportionate in its effects).
[26] Dyzenhaus and Fox-Decent (n 13) 195-96. This links back to the understanding of fairness in Rawls's theory of justice.
[27] This kind of jurisprudential resolution is one that even Hobbes might approve: 'The first cause of Absurd conclusions I ascribe to the want of Method … .' See Tuck (n 3) 35.
[28] D Kahneman, *Thinking, Fast and Slow* (Toronto, Anchor Canada, 2013).

more effortful, requiring our attention when it is operative. It is associated with agency, choice, concentration, and complex computations and so is considered more rational.[29] System 1 controls most of our actions and generates a 'narrative' that allows us to make sense of the world we encounter. It enables us to perform the thousands of daily complex tasks we need to do, but unconsciously and often automatically. It is, however, prone to common reasoning errors because of its associative nature and its mode of 'jumping to conclusions'. System 2 kicks into gear when System 1 is challenged and it can oversee and correct System 1, but only if pushed to do so, because it is lazy.

This relatively recent research on human cognition contains valuable insights for law. Foremost is the fact that when decision-makers (either individual persons or professional decision-makers) approach the decision-making process, they unavoidably bring background influences and values with them, not all about which they are aware.[30] Judges form ideas and beliefs about issues and people by drawing on their previous experiences, both personal and professional. Such expert intuition, Kahneman suggests, can be reliable if a field requires skills to discern and an environment that is sufficiently regular to be predictable.[31] Law and legal reasoning can satisfy these requirements, and this fit is often expressed in the concept of 'common sense' deliberation.[32] Nevertheless, these regularities do not necessarily arise to a robust statistical level of the kind typical of poker playing, medicine, stocks, and athletics.

Instead of pretending that a completely objective judgment is achievable, judges should mitigate arbitrariness by using thinking techniques that encourage them to be 'mindful'.[33] These techniques can stimulate and support System 2 modes of thinking. Common techniques include being open to new information in order to check conclusions and avoid overconfidence, taking into account more than one perspective in order to counter tunnel vision,[34] and creating new categories to (re)sort information. These techniques may help us to understand how we make errors in choices and judgment. They make us aware of the role of our emotions in deliberation

[29] See Kahneman (n 28) chapters 1–3 for further elaboration.
[30] For elaboration on these points, see Kahneman (n 28) chapters 4–5.
[31] See Kahneman (n 28) chapter 6.
[32] Insights from cognitive science animate the legal literature on jury deliberation, procedural problems resulting in miscarriages of justice, judicial biases based involving stereotypes, and promoting empathy in judicial decision-making. See SA Bandes, 'Remorse and Demeanor in the Courtroom: Cognitive Science and the Evaluation of Contrition' (2013) *DePaul Legal Studies* Research Paper No 14-05 (available at http://ssrn.com/abstract=2363326) N Negowetti, 'Judicial Decisionmaking, Empathy, and the Limits of Perception' (2012) *Valparaiso University Legal Studies* Research Paper No 12-15 (available at http://ssrn.com/abstract=2164325); DL Martin, 'Lessons about Justice From the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt, and Informer Evidence' (2001–02) 70 *University of Missouri-Kansas City Law Review* 847; Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge, Cambridge University Press, 2001).
[33] The literature on 'mindfulness' zeroes in on the contextualized nature of thinking or judging, rather than empirical models of the brain. See J Nedelsky, 'Receptivity and Judgment' (2011) 4 *Ethics & Global Politics* 231; J Nedelsky, *Law's Relations* (New York, Oxford University Press, 2011).
[34] Nedelsky's work on reflective judgment focuses on overcoming cognitive biases like tunnel vision. Nedelsky claims that mindfulness is an imaginative act of contextualized thinking that leads the rational agent to challenge her own subjectivity by broadening her frame of reference. Contrast this with Martha Nussbaum's work on empathy and judgment where she describes empathy as 'an imaginative reconstruction of another person's experience' that does not require us to align our interests with that of another person. Nussbaum (n 32) 302.

and direct us to analyze how our internal narrative framing affects beliefs, choices, and assessment of facts or evidence.[35]

These analytic frameworks cannot resolve the problem of characterization but, instead, guide thinking so that choices can become more consciously made, more transparent, and ideally accompanied by reasons explaining why a particular categorical choice or generic distinction has been made. This is important when we realize that characterization is not just performed for a practical purpose, but has sometimes profound normative consequences. With a framework in place, a court can either develop further or re-visit prior characterizations made by legislatures, parties, lawyers, lower courts, and administrative decision-makers. Attention therefore shifts from a focus on one-and-for-all fixing the difference between substance and process to a necessary examination of how well these frameworks and their accompanying interpretive methodologies are working.

This section has argued that the process/substance distinction, while tenable, is fraught with tensions and must be viewed as shifting and complex. Substance informs process and process legitimizes substance ultimately providing the justificatory grounds for judicial review as a set of institutional practices and normative choices. The answer lies in becoming aware of how and why a legal matter is characterized as one or the other and what results from that. Not all doctrinal areas make use of decisional frameworks that aim to bring substantive-procedural characterization matters into sharper focus. Canadian administrative law, however, does.

The chapter now turns to three recent examples of this blurring of substance and procedure and the three frameworks that have been created to assist: procedural fairness, the duty to consult and accommodate, and substantive review of discretionary decisions.

III. CROSS-FERTILIZATION OF PROCESS AND SUBSTANCE: PROCEDURAL FAIRNESS AS THE FIRST FAULT LINE

Section II briefly examined how the process-substance connection already exists in public law generally and administrative law in particular. It probed how the distinction is used to, among other functions, establish jurisdiction thereby legitimizing judicial review. When the process-substance distinction is raised, one can readily discern the presence of fault lines or stressors in the jurisprudential terrain. These stressors create high anxiety in appellate judges who see the implications of the distinction and know that a particular stressor can quickly and easily crack open the 'Pandora's Box of legality'.[36] This section first presents the current framework used to determine the content of procedural fairness in Canadian administrative law. It then turns to the three main stressors in procedural fairness—legitimate expectations, weight, and reasons—stressors that resonate in developments that the next two sections consider.

[35] See Kahneman (n 28) chapter 34.

[36] Evan Fox-Decent uses this term to describe the judicial anxiety arising from the realization that procedural fairness has substantive implications. See E Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (New York, Oxford University Press, 2011), 189–190.

A. The *Baker* framework for determining the content of procedural fairness

In Canadian administrative law, a reviewing court asks one overarching question to determine the content of the duty of fairness for review of the procedures used by an administrative decision-maker: Was the procedure used in this case fair considering all of the circumstances? To answer this question, a court employs what is now termed the '*Baker* framework'—an analytic, decisional framework of the kind identified in section two.[37] When considering and applying the framework, the reviewing court must find a balance among an open list of factors and principles that include:

The Baker Framework

1. the nature of the decision and the process followed
2. the nature of the statutory scheme and the terms of review
3. the importance of the decision to the individual(s) affected
4. the legitimate expectations of the persons challenging the decision
5. the need to respect agency expertise in determining and following its own procedures

Despite strong judicial statements that no one factor takes priority over the other, four of these factors 'pull' a reviewing court closer to or further away from deference, minimal intrusion, and a sole focus on process: 1, 3, 4, and 5. I have used the phrase 'pull' to indicate that some factors may carry more 'weight' in the context of a particular case, though they may appear neutral initially. A reviewing court accords weight to a particular factor that, in turn, may pull the judges towards greater scrutiny and intrusion. Factors 3 and 4 indicate elements that most clearly blur the process/substance distinction and move what is generally conceived solely as review of procedures towards review on substantive fairness grounds.[38]

B. How the framework blurs process and substance

Regarding Factor 1—the nature of the decision and the process followed—less deference or more scrutiny will be demanded if, for example, the nature of the decision is closer to the judicial process or if a right of appeal exists. Most courts take the traditional view that tribunals are not owed ample deference on procedural fairness matters and that the standard of fairness is a rigorous one akin to correctness. More deference, however, may be appropriate when the enabling statute delegates broad discretion to make procedural choices to the decision-maker. The result is a lessening intensity in the standard of review for procedures—from a stricter standard akin to correctness towards a reasonableness standard that reflects respect for agency expertise (or Factor 5). In other words, Factors 1, 2, and 5 can combine to produce a posture that mirrors the reasonableness standard used in substantive review.[39] The Supreme Court of Canada in the *Khela* decision best expressed this contextually deferential stance using the words "margin of deference" to the administrative decision-maker (in this case a Commissioner or Warden of a

[37] *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, [21]–[28].
[38] For commentary on the concept of substantive fairness in Australian and New Zealand administrative law, see K Stern, 'Substantive Fairness in UK and Australian Law' (2007) 29 *Australian Bar Review* 266 and DR Knight, 'Simple, Fair, and Discretionary Administrative Law' (2012) 2 *Victoria University of Wellington Law Review* 34.
[39] For academic commentary on the possibility of fusing procedural and substantive review in this way, see P Daly, 'Canada's Bi-Polar Administrative Law: Time for Fusion' (2014) 40 *Queen's Law Journal* 213.

prison) who employed a procedure that required the exercise of discretion (in this case, withholding information from the prisoner).[40] More deference will be accorded if the nature of the decision is polycentric in substance (ie involving many parties) or if it involves complex considerations regarding the public good. More deference will therefore be shown to an administrative body that is acting 'legislatively' or in complex policy matters rather than 'judicially'—terms that are both synonyms for substance and process respectively.[41] Cases that fall at the legislative end may be viewed as near non-justiciable or highly inappropriate for judicial review.

More content will also be required if the decision involves a strong individual right and the decision is very important to the individual (eg matters concerning livelihood, personal security, reputation and so on).[42] The *Baker* framework is a balancing exercise implicitly guided by the principle of proportionality. Factor 3 implicitly compels judges to engage in mini-balancing or proportionality exercise since the substance of the individual right must be weighed relative to the other factors that may compete. In practice, the content of procedural fairness varies mostly depending on the strength of Factor 3—the right, interest or privilege being weighted as more or less important against the other variables. This mini-proportionality review within procedural fairness calls into play concerns about the limits of judicial review, parliamentary supremacy, and legislative intent. Canadian administrative law wavers between adhering to legislative intent, primarily through statutory communications about process requirements, and engaging in judicial creativity by augmenting content on common law grounds. As Paul Craig argues, the "reality was that a general presumption of legislative intent had to be framed in abstract terms, to the effect that Parliament believed in justness between citizen and government and that this generated a general legislative intent that statutes should comply with the precepts of public law developed by the common law courts over time, subject to any special legislative intervention … ".[43] The *Baker* framework has brought into focus, but not really at the surface, demands for 'process legitimacy' that blur the process-substance distinction in judicial decisions.[44]

In some cases, the weight given to a particular factor will be the same as the initial decision-maker, but in others the court may re-determine weight explicitly or implicitly and the re-weighting may have substantive remedial effects. When Factor 1 is more substantive—that is more legislative or discretionary or broadly policy-oriented—then Factor 3's weight may be quite curtailed or even eliminated. But when Factor 3 is strong, and the remedy is the decision gets sent back for reconsideration, the practical effect may be that the decision-maker has before

[40] *Khela* (n 22) [89]. The concept of 'substantive fairness' as a fusion of process and substance appears to be on the horizon in Canadian procedural fairness, but it is as unclear whether or not it has any legs.
[41] For a discussion of so-called legislative decisions, see G Huscroft, 'From Natural Justice to Fairness – Thresholds, Content, and the Role of Judicial Review' in C Flood and L Sossin (eds), *Administrative Law in Context*, 2nd ed (Toronto, Emond Montgomery, 2013). Cabinet and ministerial decisions, for example, may be exempt from the common law duty of fairness if they are characterized as broad policy decisions or appear legislative in form (eg an order-in-council).
[42] Note, however, that procedural fairness protects not just rights, but also privileges and interests. See *Cardinal v Director of Kent Institution* [1985] 2 SCR 643, 653.
[43] PP Craig, 'The Nature of Reasonableness Review' (2013) 66 *Current Legal Problems* 131, 160.
[44] Fox-Decent (n 36) 189 discusses how the majority in the *Knight* case amplified the content of procedural fairness using, in part, the principle of legitimacy.

them only one possible outcome, and process blurs into substance again. This was the result in the *Baker* case. The administrative official had to reconsider the original decision to deny Mavis Baker an exemption to apply for permanent resident status on humanitarian and compassionate grounds by taking into greater account the best interests of her Canadian-born children. Only two possibilities therefore remained for that office: to approve or deny the exemption. The exemption was approved. As a result of this case, greater substance—weightier principles and additional values—were simultaneously imported into the process of judicial review as well as the decision-making procedure used by immigration officials. In many cases, a procedural remedy like reconsideration (*certiorari* combined with *mandamus*) will have a substantive result because the decision-maker will be so constrained by the court's reasoning and final determination that only one option will be before her: using an improved process to render the same decision as the court.

Factor 4 distinguishes Canada from some other common law jurisdictions, like the United Kingdom and South Africa.[45] Canadian jurisprudence explicitly and repeatedly states that legitimate expectations confers *only* procedural protection and is available only if government conduct includes an overt promise, representation, undertaking or regular practice.[46] If Canada had substantive legitimate expectations, instead of only procedural, then Factor 4 would have the potential to exert greater pull. To date, Canadian courts have shown no willingness to revisit the jurisprudential ousting of substantive legitimate expectations in administrative law.[47] This denial of substantive legitimate expectations makes the *Baker* framework appear more 'procedural' than 'substantive,' but this is a false conclusion for several reasons.

C. The three 'stressors': weight, legitimate expectations, and reasons

Firstly, as discussed above, the mini-proportionality exercise required by Factor 3 blurs process and substance by requiring reviewing courts to weigh the five factors and balance them against each other. Secondly, and briefly adverted to above, the denial of substantive legitimate expectations makes the *Baker* framework appear more procedural than substantive, but this is a false conclusion overall and one that is subject to no jurisprudential change around legitimate expectations. It may only be a matter of time, and with the right case, that Canadian public law reverses the bright line it has drawn between procedural and substantive legitimate expectations and follows the lead established by courts in South Africa and the United Kingdom.[48] Thirdly,

---

[45] See C Hoexter, 'The Enforcement of Official Promises in South African Law: Process, Substance and the Constitutional Court' (paper given at the 2014 Public Law Conference, Faculty of Law, University of Cambridge); G Weeks and M Groves, 'The Legitimacy of Expectations about Fairness: Can process and substance be untangled?' (paper prepared for the 2014 Public Law Conference, Faculty of Law, University of Cambridge); CF Forsyth, 'Legitimate Expectations Revisited' (ALBA Summer Conference, 29 May 2011) (available at www.adminlaw.org.uk/library/publications.php); A Perry and F Ahmed, 'The Coherence of the Doctrine of Legitimate Expectations' [2014] *Cambridge Law Journal* 61.

[46] See *Canada (Attorney General) v Mavi* [2011] 2 SCR 504, [68].

[47] Even in English law, many legitimate expectations cases concern only procedure. Substantive legitimate expectations provide protection from actions a court *may* conclude are an abuse of public power to disappoint. See Laws LJ in *Niazi v Secretary of State* [2008] EWCA 755, [41]–[42].

[48] The Supreme Court has recently made more use of the *mandamus* remedy to order Ministers to exercise their discretion in specific ways in both the *Insite* (n 25) and *Loyola* (n 24) cases. It may be that this kind of move toward more intrusive remedies may have an effect on legitimate expectations as courts move away from the doctrine of improper fettering of discretion and overcome their reticence about substantive expectations.

and as discussed in section two, the duty to give reasons further erodes the distinction between process and substance in judicial review.

Canadian scholars have long noted that the connection between dignity interests, legitimacy, and the common law reasons requirement. In an early analysis of *Baker*, David Mullan stated that the Supreme Court came 'close to trading in "fairness" as a substantive and not purely procedural concept. … Indeed, it serves to further emphasize that there is no bright line between procedural and substantive review.' [49] Very quickly, the reasons requirement became a problem for judicial review. Litigation around the quality or adequacy of reasons further stressed the distinction since it was not clear if poorly executed reasons constituted only a procedural flaw or were properly a matter for substantive review as the reasoning undermined the reasonableness of the decision.

The Supreme Court recognized the possibility that a severe fault line around the reasons requirement could completely collapse the distinction between process and substance and moved quickly to shore it up in the *Newfoundland Nurses* case.[50] In this case, the Court confirmed that inadequate reasons are indeed not reviewed under procedural fairness but, rather, through reasonableness review. The only question regarding reasons in review for procedural fairness is: are reasons required by the common law or not? All other questions regarding the adequacy—in form or content—should be dealt in substantive review. By relegating the adequacy of reasons to substantive review, the court was also able to re-affirm its own jurisdiction. Procedural fairness review could continue to treat the absence of reasons with more judicial scrutiny since procedural fairness is akin to correctness review in Canadian administrative law. The Court therefore affirmed its traditional guardianship and checking of administrative procedures. The Court then bolstered its more deferential stance in substantive review by affirming that the adequacy of reasons is a matter for reasonableness—not correctness—review. By making this move, the Court forestalled another potential stressor—the collapsing of the distinction between reasonableness review and review of the merits of the decision—by removing the possibility of using the most intrusive standard, correctness, to get at the merits through the reasons that were offered or could be offered to support a decision.[51]

Legitimate expectations, weight, and reasons are three stressors for the process/substance distinction in procedural fairness. While the Supreme Court has worked hard to protect common law procedural review from these stressors, their disruptive potential has come to the fore in a related, but novel, area of law—the duty to consult and accommodate in Aboriginal administrative law.

---

[49] D Mullan, '*Baker v Canada (Minister of Citizenship & Immigration)* – A Defining Moment in Canadian Administrative Law' (1999) 7 *Reid's Administrative Law* 145, 151.

[50] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, [2011] 3 SCR 708 ('*Newfoundland Nurses*').

[51] In English law, the absence of reasons may be challenged as procedurally unfair or as substantively unreasonable. See T Endicott, *Administrative Law*, 2nd ed (New York, Oxford University Press, 2011) 186–215. This chapter cannot address the recent Canadian case law where courts have 'coopered up' reasons 'which could be offered' by statutory delegates when the reasons are deficient or sometimes non-existent.

IV. EXPECTING LEGITIMACY: THE DUTY TO CONSULT AND ACCOMMODATE AS THE SECOND FAULT LINE

This section analyzes the process/substance distinction in what is now called Aboriginal administrative law in Canada. Aboriginal law is a distinct area of public law and involves constitutional, common law, statutory law, international law, and increasingly Indigenous customary law. In keeping with the overall historical development of Aboriginal law in Canada, the duty to consult and accommodate differs significantly from other forms of consultation and accommodation in public law such as those found in labour and human rights law. Instead, it is a *sui generis* blend of administrative and constitutional law. This is because the source of the various duties differs, originating in the early sovereign-to-sovereign relations between the British Crown and Indigenous peoples. The roots of Aboriginal public law therefore predate the establishment in 1867 of the positive legal authority that Confederation represents in Canada.

A. The honour of the Crown as the guiding principle for process and substance

The Royal Proclamation of 1763[52] constitutes one fundamental source of the Crown's legal relations with Indigenous peoples in North America. Key promises from the *Royal Proclamation* include the Crown's overall obligation to protect Indigenous rights from settler encroachment, the guarantee that Indigenous peoples should be able to access to a legal system in order to benefit from good governance, and the promise to resolve disputes equitably through a judiciary committed to the rule of law. The *Royal Proclamation* has been interpreted as one key source for the fiduciary nature of the constitutional relationship between the Crown and Indigenous peoples.[53] It is also a source for the resulting principle of the honour of the Crown, which the Supreme Court of Canada describes in this way in the landmark *Haida Nation* case:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[54]

---

[52] Royal Proclamation 1763 (UK), reprinted RSC 1985, App II, No 1.

[53] Two key cases explain the source and nature of the fiduciary relationship: *Guerin v R* [1984] 2 SCR 335 and *R v Sparrow* [1996] 3 SCR 101. The fiduciary relationship is rooted in the concept of Aboriginal title, which pre-exists the assertion of Crown sovereignty in Canada, and entails the requirement, outlined above, that Aboriginal interests in land may be alienated only by surrendering the land to the Crown so as to prevent exploitation from third parties such as settlers.

[54] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 at para 25 ('*Haida Nation*').

These promises, and the subsequent understanding of the Crown-Aboriginal fiduciary relationship, informs section 35(1) of the Constitution Act 1982, the provision which constitutionally guarantees Aboriginal rights.[55]

The duty to consult and accommodate acts as a sub-principle of the principle of the honour of the Crown. It can arise in four contexts: historical treaties, comprehensive modern land claims agreements, proved Aboriginal rights and title, and unproved Aboriginal rights and title. The duty rests on both federal and provincial governments and their agents, representatives, and/or delegated authorities.[56] The duty will therefore also engage decisions made by administrative actors and tribunals.[57] The duty primarily regulates the relations among Indigenous peoples, the executive branch, and the courts.

My main interest is with the most vulnerable area: unproved rights and interests. Though not fully grounded in the fiduciary nature of the principle of the honour of the Crown—because the interests and rights have not yet been recognized (unlike s. 35 rights)—the duty nevertheless entails that government action which negatively affects an unproved Indigenous right and deprives the community of their benefits—real or potential—will be found inconsistent with this principle and will require protection from the courts. Otherwise, the integrity of the constitutional order would be at risk because the judiciary would be permitting the Crown to run roughshod over potentially weighty, but unproved minority rights, and the judiciary's legitimacy, in turn, would be imperiled. Recognized Indigenous rights possess independent force or presumptive weight that ought to be given priority in government decision-making implicating broad policy or economic considerations, and the need to and balance with other competing rights and interest.[58] Unrecognized rights and interests do not carry this same weight, but may become recognized and hence are vulnerable in the transition stages to full recognition. Importantly then, *Haida Nation* provides a framework for preventing the abuse of claimed Indigenous rights in the early stages before they achieve full status in Canadian law.

These types of Indigenous rights cases involve often profound uncertainty about the nature of the right. Moreover, the implementation process for fulfilling the duty is complex due to multiple stakeholders in the affected community and many non-legal variables including economic, political, cultural and social factors. The judicial approach to Crown-Aboriginal relations that the *Haida Nation* framework represents also relieves the judiciary from a variety of remedial dilemmas including imposing interlocutory injunctions on government or private action and also forestall ongoing supervision by the courts. In many respects, the substantive remedial tail waived the procedural rights dog in the original case and this problem—how far should courts go to protect Indigenous rights?— plagues the case law. This result confirms the two problems that Lawrence Solum suggests procedural justice must face: (1) to provide accurate

[55] Section 35(1) of the Constitution Act 1982 reads: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.' The provision has been interpreted to mean that existing Aboriginal rights ought not to be diminished due to the effects of colonization.

[56] The Crown can delegate some procedural aspects to private actors such as industry partners, and they must properly perform that delegated power: *Haida Nation* (n 54) 53.

[57] Tribunals empowered to consider questions of law and whose decisions affect potential Aboriginal interests and rights must also satisfy the duty. See *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* 2010 SCC 43.

[58] Where an existing constitutionally-protected Aboriginal right is affected, the Crown must grant it priority both in the process used to allocate resources and in the actual resulting allocation. See *R v Gladstone* [1996] 2 SCR 723.

outcomes at a reasonable cost; and (2) to address the deeper problem of working out shared goals when a consensus about these goals may not exist.[59]

B. The framework for the duty to consult and accommodate

Similar to common law procedural fairness, the duty to consult and accommodate in Aboriginal administrative law works with a higher-order, decisional framework—but it is much more complicated than the *Baker* framework and even further instantiates process and substance. The legal framework that crystallized in the *Haida Nation* case has two functions. First, it aims to guide negotiations between Indigenous and non-Indigenous governments when established Indigenous rights and interests are affected by non-Indigenous decision-makers at both the federal and provincial levels of government. Second, it aims to prevent the abuse of Indigenous rights and interests in the stages *before* they obtain full legal recognition.

The framework for the duty to consult and accommodate contains two parts: (1) consultation, which is largely, though not wholly, procedural in nature; and (2) accommodation, which is mainly substantive, but is also procedural. The procedural components of the duty to consult mirror those commonly found in the duty of fairness in administrative law but, because of the constitutional nature of the Indigenous right or interest, the content of the norm does differ and, unlike common law procedural fairness, involves specific reciprocal duties on both the Crown and Indigenous peoples.

The *Haida Nation* framework is premised on an ideal model of stages and steps that a government should follow if it wishes to fulfill the duty satisfactorily. Four stages are contemplated, each with its own set of steps that to be implemented: 1) Stage 1 examines the Crown's real or constructive knowledge; 2) Stage 2 involves a spectrum approach to determining the scope of the duty that rests on the Crown; 3) Stage 3 determines if consultation obligations have been met or are required; 4) Stage 4 considers whether or not accommodation is required and, if it is, what is its content. Each stage is accompanied by the standard of review a court will use to examine the decision when it is challenged at that particular time in the framework. The table below sets out the framework:

[59] Solum (n 5) 320.

Framework for the Duty to Consult and Accommodate

	Stage 0	Stage 1	Stage 2	Stage 3	Stage 4
Steps	Crown engages in high-level strategic decision-making in various policy areas.	Crown has knowledge (real or constructive) of a potential Aboriginal right or title.	Crown determines scope of duty by engaging in a "spectrum" analysis.	Crown consults with affected parties (consultation need only be *adequate*).	Accommodation (*may* be required).
Substeps		Step 1 of Stage 1 "The trigger" of Crown knowledge. Step 2 of Stage 1 Crown decides to act. Step 3 of Stage 1 Crown knows of potential adverse effect from its decision to act.	Crown engages in the first mini-proportionality analysis by balancing the strength of the Aboriginal claim with other variables such as the potential impact on the right/interest and/or public interest. If the claim is strong, then deep consultation and maximum responsiveness is required; the opposite, if not.	Crown needs to identify relevant parties.	Crown balances competing interests in a second mini-proportionality analysis and must demonstrate that Aboriginal interests were considered usually through the provision of reasons. Stage 4 may require modification of decision or policy to minimize impact on Aboriginal peoples.
Standard of review	No review of Crown discretion at this stage.	Reasonableness	Correctness for strength of claim and severity of impact. Unless decision involves a large degree of factual determination, then reasonableness.	**Reasonableness / fairness** regarding adequacy of process of consultation.	Reasonableness or correctness regarding adequacy of accommodation required. Reasonableness regarding outcomes and balancing of interests.

Ideally, the duty to consult and accommodate permits courts to oversee the executive branch to check the wide-ranging power of the Crown chiefly by eliminating broad or unstructured discretion.[60] A reviewing court will accord a margin of appreciation to the process used and the policy choices made by the Crown in either of the two proportionality analyses indicated in the table above. A reviewing court will ask whether or not consultation was reasonably adequate given the circumstances. In order to answer this question, the reviewing court will need to look at whether the process used was meaningful in proportion to the seriousness of the harm. It should also examine whether the Crown's practice of informing itself and consulting affected parties was in good faith. Lastly, the reviewing court considers whether or not a reasonable balance was struck between Indigenous and other interests/values in its final decision, including whether or not the outcome is reasonably accommodating of the prioritized Indigenous interests. The standard of review 'toggles' according to the particular stage with case law confirming that correctness is the norm for the question of law concerning the strength of the claim but with reasonableness as the preferred standard for other components of the duty. Notably, as the table above indicates, reasonableness and fairness are often fused when scrutiny turns to the adequacy

[60] The Crown's fiduciary obligation facilitates judicial 'supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples': *Wewaykum Indian Band v Canada* [2002] 4 SCR 245, [79].

of the consultation process indicating a tangled movement towards substantive procedural fairness in this jurisprudence.

In this area of public law, the duty to consult and accommodate completely fuses process and substance. Process, however, routinely works to undermine substance because of judges' desire to avoid the underlying issues of emergent Indigenous sovereignty, development of self-government as a more complex form of Canadian federalism, and demands for a post-colonial relationship. Though never fully addressed in consultation cases—indeed, the conundrum of sovereignty is often submerged even in Aboriginal title cases—the duty must manage conflicts arising from the existence of multiple communities whose claims contradict the unilateral assertion of Crown sovereignty originally made by the British sovereign. In this area, then, the two major 'stressors' are relations between sovereigns and polycentricity.

The duty, however, is plagued by key structural weaknesses including: the burden of knowledge on under-resourced Indigenous groups to specify alleged infringements as well as potential harms; the problem of inadequate notice to affected Indigenous communities; the presence of too much Crown discretion; judicial deference; and inadequate accommodation. The weakness that I want to focus on is accommodation since accommodation is the final stage of a process (consultation), but is also a substantive end in itself and therefore fuses the distinction.

C. How the two stressors create a sub-optimal fusion of process and substance

At judicial review, *Haida Nation* advises judges to focus '*not on the outcome*, but on the process of consultation and accommodation'.[61] These instructions—at odds with how the standard of review works in administrative law in general—seem to indicate strongly that those procedural violations, rather than unreasonable outcomes, will first trigger a remedy. Conventional administrative law remedies such as remitting an unsatisfactory consultative case back to the original decision-making to engage in further consultation (process), or to reconsider some of the factors that lead to the original unreasonable decision (substance), often leave a vacuum given the breadth of Crown discretion, potential for unilateral arbitrary, behaviour, or lack of capacity. Conventional remedies regularly result in the under-enforcement of Indigenous rights through the duty to consult and accommodate. The two major stressors—relations between sovereigns and polycentricity—account for both legal complexity and sub-optimal enforcement.

We can see that the envisaged process demands that government decision-makers make efforts to understand the interests that are asserted by Indigenous claimants and to assess the potential harms that Indigenous communities perceive government action might cause. This awareness, however, does not always translate into substantial accommodation whereby action is barred or policy is markedly modified.[62] What kinds of actions will be inconsistent with the Crown's duty? Again, it is up to the decision-maker to determine as a matter of discretionary judgment the intensity of the effects of infringement, resulting in both a skewed process and a potentially arbitrary outcome. The process selected by the government decision-maker could fail

[61] *Haida Nation* (n 54) [63] (emphasis added).
[62] For an illustration of judicial conflict about substantive accommodation, see *West Moberly First Nations v British Columbia (Chief Inspector of Mines)* 2011 BCCA 247 ('*West Moberly*') [163]–[165]. In this decision, the reviewing court folded substantive accommodation back into a future consultative process.

and thereby never attend to the need for accommodation because it did not allow for the kind of knowledge that is essential for the assessment of the impact and harm. The decisional framework of the duty seemingly aims to correct for this possibility, but anxieties about substance often mean that this potential is not realized.

André Nollkaemper argues that the procedures employed to guide and shape substantive law themselves reflect normative choices and our assessment of these choices depends on "whom we want to entrust with making them."[63] Aboriginal administrative law illustrates a collective action problem when public values, which require recognition and enforcement, are weakened. These values are 'public goods' requiring protection in the name of individual cases and the larger public interest. If government decision-makers do not consult properly, they will inevitably fail to accommodate properly, and the process/substance connection will function sub-optimally. Nollkaemper further writes that: "Procedures, and the voices that can be heard through procedure, are part of the process for identifying what a public good is, how to interpret it and how to strike balances when it comes to conflict with other public goods."[64] We need to know if those claimants who are making use of legal procedures and framing legal arguments see their own understanding of values and public goods reflected back in administrative and judicial decisions. The substantive political issues of recognition and representation and the corresponding existential problems of Indigenous loyalty, voice and exit anxiously percolate throughout these cases.

The process/substance problem is further exacerbated when multiple parties and decision-makers are involved—as is often the case in this polycentric area where a case may involve several Aboriginal groups, more than one government decision-maker, industry third parties, and/or interest groups. Nollkaemper, citing examples from international law, calls the kinds of complex public goods prevalent in these cases 'aggregate-effort' goods and includes cases involving climate change and nuclear weapons as examples.[65] The uncertainty posed by the unproved rights and interests, combined with the polycentric nature of the cases, invites a high degree of deference from reviewing courts. Indeed, these cases appear at the 'legislative end' of the spectrum of decisions that a reviewing court may or may not review. Though this paper does not consider claims that common law procedural fairness should be extended to address citizens' demands for greater democratic participation in government or regulatory decision-making, it does, however suggest that Indigenous participatory rights should be increased to overcome the prohibition against interfering in policy-oriented or 'legislative' decisions.[66]

Courts are increasingly grappling with these aggregate and competing public goods and disagreement exists over the question of which substantive values procedural rules should serve. Courts may also not be fully attentive to, or not wish to address, the balance of power. Procedural fairness and lack of substantive equality between the parties may pull the judge in different directions. As Thomas Main argues, procedures are 'an instrument of power that can, in

[63] Nollkaemper (n 4) 772.
[64] Ibid, 781.
[65] Ibid, 778.
[66] The possibilities for cross-fertilization, however, are strong. For an argument that the common law may legitimately extend participatory rights, see G Cartier, 'Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?' (2003) 53 *University of Toronto Law Journal* 217.

a very practical sense, generate or undermine substantive rights.'[67]A paradox emerges whereby a court may seek to preserve 'the value of an intermediate good [which] may undermine its contribution to the final public good.'[68] The intermediate good that the courts are protecting is the legitimacy of judicial review. Courts are of course a good worth protecting, but their approach to the duty to consult and accommodate undermines a final public good such as the protection of Aboriginal rights (from the perspective of Indigenous peoples) and reconciliation (from the perspective of the larger Canadian public interest which also includes Indigenous peoples). No easy solution exists for this problem, but the application of the current framework prevents examination of the implicit choices judges make in order to skirt the 'big questions'.[69] I suspect that if Canadian jurisprudence acknowledged the presence of substantive fairness and substantive legitimate expectations in procedural fairness, then the fairness of consultative procedures and accommodations might be made more transparent and rigorous.[70]

Looking at the duty to consult and accommodate from the perspective of process and substance in procedural fairness discussed in section three, the differing roles accorded to legitimate expectations is manifest. If we understand a legitimate expectation simply as an expectation that deserves judicial protection based on a government promise, representation or practice then it initially seems akin to but less onerous than the fiduciary duty that underpins state-Aboriginal legal relations. But jurisprudence from England (and Wales) suggests that substantive legitimate expectations can play as weighty a role as the fiduciary duty does in Aboriginal administrative law. In the leading English case on substantive fairness, *Coughlan*,[71] the Court of Appeal explained the different forms of protection available for expectations: 1) the government must give appropriate weight to the previous policy or other representation and, if it does, the courts will review on a highly deferential standard; 2) if the promise or practice induces a legitimate expectation of, e.g., being consulted, courts will then require that outcome unless there is an overriding reason to deny it; and 3) if a legitimate expectation is established, and the benefit is substantive rather than procedural, a reviewing court will weigh whether frustrating the expectation is so unfair as to amount to an abuse of power.[72] In *Coughlan*, the promise to Mrs. Coughlan of a home for life was very important and the financial consequences of holding the authority to account were minimal, so the court decided in her favour.

---

[67] TO Main, 'The Procedural Foundations of Substantive Law' (2010) 87 *Washington University Law Review* 801, 802.
[68] Nollkaemper (n 4) 783.
[69] Jenny Martinez reconsiders process and substance in the US 'War on Terror' decisions, examining five procedural strategies judges use to avoid substance: (1) procedure as avoidance; (2) process as merely signaling substantive issues; (3) process as substance; (4) substance as disguised process; and (5) process as housekeeping where values like accuracy and efficiency drive the decisions. All of these strategies are evident in the Canadian jurisprudence on the duty to consult and accommodate. See JS Martinez, 'Process and Substance in the "War on Terror"' (2008) 108 *Columbia Law Review* 1013.
[70] Lorne Sossin discusses judicial tactics similar to those identified by Martinez, tactics he terms 'prudential proceduralism'. He also considers creatively designed procedures, such as the frameworks discussed in this chapter, where courts manage substantive issues through procedural means. See L Sossin, 'The McLachlin Court and the Promise of Procedural Justice,' in DA Wright and AM Dodek (eds), *Public Law at the McLachlin Court: The First Decade* (Toronto, Irwin Law, 2011) 58.
[71] *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 231 (CA).
[72] See Endicott (n 51) 289–95.

In more recent cases, however, the English courts have moved away from this categorized approach toward one where proportionality is the appropriate test, subject to deference since substantive unfairness is a ground that does not generally justify judicial review. Once an applicant, establishes the legitimacy of the expectation, the relevant authority must identify any overriding interest on which it relies to justify frustration of the expectation. The courts will then step in to weigh the requirements of fairness against the overriding interest(s) and demand objective justification that the measures used were proportionate in the circumstances.[73] Deference will be shown when the authority proves—through evidence and/or reasons—that its refusal or failure to honour the expectation was justified in the public interest and that it had carefully considered both the substance of the issue and fairness concerns as highly relevant factors in its decision-making process. Proportionality, again, is key and provides the mechanism to link, join or fuse process and substance.

Canadian judicial direction to focus on process at the expense of outcome is at odds with contemporary constitutional and administrative law. The Charter Section 1[74] balancing exercise employed under the *Oakes* test, for example, explicitly incorporates into the analysis the outcome under step 2. The framework for the *Oakes* test has two steps, the second with three substeps: (1) there must be a pressing and substantial objective; 2) the means to achieve it must be proportional; (2a) the means must be rationally connected to the objective; (2b) there must be minimal impairment of rights; and (2c) there must be proportionality between the infringement and objective. [75] Moreover, it shifts the burden to the government to justify the consequences so that they are consistent with both upholding constitutional rights and permitting their limitation when such limits further legitimate democratic goals. Similarly, under reasonableness review in administrative law—as well as under the new *Doré*[76] framework for assessing discretionary decisions that implicate Charter values (discussed further below)—the court may invalidate a decision on the basis of the *unreasonableness of the outcome*, as well as the process of articulating the reasons supporting the outcome. Procedural rules implement substantive law to produce quality outcomes as measured by norms embedded in substantive law and the decision-maker's own reasons.[77] But, in the duty to consult, we see that process undermines substantive legality, legitimacy, and the recognition of potential rights.

If we hold institutional comity in mind, it is not a breach of that doctrine to hold an authority to account to decisions and choice to which it has committed itself, unless it provides reasons indicating legitimate grounds to support a change of mind. Following Timothy Endicott,

---

[73] For a recent statement of the test for substantive legitimate expectations, see the Privy Council decision *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [49]. For a discussion of proportionality, reasons and the legitimate expectations as a highly relevant factor see Lord Dyson SCJ's decision at [36]–[42]. This is consistent with earlier cases such as *R v Department of Education and Employment, ex p Begbie* [2000] 1 WLR 1115 and *R (Abdi & Nadarajah) v Home Secretary* [2005] EWCA Civ 1363—both cases where expectations received no protection.

[74] Section 1 reads: '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.' See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK).

[75] *R v Oakes* [1986] 1 SCR 103.

[76] *Doré v Barreau du Québec* 2012 SCC 12, 1 SCR 395 ('*Doré*').

[77] Nollkaemper (n 4) 779.

then, a continuum of different kinds of expectations might exist attracting greater or lesser substantive content. Legitimate expectations could range from the largely minimal as in current procedural fairness to the more maximal as in current Aboriginal administrative law.[78] In either case, this component fuses process and substantive to explicitly acknowledge the role of substantive fairness. Duty to consult cases that involve unproved interests and rights raise real concerns about abuses of power. If we agree with Timothy Endicott that '[i]t can be procedurally unfair to disappoint an expectation without a hearing, and it can be substantively unfair to disappoint an expectation. And then the decision is unlawful if it is procedurally unfair, or it is so unfair in substance that it is an abuse of power …'[79] then the duty to consult and accommodate and procedural fairness share a similar the problem wrought by the process/substance distinction: further jurisprudential development of substantive (un)fairness, better reason-giving, and explicit proportionality analyses within their respective decisional frameworks. Greater attention to outcomes may result in the minimization of infringements on unproved but strong Aboriginal rights, the lessening of impact of activity on Indigenous land so that it does not disrupt Indigenous use and occupation (especially given the requirement of prioritization), and go some distance to accommodating Indigenous peoples' preferred mode of exercising their rights as part of self-governance.

V. CONSUBSTANTIATING PROCESS AND SUBSTANCE: REVIEW OF DISCRETIONARY DECISIONS AS THE THIRD FAULT LINE

The analogous legal frameworks employed in administrative and constitutional law have—or are—developing proportionality analyses that protect fundamental rights and values, permit justified limitations through the provision of adequate reasons, and exhibit deference where appropriate. These frameworks permit reviewing courts to assess the legitimacy of the substance and the outcomes which limit or harm important rights and values. Section three showed how analysis is bifurcated in procedural fairness since the presence of reasons is a question for procedure while the adequacy of reasons is a question for substantive review. Section four illustrated how the duty to consult and accommodate shares these features, but does not always succeeded in justifying the limitations or fully attend to the consequential harmful effects of the decision, despite employing two mini-proportionality analysis and insisting that the decision-maker correctly assess the strength of the claim and the severity of the impact (potentially, but only if outcomes are considered).

In the 2012 Supreme Court of Canada decision, *Doré*, the Supreme Court overturned the past methodological approach that was used in previous jurisprudence to review discretionary decisions involving *Charter* interests and values. The Supreme Court confirmed that the old orthodox approach used to review whether or not a law justifiably infringes a right or freedom—the *Oakes* test—should not replace administrative law review of discretionary decisions. *Doré,* affirmed that an administrative decision-maker must not disproportionately and unreasonably limit a *Charter* right or value when exercising a statutory discretion.

[78] For a provocative philosophical argument that the state should be considered a fiduciary of its entire political community, see Fox-Decent (n 36).
[79] Endicott (n 51) 295.

A. The framework for the standard of review involving discretionary decisions

In exercising discretion, the decision-maker should first identify the relevant statutory objectives as well as the values pertinent to that statutory context.[80] Once identified, the decision-maker then engages in a balancing exercise that involves weighing the relevant statutory objectives and the *Charter* values. The decision-maker needs to consider how *Charter* values will best be protected in light of the statutory scheme. This involves engaging in a proportionality analysis that balances the severity of the interference (if any) with the importance of the statutory objectives.[81] The decisional framework used by courts to review the resulting decision on substantive grounds contains four factors:

The Standard of Review Framework

1. Look to past jurisprudence to see how particular category of question was addressed—*if satisfactorily*—regarding level of deference owed.[82]
2. If not satisfactory, contextually analyze using the modern purposive approach to statutory interpretation four factors:
   a. the presence or absence of a privative clause;
   b. the purpose of the tribunal as determined by interpretation of enabling legislation;
   c. the nature of the question at issue;
   d. the expertise of the tribunal.[83]

A reviewing court will exhibit deference to a decision-maker's decision that is the result of this balancing exercise.[84] The appropriate standard of review for discretionary decisions that implicate *Charter* values is reasonableness contextually applied.[85] Since the *Dunsmuir*[86] case, and with a recent fundamental qualification, reasonableness has so far been confirmed as the presumptive standard for reviewing administrative decisions in administrative law when: (1) a specialized or expert tribunal; (2) interpreting its enabling or home statute; (3) on a question of fact or mixed fact and law; (4) or has the jurisdiction to consider questions of law; (5) or is exercising broad statutory discretion; (6) correctly applies all legal principles or tests; (7) to construct an interpretation of its statutory powers that falls within the range of possible acceptable interpretations; (8) resulting in a decision that demonstrates justification, transparency and intelligibility; (9) and produces a reasonable outcome which is defensible in respect of the facts and law. Should the tribunal satisfy all of these conditions, the reviewing court must find the decision reasonable. So far, correctness review has been relegated to the margins, but not ruled out.[87] Following *Dunsmuir*, the proportionality test will be satisfied if the measure falls within a range of possible, acceptable outcomes and is explained by reasons exhibiting

[80] *Doré* (n 76) [55].
[81] Ibid, [57].
[82] Note that the case law has not yet sorted out how and when precedent will control.
[83] Note that a privative clause and agency expertise generally receive enough weight to attract the deferential reasonableness standard either alone or in concert, whereas a question of law should only attract a correctness standard if it is a question general law outside of specialized area of expertise and of central importance to the legal system as a whole.
[84] *Doré* (n 76) [57]. Reasonableness review is not 'a single, rigid Procrustean standard of decontextualized review' but, rather, encompasses a range of degrees of deference based on the circumstances of the case. See *Canada (Citizenship and Immigration) v Khosa* 2009 SCC 12, 1 SCR 339, [59].
[85] Ibid, [56].
[86] *Dunsmuir v New Brunswick* 2008 SCC 9, [2008] 1 SCR 190, [47] ('*Dunsmuir*').
[87] See JM Evans, 'Triumph of Reasonableness: But How Much Does It Really Matter?' (2014) 27 *Canadian Journal of Administrative Law & Practice* 101.

justification, transparency and intelligibility. The principle of deference informs this exercise, as a reviewing court must recognize that when the nature of the decision is discretionary, polycentric and involves balancing competing considerations, micro-managing by courts should be eschewed.[88]

Entrenched fundamental values are recognized as having deontological weight, but it is permissible to limit these values if the limitation is proportionate, accompanied by a legally structured justification, and the harmful effects minimal. In Canadian constitutional law, this methodology is embedded in the *Oakes* test that pragmatically combines deontological and consequentialist considerations. We have seen part of this common law methodology in both procedural review and the duty to consult and accommodate. Recent administrative law cases therefore indicate that the post-*Charter* cross-fertilization of Canadian administrative and constitutional law continues.[89] But, as Dyzenhaus and Fox-Decent claim:

> To generalize that methodology in the common law of judicial review is undeniably to reform administrative law. Elements that were part of administrative law, but not central to it, move to centre stage. Talk of unfettered discretion and jurisdictional talk become gradually obsolete as they are replaced by talk of structures of justification. No hard and fast distinction between process and substance is available, as recognition grows of the inevitable substantive implications of process as well as of the fact that the justification for having process at all is in some sense substantive.[90]

As discussed above, the movement of reasons into substantive review confirms this view because reasons have now taken centre stage in Canadian administrative law.

B. Comparing current frameworks for process and substance

But, the modern reform of Canadian administrative law clearly needs to continue. To that end, I want to engage in a synthetic thought experiment using the framework from procedural fairness and that from substantive review, at the same time keeping in mind the fault-line around substantive fairness that the duty to consult and accommodate discloses. The following table compares the two frameworks used in reviewing procedures and substance:

[88] *Doré* (n 76) [51].
[89] See E Fox-Decent, 'The Charter and Administrative Law: Cross-Fertilization or Inconstancy' in C Flood and L Sossin (eds), *Administrative Law in Context: A New Casebook*, 2nd ed (Toronto, Emond-Montgomery, 2013).
[90] Dyzenhaus and Fox-Decent (n 13) 238.

Comparison of the *Baker* Framework with the Framework used in Substantive Review[91]

What is similar and what is not	Baker five-factor framework for determining the level of procedural fairness	Standard of Review decisional framework (formerly the pragmatic and functional analysis)
Overlap	Nature of the decision (and the process followed). May involve interpretation or discretion regarding procedures.	Nature of the question: law, fact, mixed fact and law, or discretion.
Unique	---	*Privative clause.*
Overlap	Nature of the statutory scheme and the terms of review. Weight of home statute.	Language/purpose of the provision and within the Act as a whole. Weight of home statute.
Overlap [when dicta included]	Importance of the decision to the individual(s) affected.	Decisions must reflect the "fundamental importance" of *Charter* values.
Unique	*Legitimate expectations of the person(s) challenging the decision.*	---
Overlap	Respect agency expertise in determining and following own procedures particularly with respect to its home statute.	Expertise of the tribunal particularly with respect to its home statute.
Role of reasons	May be required by the common law.	Reasons must demonstrate justification, transparency, and intelligibility.
Consequentialism	Defensible outcome in respect of facts and law.	Reasonable outcome in respect of facts and law.

When placed side-by-side like this, the overlap is striking. The nature of question, the statutory scheme, the weight of fundamental values along with the concurrent demand for proportionality, the requirements of deference in the acknowledgement of expertise, and the role of reasons in terms of justifying the outcome are all shared between the two frameworks. The key differences are: the role given to a privative clause as a different ground for deference in substantive review; legitimate expectations as a separate factor in procedural fairness; and, the bifurcation of reasons between procedure (providing reasons) and substance (examining reasons for reasonableness and rationality in the decision under review). As discussed above, Canadian administrative law currently burbles with tensions and overlaps between process and substance and this juxtaposition of the two frameworks underscores a vital question: *does the distinction between process and substance in administrative law have any continued salience given that the two frameworks used in judicial review markedly overlap and could potentially be combined*? Furthermore, what might the implications be for Charter review and the *Oakes* test? Could one simple overarching test in public law be constructed that takes into account rights, legislative intent, and the principles of deference, legality and proportionality?

C. Hypothesizing one universal, overarching framework for public law

If, as I have suggested above, Canadian law embraced substantive fairness, acknowledged more transparently the need to identify and specify the content of fundamental values explicitly in proportionately analyses, and conceded that reasons consubstantiate substance and process, we

[91] Italics indicate a factor unique to that particular framework. Underline indicates guidance from the jurisprudence but which is not formally part of the framework.

might re-imagine a court reviewing process and substance using a unified framework.[92] This framework and its animating questions might look like the following 'macro review' framework:[93]

Overarching Framework When Distinction is Removed

Question asked	Framework element
What is being challenged?	Nature of the decision and/or the process followed.
What guidance does the statute provide?	Nature of the statutory scheme, terms of review, and purpose of the provision. Note that the framework subsumes the private clause into the statutory scheme but gives it heavy weight instead.
What are the animating principles and values in the home statute as well as those identified by the person who is challenging the decision?	Identify the fundamental values implicated in the case as a whole.
How much deference is owed?	Respect agency expertise in procedures and in interpretation of the law under the home statute.
Are the reasons adequate?	Demonstrate justification, transparency, and intelligibility appropriate to the context.
Is the outcome reasonable?	Outcome / effects of limit are proportionate.

My intent here, however, is not prescriptive. Major renovation of the current frameworks used for procedural fairness and substantive review seems highly unlikely in Canadian public law right now. The point is that if courts acknowledged the process/substance connection—rather than merely distinction—the decisional framework used for judicial review in administrative law might be simplified by being shared between the two domains. Weighting factors would move into the spotlight, fairness would be assessed substantively and contextually, attention to outcomes would be more robust, and courts could finally explicitly recognize that agency expertise includes interpretation and not just procedure. Deference would be grounded in these considerations combined with a transparent examination of the values brought to the case from the statute, the common law, and the parties. Reasons would identify and harms and would explain the rationale for upholding, expanding or denying individual rights and the exercise of government power. In this manner, the principle of deference could therefore embody the connection between procedural and substantive norms and, in turn, structure the scope of judicial review.

In short, acknowledgement of the process/substance connection would affect the Canadian model of judicial review. It would ground deference differently and move it closer to 'deference as respect' ideal where administrative decision-makers are recognized as expert partners, though not co-equals, in coordinate construction of the constitutional order.[94]

[92] It is difficult to fit the complex framework developed under the duty to consult and accommodate into these simpler frameworks. This begs two questions: (1) should the duty to consult and accommodate framework be simplified?; or (2) should the other frameworks be complexified?

[93] I thank Jason Varuhas for suggesting this characterization of the proffered framework.

[94] Similarly, Craig (n 43) 163 when writing about proportionality and reasonableness review states: 'Suffice it to say for the present that a condition precedent to reasoned deliberation as to how the balancing should be conducted is open and honest recognition that it is being undertaken'.

VI. CONCLUSION: RITES OF TRANSUBSTANTIATING PROCESS AND SUBSTANCE

The previous section concluded that process and substance are connected—indeed, even transubstantiated in administrative law—but my argument also concedes that the terms continue to serve functional and descriptive purposes in practice. The reality of many features of the law is not just the co-existence of these attribute, but their necessary and reciprocal intermingling. Acknowledging the reality of the connection should lead not just to the creation of higher-order decisional frameworks but also to better and more transparent application of these frameworks. In other words, the focus is on better and best practices. Accepting the existence of substantive fairness in the doctrine of legitimate expectations would be one example of a better practice within a best practice framework. As both Geneviève Cartier and David Mullan contend, ridding ourselves of pernicious and formalistic effects of the process/substance distinction in administrative law permits the 'real questions' to be asked and demands that public officials and judges provide 'real answers' in their decisions.[95]

This conclusion is also based a consideration of the importance of fundamental values whose content and reach are being currently worked out in Canadian public law. These fault lines have had beneficial effect. They suggest that the Canadian practice of judicial review now rests on substantive ideals or values and that judges use these substantive criteria as guidance and for justification. These values include democracy, dignity, equality, autonomy, and human rights.[96] Or, as L'Heureux-Dubé J writes in the *Baker* decision: '…discretionary decisions will generally be given considerable respect … discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.'[97]

A political community committed to both democracy and legality will provide multiple routes for those affected by public power to demand fairness, to have input into the decision-making process, and to have quality reasons for those decisions. These considerations constrain public power under the rule of law, but they also enable members to participate as members of a democracy, as rights holders, and as claims-makers. The reasons requirement furthers accountability, but it also provides the bases for public justification and judicial deference to administrative decisions. Of the three areas canvassed, Aboriginal administrative law shows the potential for greater democratic content, despite its current flaws. The procedural nature of the duty to consult and accommodate for Aboriginal communities as emerging constitutional partners means that democratic participatory rights are heightened and the decision-maker may be required to change her mind in order to avoid substantive unfairness. This duty stands as a

---

[95] G Cartier, 'The Doctrine of Legitimate Expectations' in G Huscroft and M Taggart (eds), *Inside and Outside Canadian Administrative Law* (Toronto, University of Toronto Press, 2006) 186–87. She is citing the seminal article by David Mullan, 'Fairness: The New Natural Justice?' (1975) *University of Toronto Law Journal* 281.

[96] Dawn Oliver identifies five overarching systemic values: autonomy, dignity, respect, status, and security: see D Oliver, 'The Underlying Values of Public and Private Law' in Michael Taggart (ed), *The Province of Administrative Law* (Oxford, Hart Publishing, 1997). Paul Daly identifies four 'core' values, namely the rule of law, good administration, democracy, and the separation of powers: see P Daly, 'Administrative Law: A Values-Based Approach' (in this volume).

[97] *Baker* (n 37) [56].

touchstone for emerging substantive content on consultation, participation and accommodation in other areas of public law.

These ideals, however, place enormous stress on both the traditional 'Diceyan' and quintessential American model of judicial review. The stress is mitigated, but not removed, by the provision of reasons. Reasons place a burden and an advantage: the burden rests on the decision-maker to justify their decision according to fundamental values, but the advantage shifts in judicial review because judges must look to the justification given for the outcome, not just the outcome itself. In administrative law, this means that correctness review is presumptively foreclosed and, when the judge disagrees with both the reasoning and the outcome, must herself engage with the decision and provide her own justification for a different result. Moreover, there are many ways for other branches to respond to judicial decisions in administrative law. This creates a more responsive, transparent, and accountable relationship between the judiciary and other institutional actors, an ideal that in Canada is called "institutional dialogue."[98] Just as importantly, an institutional dialogue which permits a fruitful connection between process and substance can also buttress and generate "dialogue rights" and relations among individuals, groups and decision-makers that go beyond the content of more conventional duties and rights.[99]

Both democracy and the rule of law justify the creation of institutional mechanisms for citizens and affected persons to prevent or challenge the abuse of power by public officials. As we have seen, the rule of law supports the creation of procedures that treat individuals fairly when their rights, interests and privileges are affected in public decision-making. The rule of law also supports judicial review of administrative decisions on their merits and greater access to the courts through the expansion of standing and intervener status. The hope here is that judicial deliberation will lead to better and more reasonable decision-making processes and policy outcomes. A participatory democracy will create conduits for direct participation in decision-making and greater accountability through both legal and public oversight. Deliberative practices such as reason-giving support the creation of open processes for public reasoning and debate and may lead to more justifiable public policies. At their best, these practices show how "our shared sense of justice is compatible with a plurality of reasonable comprehensive doctrines" inherent in a liberal-democratic culture.[100] Contemporary governance therefore offers a range of institutional possibilities for public participation on democracy and rule of law grounds.[101] From my examination of recent developments in administrative law, I look to the larger democratic potential of public law to better realize the connection between procedural fairness and substantive public law values for all affected persons, citizens or not, in a liberal democracy.[102]

---

[98] For an overview of the various models of institutional dialogue, including Canada's, see S Gardbaum, 'Reassessing the New Commonwealth Model of Constitutionalism' (2010) 8 *International Journal of Constitutional Law* 167.

[99] See PP Craig, 'Process and Substance in Judicial Review' in Huscroft and Taggart (n 95) 176.

[100] J Gledhill, 'Procedure in substance and substance in procedure: reframing the Rawls-Habermas debate' in JG Finlayson and F Freyenhagen (eds), *Habermas and Rawls: Disputing the Political* (Routledge, New York, 2011).

[101] Richard Bellamy, 'The Republic of Reasons: Public Reasoning, Depoliticization, and Non-Domination' in Samantha Besson and José Luis Martí (eds), *Legal Republicanism: National and International Perspectives* (New York, Oxford University Press, 2009).

[102] Rawls's theory would specify content. In contrast, Jürgen Habermas argues that a legal procedural morality is one where law 'has rid itself of all specific normative contents…[and which have been] sublimated into a procedure for the justification of possible normative contents'. See J Habermas, 'Law and Morality' *The Tanner Lectures on*

As most modern political theorists contend, the modern state in pluralist conditions fundamentally depends on the working out of substantive values through institutional practices that contribute to procedural legitimacy in public institutions.[103]

The legal frameworks examined here should, and in some cases do, amount to practices of discourse that, when properly engaged, are reflexive in nature and compel claimants and decision-makers to become more transparent about their background suppositions concerning rights, goods and conceptions of justice. These frameworks disclose the reciprocal relationship between process and substance. I have argued that the relationship between process and substance contains the further promise of our ability to bootstrap the reciprocal relationship "between government and citizen with respect to the observance of rules,"[104] standards, and now fundamental values in Canadian liberal-democracy.

Human Values, trans. Kenneth Baynes (1986) 247 (available at http://tannerlectures.utah.edu/_documents/a-to-z/h/habermas88.pdf).

[103] Habermas privileges democratic procedures, while Rawls's *a priori* constraining principles entail that courts play a vital role in creating guidelines for what counts as admissible reasons. Through practices of public reason, the hope is that we can reconcile ourselves to the unreconciliable—our social world and its multiplicity of incompatible or overlapping comprehensive doctrines. See J Rawls, *Political Liberalism* (New York, Columbia University Press, 1993) lviii.

[104] L Fuller, *The Morality of Law,* rev. ed. (New Haven & London, Yale University Press, 1969) 39. See James Boyle on the unresolved tensions concerning form, process, and substance in Fuller's work: 'Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance' (1993) 78 *Cornell Law Review* 371.