

Navigating the Waters of Procedural Fairness



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Where does procedural fairness come from?

■ Historically:

- Rules of natural justice applied by courts were not applicable to administrative tribunals.

■ Caselaw changed that and tribunals must now apply principles of procedural fairness:

- *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, 1978 CanLII 24 (SCC), [1979] 1 SCR 311.
- *Martineau v. Matsqui Institution*, 1979 CanLII 184 (SCC), [1980] 1 SCR 602.

But what is procedural fairness?

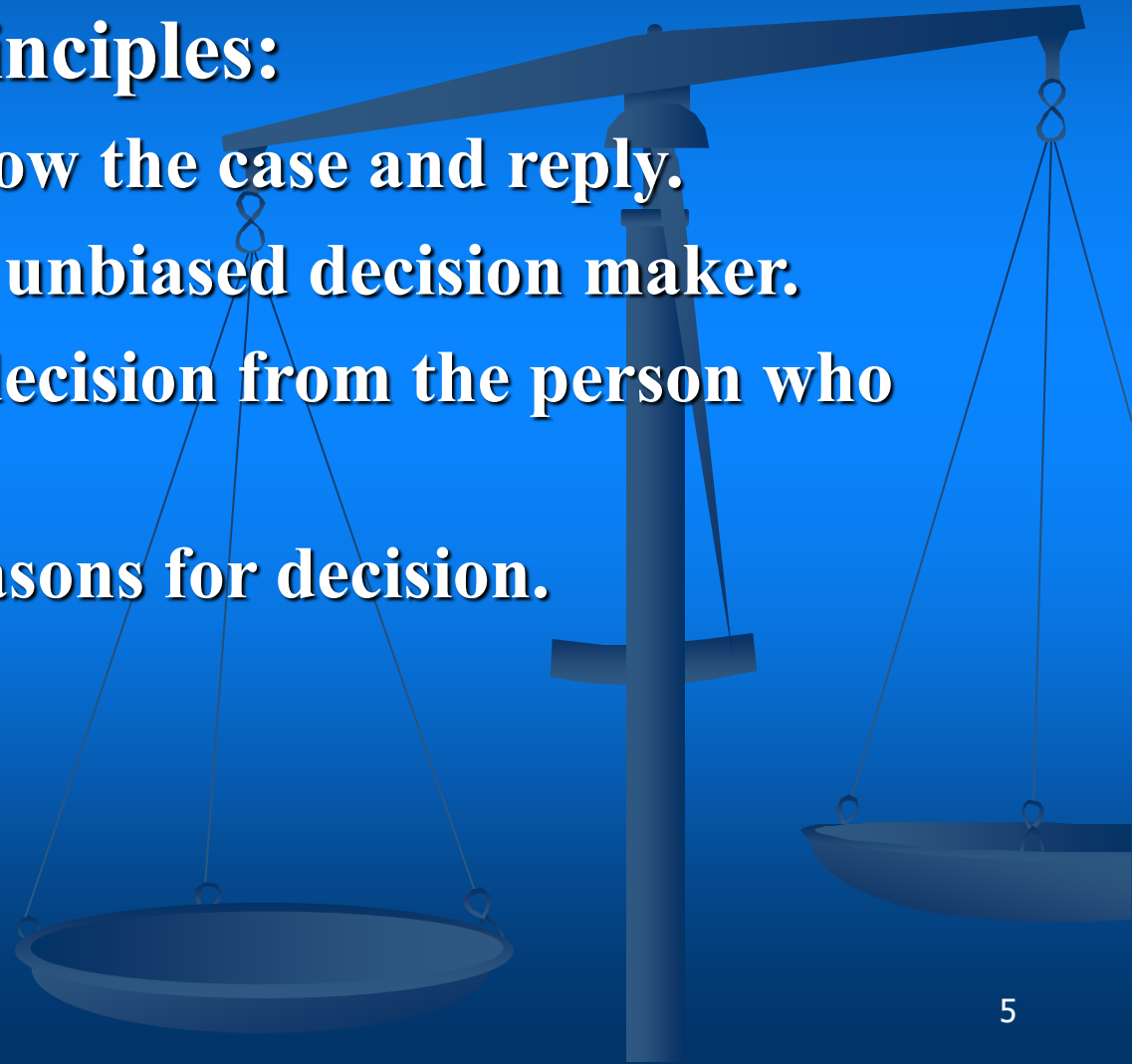
- Application of the concepts like those found in the rules of natural justice to administrative proceedings.
- The legal requirement that every tribunal, within its own unique context, ensures that participants in its process get a fair hearing.
- But what does that mean?

Where are we today?

- Since *Nicholson*, courts have continued to expand and refine the content of procedural fairness and the factors tribunals and courts should consider in deciding what procedural fairness means in any given situation.

Principles of procedural fairness

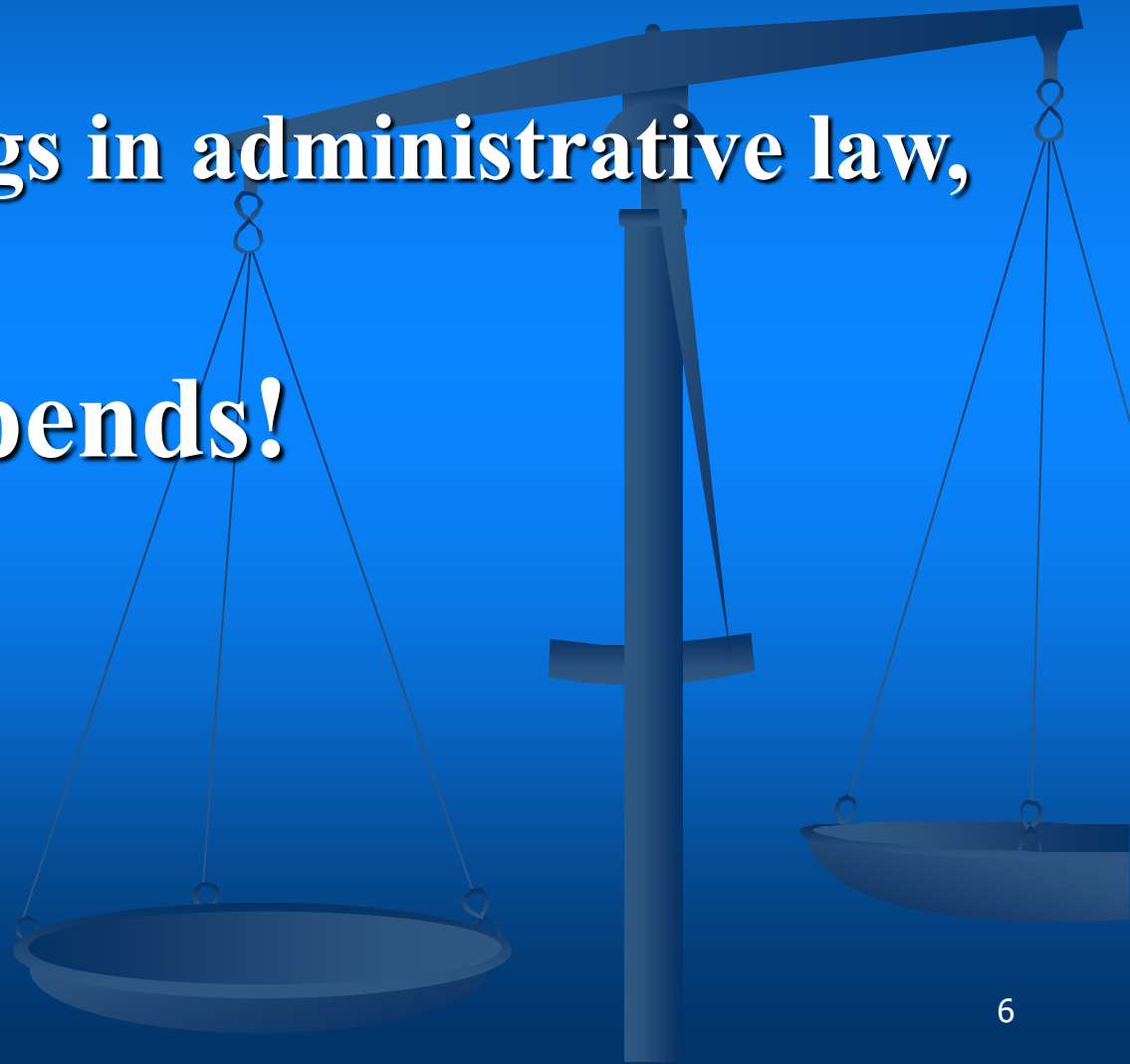
- **Four overall principles:**
 - The right to know the case and reply.
 - The right to an unbiased decision maker.
 - The right to a decision from the person who heard the case.
 - The right to reasons for decision.



But how do the principles apply?

Like many things in administrative law,
the answer is:

It Depends!



The right to know the case and reply

- Notice
- Particulars
- Defense
- Adjournment/postponement
- Time and length of hearing



The right to know the case and reply (con't)

- Sufficient preparation time.
- Disclosure and production of documents.
- Cross-examination.
- Control of abuse of process.
- Fair treatment in the hearing.
- **Categories are not closed!!**

Bias

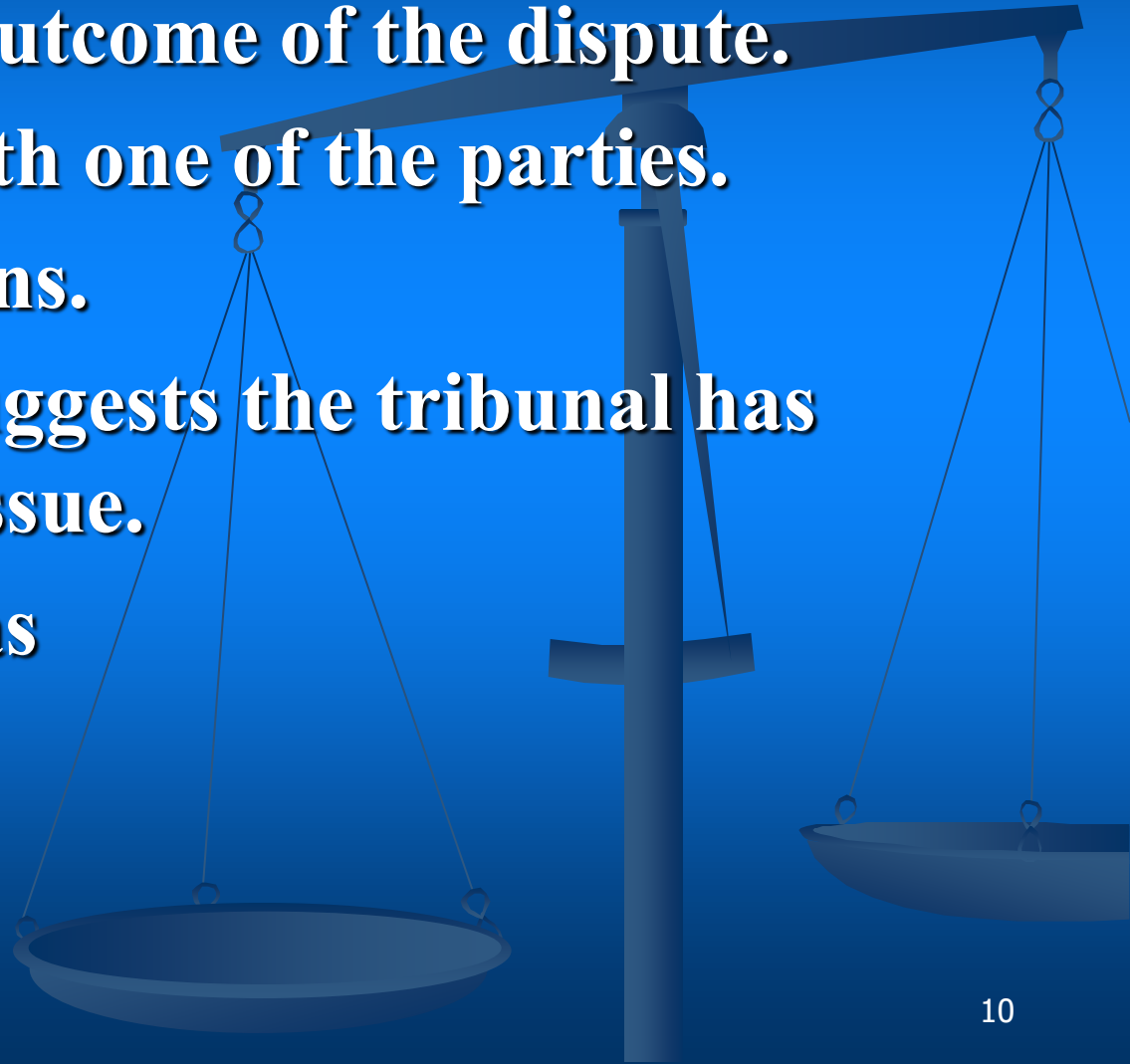


- Actual bias.
- Reasonable apprehension of bias.
- Test for bias:
 - A reasonable apprehension of bias is established where a reasonably informed bystander could reasonably perceive a bias on the part of an adjudicator.

Newfoundland Telephone Company v. Board of Commissioners of Public Utilities [1992] 1 SCR 623.

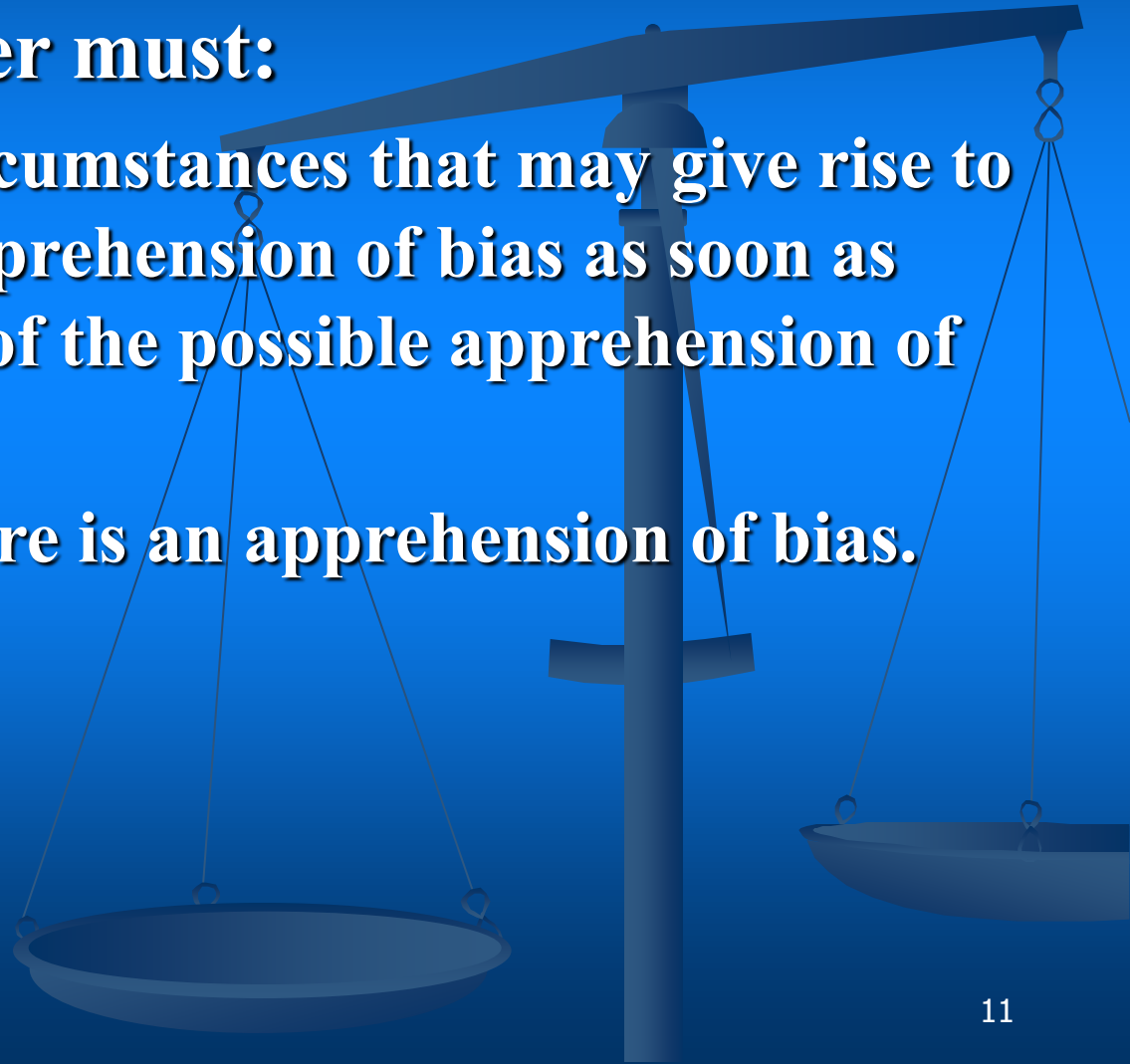
Bias - Examples

- Interest in the outcome of the dispute.
- Relationship with one of the parties.
- Close connections.
- Conduct that suggests the tribunal has prejudged the issue.
- Institutional bias



Handling Bias Issues

- **Tribunal member must:**
 - **Disclose any circumstances that may give rise to a reasonable apprehension of bias as soon as they are aware of the possible apprehension of bias.**
 - **Step aside if there is an apprehension of bias.**



Right to a decision from the person who heard the case

- They who hear must decide.
- Must hear the whole case.
- Can't delegate decision making to someone else.
- Can't exclude someone who is part of a panel.
 - *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 SCR 28

Evolution of right to reasons...

- *Baker v. Canada (Minister of Citizenship & Immigration)* 1999 CarswellNat 112:
 - The duty of procedural fairness requires a written explanation for a decision where the decision has important significance for the individual or where there is statutory right of appeal.

Evolution of right to reasons...

- *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9.
 - A tribunal's reasons for decision should demonstrate justification, transparency, and intelligibility within the decision-making process.

Evolution of right to reasons...

- *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 CarswellNat 7883, 2019 CarswellNat 7884, 2019 SCC 65
 - Reasonable decision is justified, transparent and intelligible, and is justified in relation to relevant legal and factual constraints.

Standard of Review of Procedural Fairness

*Sran v University of Saskatchewan Academic
Misconduct Appeal Board, 2024 SKCA 32*

- Correctness is the applicable standard of review to issues of procedural fairness.
- Court must determine whether the tribunal's procedure was fair in the circumstances.
- The question of whether the procedure was fair is “best reflected in the correctness standard”, but “strictly speaking, no standard of review is being applied.”

Standard of Review of Procedural Fairness

More from *Sran*:

- The ultimate issue is always whether the process accords with the underlying values reflected by the duty of fairness.
- Deciding what is fair in the circumstance calls for a contextual analysis.
- The duty of procedural fairness in administrative law is eminently variable, inherently flexible and context specific.

**But how do I do that in
my world?**

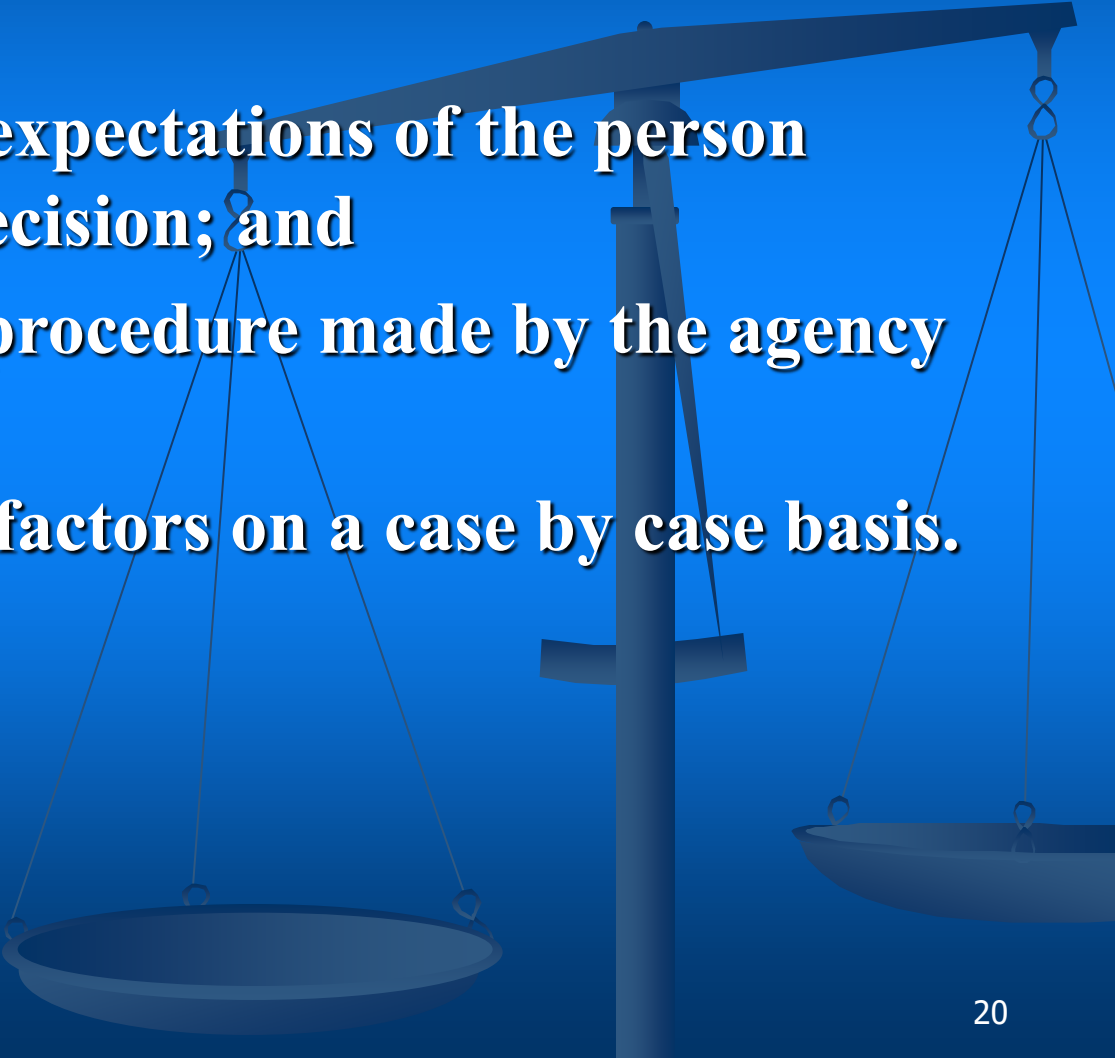


Factors in determining content of procedural fairness (*Baker*):

Non-exhaustive list of factors (*Baker*):

1. the nature of the decision being made and the process by which it is made;
2. the nature of the statutory scheme and the role of the particular decision within it;
3. the importance of the decision to those affected;

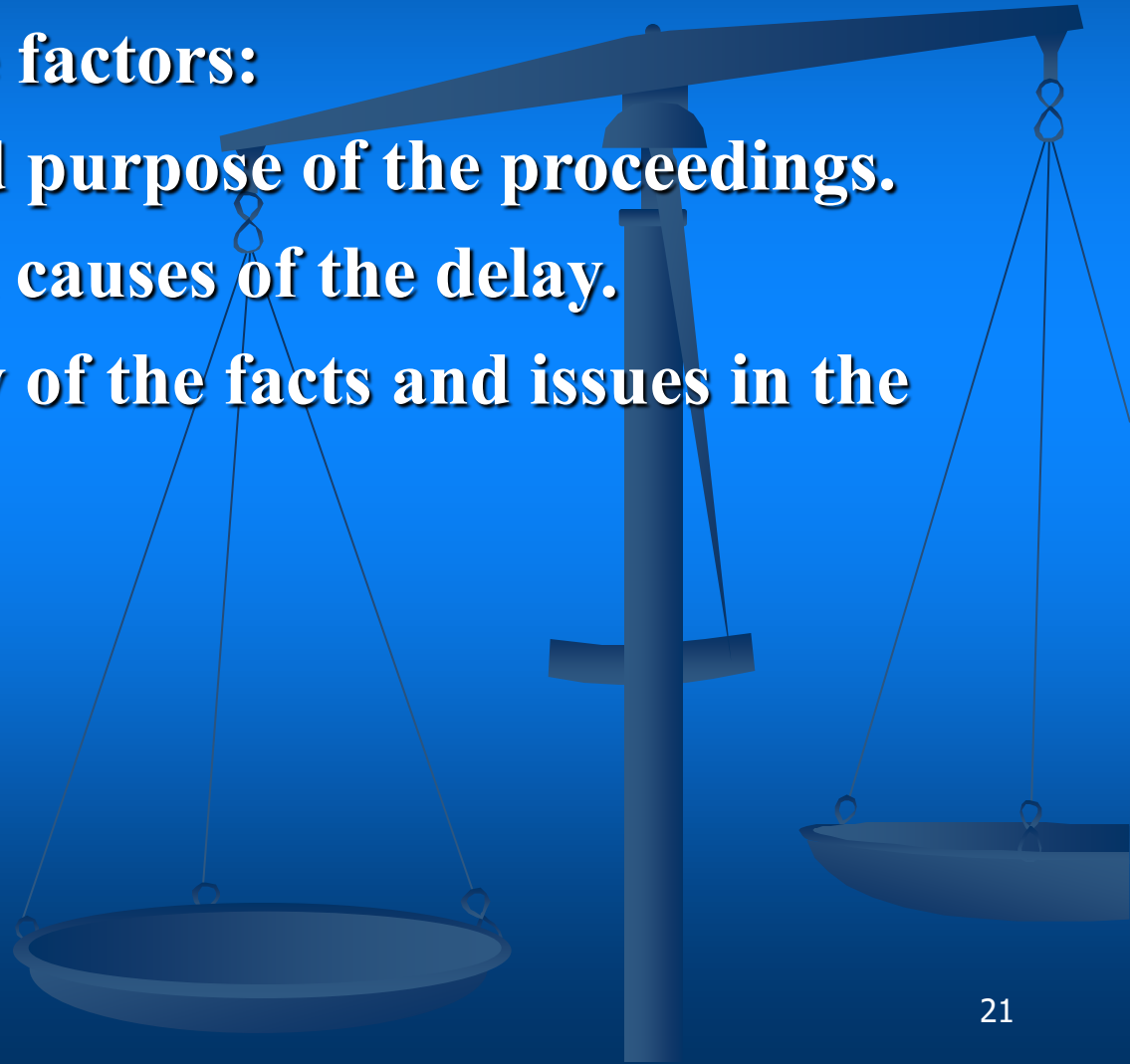
Factors continued...

- 
4. the legitimate expectations of the person challenging the decision; and
 5. the choices of procedure made by the agency itself.
 6. other relevant factors on a case by case basis.

Sran on whether undue delay can be lack of procedural fairness

■ Non-exhaustive factors:

1. the nature and purpose of the proceedings.
2. the length and causes of the delay.
3. the complexity of the facts and issues in the case.



Undue delay continued...

4. whether the delay caused significant prejudice.
5. a “final assessment” to determine if abuse of process is established. Delay must be manifestly unfair to the party to the proceedings or in some other way bring the administration of justice into disrepute.

Case Examples...

- **Sran v University of Saskatchewan Academic Misconduct Appeal Board, 2024 SKCA 32.**
 - Delay in getting to hearing
- **Canadian Union of Public Employees v The Town of Preeceville, 2024 CanLII 73795 (SK LRB).**
 - Disclosure - Support numbers for Union certification application

Case Examples...

- **Prairie Pride Natural Foods Ltd. v United Food and Commercial Workers, Local 1400, 2024 SKCA 84 (CanLII)**
 - Challenge to competence of interpreter
 - Sran cited with approval and applied.

Case Examples...

- *Gerald Solowan and Gillian Solowan v Francis (Rural Municipality)*, 2024 SKMB 17 (CanLII)
 - Failure to afford a fair hearing.
- *Xiao-Phillips v Thomson*, 2024 SKCA 67 (CanLII)
 - Issue re quashing of subpoenas.

Case Examples...

- *International Brotherhood of Electrical Workers, Local 2038 v Stuart Olson Industrial Contractors Inc., 2023 SKCA 115 (CanLII)*
 - Bias allegation against Labour Relations Board member.

Some Practical Advice

- Ask your self:
 - How would I want to be treated?
 - If I asked my sister, how would she want to be treated?
- You are there for a public purpose –
What would best ensure that purpose is fulfilled in a fair and reasonable manner?



Questions?

Thank you!