Procedural Fairness: Judicial + quasi-judicial decisions had to accord with NJ- decider had to hear both sides before deciding, and you can't judge your own case/be biased
→ ADMs weren't procedurally impeded- for procedural protections have to argue decision lay in judicial/quasi-judicial category
→ Grown of ADM state required changes to this system- decisions became too frequent and too important

- *Nicholson v Haldimand*: court rules that DoPF applied to ADM- no matter classification of a given decision, if its results would seriously affect someone, it may require some procedural protections
  - For judicial decisions- natural justice; admin. decisions= general duty of fairness

→ DOF requires public authorities to act fairly in how they make the decisions- decision itself needn't be fair-
- ensures accountability of decision-makers, plus input of those affected- see discretion as dialogue
- instrumentally important but also ensures people can participate in

Sources:

- Common law; *Charter* s.7 or s.8 (arguably)
- Home statutes of ADM - some include provisions addressing procedures, tho usually few restraints
- General procedure statutes: attempts to increase predictability by providing certain minimum standards- codifies and displaces CL; certain tensions b/w CL and statute; in public law need to fill gaps in statute thru presumed legislative intent
- Legitimate expectations: Can elevate amount of PF but can't dictate substantive results
- Bill of Rights- Quasi constitutional rights- which also adds property as a right

Purpose:

- Better decision making, better policy outcomes:
- fair treatment for individuals
- Participation: allows people to participate in decision-making processes that affect them and therefore protects dignity of people- ensures they are treated with respect

Application:

- decisions that affect an individual's rights, privilege, or interest will be subject to DoF- covers most ADM decisions (***Baker***)
- Consider: Jud. activity? Policy-setting aims? ADM? Investigative? Importance of decision to affected?

Basic Content: (1) right to be heard; and (2) right to an independent and impartial hearing.

- But highly flexible- see *Baker*/*Kent*- content will vary widely depending on the context of the decision and somewhat normative- varies w/ what procedural protections the courts think should be present
- DoF requires procedures conform with some, not all elements of natural justice (*Nicholson*)
- See appendix for specific components

Effect of Mistake: decision quashed, sent back to tribunal to be made properly; tho it doesn't change the decisions it may be difficult for decider to get back to the same decision- thus a successful judicial review may make it easier to get the preferred outcome- and certainly a more legitimate, informed decision

DoF- Evolution and Threshold:

***Nicholson* (1979)**: cop fired- doesn't get reasons, none in record, no appeal/present his own case
→ Is cop owed notice/reasons/oppp. to contest decisions, while still on probation? At CL no duty
→ Lower court says that after 18 months cop is protected from arbitrary discipline/discharge and may be entitled to notice/hearing/and judicial review, but nothing for cops who have worked < 18 months
- based on the words "at pleasure" and "probationary" in *Police Services Act*
  - exception in PSA allowed dismissal w/o protections for those who have worked < 18 months

→ PSA seems to set up a quasi-judicial regime, but specifies that this will not apply to those who have worked less than 12 months- and therefore rules of natural justice appropriate for quasi-judicial don't apply
→ Note employment law vs law- employee is master-servant relationship, governed by K law (private);

- might have gone to private law for breach of K- firing after probation up; however instead went to removal without good cause based on his position as a holder of public office- public law sphere; further aspect of this was to give gov. max discretion to select the best person for the job
- Public officer holder relationship governed by 18month period set out in regulations (public law);

SC: old CL rule allowing dismissal w/o procedure “at pleasure” office holders should be changed given modern labour climate/conventions- 1970’s highwater for CB rights and labour

- also notes that “at pleasure” does not accord with fact that he was hired at as 3rd class (not 4th) and was promoted to 2nd after just 12 months- deserves some procedural protection

- ‘at pleasure’ needn’t be taken so seriously b/c isn’t employed by Crown but PSB- the royal prerogative to have max discretion to fire/hire to get the best employees is less needed here
- Dickson suggests that dropping of ‘at pleasure’ and replacing with fixed time-period after which extensive procedural rights present- and if extensive procedures needed for fairness post-18 months, at least some were needed prior to 18 months

→ SC accepts there is a general DoF in ADM decisions- tho less protection than the rules of NJ

- from day 1 cop had rights to receive notice and opp. to make submissions- tho not procedural rights required by rules of NJ for judicial/quasi-judicial

→ Difficult to classify some statutory functions as judicial/quasi-judicial vs administrative, therefore it would be unjust to give some extensive procedural protections and others none, when the results of these decisions/fxns can seriously affect people, regardless of classification

→ DoF varies contextually given the decision, its effects, etc

→ B/c of the serious consequences of the admin decision for appellant, he should be given reasons and an opportunity to respond to the decisions

→ Long term impact seems to have blurred line b/w judicial/quasi judicial and ADM decisions, such that extensive procedural fairness may apply to all decisions with the exception of legislative decisions

- Note *Dunsmuir*- for rights stop dividing public office holders as separate from other employees

Dissent: *Police Act* clearly gives police board authority to dismiss employee up to 18 months after hiring- they are ‘at-pleasure’ employees in that period; Does the board owe the cop PF? (eg. opp. to be heard)

→ Wasn’t a matter of investigating the cop for anything, or dismissal for cause; cop was on probation and board had full right to use probationary period to decide if they wanted to continue employing him- only interest at stake was PSB’s and it made a purely ADM decision; therefore no duty to give reasons or give him an opportunity to be heard.

***Inuit Tapirisat* (1980)**: Bell applies to CRTC to increase phone rates, approved; Tapirisat= intervenor; appeals decision; denied; Ps claim they were denied a hearing as required by rules of NJ;

→ Does GiC have duty to observe principles of natural justice- or owe DoF when dealing w/ public?

→ Ps claim that GiC must decide appeals according to fair procedures that accord with principles of NatJ

- At GiC meeting, appeals considered but appellants not allowed to attend or make submissions
- GiC didn’t receive their petition or give them opportunities to respond to petition against them;
- they argue GiC is a quasi-judicial entity (therefore must make decisions in accordance with NatJ) or owes them duty of fairness; right to answer other parties submissions- and that GiC must give notice when they issue decisions that may affect people

→ Natural justice= procedures before any body acting judicially shall be fair in all ways

→ GiC must stay within the law as legislation creates when acting pursuant to statutory power

- in this case law contained no limits on the GiC’s exercise of power in terms of its “rate review fxn”
- no procedures placed in Act to limit GiC’s power in this respect- statute gives GiC essentially leg. power which is exempt from judicial review; seems to be a highly political decision.

→ Nor does s.64 contain implied duty to observe PF- gives GiC supervisory power to respond to political/social/econ. concerns- and complete discretion w/i bounds of Act (no need to give reasons)

→ DoF and principles of natural justice won’t affect legislative process- whether 1ry or delegated ones

- if exercising delegated powers by legislature and empowering Act doesn’t contain terms requiring PF, likely not subject to DoF- likewise if executive assigned duties formerly done by legislature

Critiques*:* Political accountability isn't highly responsive force to ensure decisions made well- no real venue apart from the HoC where cabinet ministers held to account- cabinet decisions shielded from PF
Notes: flexibility of DoPF is such that you could say the duty didn't require many protections in this case, which were met, but don't simply rule that the threshold wasn't met
→ Alternatively, given that Cabinet has to do certain tasks which must be completely out of JR- simply not equipped to do so- might be safer to set a hard principle that the courts won't review court decisions

Re Webb: Webb + kids are public housing tenants; ejected; right to receive welfare but not to receive statutory housing; Does Ontario Housing Corporation owe her DoPF through decision to maintain lease?
→ No DoPF before tenant, but once accepted, decision to terminate her tenancy attracted PF rights- but in circumstances all required was reasons for termination and receive opportunity to respond; on facts she had been given these rights- and she wasn't worse off b/c landlord was a public body- if she had been renting from a private landlord she would have had fewer rights

Huttfeld: Huttfeld had no right/vested entitlement to work at hospital even if some reputational interest
→ Absent special circumstances, usually no duty of fairness on first application for something
→ Interests *and* rights may give procedural protections- courts must be sensitive to varying circumstances
- hospital rules said duty to investigate- investigation that had to recognize reasons for the decision
- Court also recognizes implicit reputational issue for doctor, impact on practise, + effects on public

→ Given these considerations, threshold test met because doctors interests substantially affected

Homex Realty: Homeex buys land to divide as subdivision; prior owner subject to condition they would install municipal services; Homex doesn't want to- wants to subdivide w/o providing services; town passes bylawforcing them to reapply again where they would promptly be required to set up municipal services
→ Court rules that 'in substance' the bylaw was a quasi-judicial decision- municipality acting as judge and plaintiff in its own case, therefore the decision was subject to certain procedural protections.
- ultimately Homeex wasn't granted a remedy- public law generally offers discretionary remedies

Cardinal v Kent: warden acting according to PSR- gives him powers to isolate inmate involves severe restrictions on mobility /activities/association- segregation reviewed once/month by a board from pen staff
→ Board recommended 45 times to release; warden rejects it based on incident- hadn't made other inquiries re. the incident; couldn't provide evidence but pointed to his knowledge of inst. dynamics; didn't provide reasons for rejecting board's recommendation, nor did they get a hearing
→ Appellants claim denial of PF in being placed + kept in seg.- ask for quashing of decision;
SCC: agrees SCBC had jurisdiction to issue writs on the issue and that Habeus corpus can determine validity of person being left in admin seg + will order release if its found unlawful
→ Warden owes DoF when using s40 PSA power given that it affected RPIs, and wasn't legislative;
Content of DoPF: keep in mind req. of prison discipline- requires quick decisions- use JR power w/ caution
→ DoPF: requires reasons + opp. to state their case- no requirement to do ind. inquiry into the incident- still had duty to hear + consider As involvement in incident- and other Qs relevant to why release might harm good order + discipline- no reason to think duty would unduly burden prison ADM/create security risk
- failure to provide fair hearing about release, upon board's advice, was unlawful
- right to fair hearing= independent unqualified right, grounded in sense of procedural justice which anyone subject to ADM decision is entitled to- not court's decision to deny that based on speculation about what might have happened if hearing had been fair

→ " a general CL principle, a duty of PF lying on every public authority making ADM decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual"

Re Canada Assistance Plan- fed and provincial governments enter into a K; fed. gov agrees to cost-share welfare benefits, put in leg that any changes in funding formula preceded by some consultation → Reyling

on this, provinces set up welfare schemes, gave benefits out, however the federal gov then (aiming to cut-deficit) unilaterally amended the legislation to lower funding to the wealthier provinces
→ SC: legitimiate expectations can ground enhanced rights but did not offer grounds for substantive rights, nor would the courts impose such procedural requirements on the legislature; SC can police const. issues/impose procedural protections on quasi-legislative issues, but not purely legislative decisions

Content of Procedural Fairness

Baker: ADM decisions that affect RPIs of individual triggers duty of fairness
→ Duty of procedural fairness highly flexible- depends on context of statute and rights affected (22)
Factors that will determine content of DoPF: Non-exhaustive!
(1) Nature of decision and process of making it; if tribunal functions and DM processes to closer to judicial decisions, DoF requires procedural protections closer to trial model; if less like a court (eg. state vs individual more deference
(2) Nature of statutory scheme- and terms of statute that guide how the body operates- eg. no appeal right means increasing procedural protections required; if statute seems to be polycentric or policy driven, less judicial like and duty of PF will require fewer procedural protections;

- if it allows for 2nd stage may require more protections so appellant can meaningfully participate
- may be specific legislative proceedings that govern procedures and may outline parts of DoPF
- Also consider the enabling statute and CL.
- Privative clauses- usually go to jurisdictional issues- courts may simply ignore the privative clauses

(3) Importance of decision to those affected- sliding scale

- essentially RPIs, expectations, and property interests; disruption to an individual's life, family, etc
- Interests of children---------- Low income housing tenant----------threshold point where DoPF applies

(4) Applicant's Legitimate expectations: if you're led to believe you will receive certain protections, you may be entitled them, even if they would otherwise not be required

- Can arise from representations, promises, past practices, or current policy
- Controversial- LE if person led to expect particular outcome- but doesn't require fulfillment of substantive expectations- see ***Inuit v Tapirisat,***

(5) Procedures ADMs chooses: content duty should account for + respect them- ADMs have better knowledge of its own needs and people it serves- and thus the procedures it establishes warrant respect

- Is this actual deference? Or is it just

→ Values that ground duty of PF relate to the idea that people affected should have opportunity to fully present their case- and when rights are affected the process should be fair/impartial/open

- Depending on the factors listed above, the duty of PF may require varied participatory rights

→ Duty of PF doesn't require oral hearing in all H + C decisions- nor is there a general requirement to provide reasons for ADMs decision, though court notes usefulness- and in some circumstances CL requirement for ADM to provide them, or under duty of PF (32-43)
→ PF duty also requires that ADM's decision be free from R App. of Bias- "what an informal person, viewing the matter realistically and practically, would conclude"- consider the "particular circumstances of the case, free from stereotypes" (45)

Judicial Review of Procedural Fairness:

Cardinal- "right to fair hearing= independent unqualified right which finds its essential justification in the sense of procedural justice which any person affected by ADM is entitled to"

- English CL support that rules of NJ are important b/c there are too often cases that are more complex, less clearcut than they initially seem- people are owed the knowledge that they are treated fairly and at least had a chance to influence decisions

→ Procedural grounds and compliance w/ DoF= jurisdictional issue, must be answered *correctly*- if wrong procedure, decision quashed, and original ADM must review it again, w/ correct procedure

- some room for deference (court will account for ADMs choices of procedure) but once court has determined content of particular DoPF, question is whether it has been met- yes or no
    - If no, doesn't result in court imposing substantive outcome- only quashing of decision and sending it back to ADM for a new decision; though this is still quite impactful- time, money, etc

Limits on DoPF: applies to DM process only- maybe to prelim. decisions, but only if have de facto finality

→ Separation of powers requires that DoPF won't apply to legislative decisions/functions; this isn't always clear but no right to fairness in political decisions

How far does this go? Court may look to form and content requirements- what did the relevant statute require the entity to do, and did it do so according to its procedures?

→ **Why**? Avoid impeding the legislator's ability to consider various issues/interests/viewpoints and choose among them- and there will be political accountability through the legislator (and thus less need for legal accountability); Legislators should be able to control and dictate their own procedures

- see appendix for specific examples when DoPF applies based on separation from legislative power

Mount Sinai v Quebec: hospital specializing in tuberculosis (½ short term, ½ longterm care; during negotiations w/ prov gov. to relocate the hospital to Mtl, accompanied by fundraising by Montreal jewish community, hospital wants the permit amended Minister says a number of times that they will be given a permit, but later says no permit (in the public interest) even if it was tacitly approved;

Majority: Was original exercise of discretion validly reversed to deny modified permit?

→ Respondents ask that decision be quashed, fix minister w/ conception of public interest he agreed upon w/ hospital in writing, based on that issue mandamus to enforce duty under *Act* to issue permit

→ Court notes that tho s.138 gives broad discretion to M, it has some limits: power must be used only for reason it was granted, and in accordance with PF; alternatively decision may be patently unR, therefore could be quashed; however *they don't want procedural relief- they want a substantive outcome*

→ No right to permit- but right to have decision to modify permit carried out in a fair manner- clear DoPF

→ In this case no PF- no notice M was going to reverse decision, reasons, or opp. to respond

Legitimate expectations: court notes that forcing substantive result thru this is against prior jurisprudence but it's an evolving doctrine and has been used this way on ADM's using statutory or prerogative powers

- permitted in England and Ireland where LE allows relief from PF all the way to substnative relief
- *Coughlan*- health authority tells lady she will have a home for life if she moves in- it later closes; in this case court held that her legitimate expectations could create substnative remedies-
- court concerned that releasing this doctrine will force court to order minister to do things
- PF's content looks to applicant's interests and ADM's power WRT to that interest, while LE looks at how public authority has conducted itself when exercising this power- not really estoppel but aims to promote "regularity, predictability, and certainty in government's dealing with the public"
- See *Re RCAP* (above)- if LE doctrine is used to overrule M authority, need to have limits on it; Only way to attack M decision on procedural grounds is through 'abuse of discretion'
- When tough to tell if substantive or procedural relief at issue, keep wider principle in mind- issues of broad public policy are purview of the M, not courts
- Court decides that b/c M decision already quashed due to PUF, LE isn't needed for PR, and won't apply to provide substantive relief

Abuse of discretion: exception to deference to M decisions- when Ms exercise discretionary power they get highest deference- patent unR

- *Coughlan*- decision to withhold substantive relief under LE doctrine "can only be justified if there is an overriding public interest. Whether there is an overriding public interest is a question for the court"- in Canada M decides if overriding public interest- court only interferes if M decision is patently unR- "irrational or perverse"- in this case court says M decision was PUR- he and earlier Ms had defined it through comm. w/ hospital, had encouraged them, and failed to consider implications of breaking the promise- M didn't offer any public policy reason as to why he broke it

→ M's decision was PunR and thru process that was demonstrably unfair- only R option is to issue modified permit that he should have

Majority: the hospital's permit request was for modification, not renewal so 138 applies not 139

→ 138 says that "M shall issue a permanent permit or a temporary permit if he considers that it is in the public interest", this imputes to the Minister an exercise of discretion with respect to whether or not granting a particular temporary or permanent permit will be in the public interest"- court says M exercised this discretion when he encouraged the move, promised hospital it would received modified permit, and endorsed the hospital in its new form- essentially deciding for purposes of s138 that it was in public interest for it to get a modified permit- merely granting it was left until move to MTL- the discretion granted was exhausted- "This does not mean that in a different set of circumstances the Minister could not, based on overriding policy concerns, in exceptional circumstances, reverse a prior discretionary decision"

→ Minister had no grounds to refuse to modify permit and his later behaviour was inconsistent w/ his "supposed reversal of original exercise of discretion"- therefore wasn't a valid exercise of discretion

- avoids R and PF issues by saying Minister's letter was a nullity- wasn't issued pursuant to statute
- the discretion granted to minister had been exhausted-

Procedural Fairness: Independence, impartiality, and bias are central to notion of fairness in ADM process- key element of fairness is that process and DM don't grant unwarranted preferential treatment

Purpose:

- in ADM law, continual shift b/w deference to ADMs and legislative choices vs view that the judicial apparatus is preferable to resolve "issues of AMD ind., impartiality, and bias
- historical and cultural contingency of the concept of impartiality- the idea that DM should be neutral and impartial

Sources: Independent and impartial tribunal guarantee?

→ Developed from PF concepts as well as CL and const./quasi-const. principles

→ CL principles of NJ: (1) Rule against bias- ADM shouldn't judge own cause or have interest in outcome of case (*nemo judex in sua causa debet esse*); (2) ADM must hear both sides before making a decision

- both contribute to right to ind + impartial hearing- prevents ADM from judging cases they may personally benefit from; 2nd rule encourages them to decide based on facts and law- avoid other considerations

→ Constitutional sources? ind. + impartial ADM arguably guaranteed by RoL + unwritten const. principles

- eg. *Charter* requires this sometimes(s.11d- requires penal consequences b4 applying outside courts)
- Quebec Charter provide broad right to fair hearing by ind. impartial tribunal when rights and Os determined- however narrowed by strict statutory definition of tribunal- adjudicative body
- ADMs, by nature, have some links to government- usually thru ministers or departments

History of Concept of Administrative Independence and Impartiality:

→ 3 main shifts: (1) Judicial independence theories used to shape concept of independence of ADM tribunals; (2) *Ocean Port Hotel*- made clear hybrid nature of tribunals- no general const. guarantee of tribunal ind.; (3) Further pushes to have adm. tribunal ind. guaranteed by Const.

Content:
Lack of bias- partiality (perception- if R- or real) towards a certain outcome
Impartiality- make judgements with an open mind- don't start process w/ mind made or ideas that will unfairly influence process to make decision
Independence- means of ensuring impartiality; an ADM's ability to decide matters free from inappropriate influence/interference
Justifications: Why is impartiality/lack of bias/independence valued?
Rule of law- greater confidence that decisions based on facts and law alone; necessary for litigants and public confidence in adm. of justice, who need to know decisions aren't based on irrelevant considerations (prejudice, relationships, undue pressure)
Public confidence in DM procedures- given links b/w tribunals and politically vital executive branch, R to fear interference out of this relationship

- b/c it's partly about public confidence, *perception* of fairness is also important

Judicial independence: initially informed notion of ADM independence
→ Mere appearance/perception of interference is an issue- even if at a lower level most are concerned about breaches of DoF- why? Look to justifications
→ thus independence is a basis that protects other important values- provide appearance of impartiality
→ judges must have a certain degree of security of tenure, remuneration- not based on their decisions or the amount of work they do; need liberty to make decisions free from pressure/interference from gov, pressure groups, individuals, or other judges
→ **3 obj. structural conditions for independence:** (1) security of tenure- won't get removed for decision gov. doesn't like- Js get secure tenure, only removed for cause; (2) financial security- (a) gov. can't alter pay for arbitrary reasons- thus fixed salary guaranteed const; (b) judges paid enough to not need to find alternate ways to get income (3) Admin. or inst. control- tho CJ can clearly allocate court cases, what about budgets? Adm of justice system requires some leg. and execu. involvement- usually solved by arms-length commissions; unlike first 2, more an inst. rather than individual factor

- together help public to know that other branches of gov. won't interfere w/ judiciary
- 4th factor- adjudicative independence (*Beauregard*)- decision maker has ability to decide w/o inappropriate interference from other decision-makers
    - not inst./structural but relational matters and internal processes of deliberation

Judicial independence → Tribunal independence?
→ Vague trend towards extend this aspect of NJ to JPs, quasi judicial tribunals and administrative entities

- latter based on the constitutional "similar in principle to that of England)

→ support also found in common law norms, constitutional and quasi-constitutional sources, *Bill of Rights* (federal ADM may require administrative independence)

- Quebec *Charter* also requires independent tribunals however defined narrowly

Valente v The Queen: suggested applying judicial independence theory to tribunals; other litigation has pushed for same amount of ind for tribunals, arguing based on written (*Charter*) and unwritten const. safeguards (judicial independence, rule of law), and quasi-const. provisions (eg. Bill of Rights)
→ Test for tribunal independence/R app. of bias: could R, well-informed person who has thought about matter, conclude ADM is free from factors that might interfere w/ ability to make impartial judgements

- Lower standard than jud. independence- must be flexible to account for tribunal functions
- Usually guarantees of independence of judiciary are far less for tribunals- though tribunal chairs can often allocate caseloads and budget, often little financial security/security of tenure- even if pay set by legislation, low compared to skill; variable types of tenure- sometimes months/years, renewable

→ Goal= impartiality; Means= independence
Vallente: s.11(b) invoked to require court-like independence for administrative tribunals- but on a less strict level than in the judicial context

→ requires substantial possibility that decisions would be tainted; institutional structures only needs to be sufficiently free of factors that might impair decision-makers ability to make impartial decisions
→ If institutional structure leads to RAoB in # of cases, this isn't enough- must lead to RAoB in a substantial number of cases
→ Tension: conflict "between the day-to-day realities of admin. tribunals and jud. understandings of the adm. state should work."

SEC v Ainsley: ½ way thru investigation of dealer, entity published guidelines on policy WRT the dealers
→ 1 of 3 panel members kicked out due to bias- can other 2 panel members come to impartial decision?
→ What about a member with a particular area of expertise being appointed to the tribunal

CP v Matsqui:

Lamer "adequate alternative remedy principle" (*Harelkin*): even when potential lack of jurisd~, JR is discretionary; even if jurisd~ problem is due to misreading of statute, appeal right may be enough.
→ *Auditor General v Canada*: suggests that alternative remedy, as bar to judicial review, isn't so much about Parliament's intent, but about court's concern w/ exercising discretion appropriately
→ on this basis court chooses # of factors to decide whether they should allow judicial review or require appellant to use the statutory appeal- "the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body"
RAoB in appeal tribunals? Band members, w/ direct $ interest in maximizing tax $, on tribunals
→ Non-Indians may not want to make decision adverse to band- might not get paid or get re-appointed
→ S.11 inapplicable (no charge) but they're principles to be drawn re. bias, independence, and impartiality
→ CP claims appearance of partiality on the part of members and question appearance of independence- claim structural impartiality issues given that band members are appointed to tribunals
→ **Apply *Lippe*: (A)** Given potential for conflict of interest b/w tribunal members and those before them, is there RAoB for informed person in substantial # of cases (**Structural impartiality)**? (B) If not institutionally, on case-by-case basis? (**Institutional Independence**)
→ Appeal tribunals adequate to consider issue raised by CP; statutory appeal procedure available allows CP to appeal to FCTD from tribunals- they will still get full judicial examination;
(A) No- tribunal members need to reflect all members of society, band members have a stake in it, and they may want to lower taxes for other reasons (investment)
→ Band members have important interest to be on the tribunal and idea that they will want to raise taxes is too remote- doesn't go to them individually, they have no "personal and distinct interest in it"
- efficiency and democratic reasons- you want representations from diverse viewpoints on tribunals
    - also helps to avoid regulatory capture issues

(B) Doesn't seem tribunals sufficient ind.- should be considered if CP required to go before them:
→ 3 factors to assess inst.ind (*Valente*): (1) security of tenure, (2) security of remuneration, (3) admin. control: (a) judge must only be removed w/ cause- not at executive whim, or tenure until retirement, for fixed term or tax; (b) right to salary must be established at law- executive can't be able to interfere
- Suff. authority for *Valente* applying to ADMs when tribunal settles disputes + determines rights
- Principle of NJ that party can appear before tribunal that is independent *and appears independent*

→ Policy of promoting Ab self-government isn't relevant to whether there's RAoB, institutionally
- taxation tribunals still have to comply w/ rules of natural justice

→ RAoB test (*Committee for Justice*): app of bias must be R, held by R persons when applying to topic- would they think more likely than not that X would decide fairly? Grounds for app. must be substantial
- test should be flexible for ADMs- should be considered w/ respect to ADMs experience and advisers- rules of NJ may be flexibly applied to ADM and in light of its functions

Institution independence test: should consider nature of tribunal, interests at stake, + other ind. indicators (eg. oaths) eg. tribunals dealing with security of person requires greater ind. than property tax one- former will need to more closely follow *Valente* principles akin to judiciary than the latter

Nature of the tribunals: perform adjudicative functions, *may* receive salaries, term security varies; Chiefs/Band councils select tribunal members + control tenure + payment- suggests relationship of dependency; tribunal members are chosen by people who oppose CPs claim

- Absence of financial security, security of tenure (absent or ambiguous/unclear), tribunal appointers (band council who opposes claim) supports R app that tribunal is insufficiently ind.
- Tho prov. tribunals don't have security of tenure/payment, b/c the members of AB tax tribunals are appointed by the taxing authority and no security of tenure, likely RAoB on an institutional basis
- to ensure inst. ind., bylaws should guarantee salary, tenure, and require cause for dismissal

→ Though allegation of bias/impartality on the part of the tribunal is speculative- the lack of inst. independence (II) isn't speculative- application of *Valente* to the by-laws clearly shows it

→ Institutional independence means that tribunals must be legally structured to be R independent

- perhaps discretion could be used (thru by-laws) to resolve financial + salary matters, but the point of II is to ensure that independence of tribunals isn't a matter of discretion

→ "Institutional independence and the discretion to provide for institutional independence (or not to so provide) are very different things." Independence premised on discretion is illusory.

→ B/c tribunals lack suff. independence from Band Chief/Council= aren't an adequate alternative remedy

Ruling: **Sopinka** says that b/c he doesn't think Joyal needed to consider R app. of lack of II, his decision should have been deferred to- think use of discretion was appropriate: Why?

(1) appellate court should defer to proper exercise of discretion- fine to not R app. of lack of II at FC

(2) AB self-government *is* relevant to assessing II;

- assessing II of ADM tribunal is less strict than judicial
- significant feature that taxation measures created were meant to promote AB self-government; this policy context relates to whole issue of judicial discretion
- Intepretation of Indian Act must be done broadly- and this applies to assessing II of the tribunals
- Any question of whether tribunals are suff. II needs to be interpreted in light of practical application

(3) cases have considered II by looking at tribunal practises in context of actual hearing- for the purposes of R. app. test , instead of focussing on the by-laws, Sopinka suggested defer application the II test to see how the tribunal operates in actual practice"; Principles of NJ are flexible- must be contextualized

- Judicial independence (and therefore ADM ind.) analysis must consider actual context/operations
- if legislation considered for R. App. II, consider leg. scheme and how it operates in practise
- might this include filling in the gaps in bylaw through practise- band council resolutions pursuant to the by-laws to provide tenure and remuneration
    - the 'deficiencies' pointed out by Lamer are just gaps in the by-law that might be filled in

→ "The essential conditions of institutional independence in the judicial context need not be applied with the same strictness in the case of administrative tribunals. Conditions of institutional independence must take into account their operational context"

→ Don't form conclusions solely based on the by-laws that create the tribunals- consider the operational reality/actual context of how the by-laws operate

- case law has generally only considered II after tribunal has provided a decision- to assess II by considering practise as shown in particular situation- thus trial court didn't err in not reviewing II

Dissent 2 (Major): Tax tribunal didn't have jurisd~ to review its own jurisd~- CP had title for 100+ years;

→ tribunals only have jurisdiction granted by statute; considerable jurisdiction for taxation assessment matters on part of the board- including all lands w/i the reserve, and appeal tribunals have juris. WRT listed grounds in the by-law (including whether lands in reserve improperly included on tax rolls)
→ "Q of whether land is taxable= Q of law outside the board's jurisdiction."
→ "Deciding whether land is "within the reserve" or not will inevitably require a consideration of a variety of factors, such as real property law, survey results, and treaty interpretations, to name but a few. These are matters in which the board has no expertise and over which there is no evidence that Parliament had any intention to grant the board jurisdiction"
→ When "taxing authority exceeded their jurisdiction in some manner, and the taxpayer argued that, as a result of this excess of jurisdiction, they should be entitled to have resort directly to the courts without first going through the appeal procedures established in the legislation"

Post Matsqui:

2747 Quebec Ltd v Regie: tribunal members had fixed terms but not for life; court held that tribunal independence doesn't require life-terms for tribunal members; fixed-term appointments avoided risk of adjudicators losing office b/c of decision gov. doesn't like; also specified that the directors of the tribunal could be removed only for specific reasons- and could contest dismissals
→ Despite considerable links b/w tribunal + Minister in terms of home act, which threatened board's inst. ind.- court didn't think this was a huge problem- no further evidence minister could influence the process

Oceanport Hotel: appeal to SC, *Ocean Port* argued b/c LAB exercised adjudicative fxns, required same degree of ind. as courts, const. guaranteed- pointed to both *Re Judges* for unwritten const. principles of JI SC says this would be important if procedures for appointments weren't determined by statute- unlike Regie where there was a quasi-constitutional document, none here, and CL presumptions of independence from Matsqui did not apply against express statutory provisions
→ if the legislature wishes to set up an un-independent tribunal it can, w/i constitutional limits
→ No const. guarantee of ADM tribunal independence- judicial independence doesn't entail this
→ Jud ind. meant to protect jud. from executive, whereas ADMs aren't separate from executive- and are often created to implement policy- their degree of independence- and structures responsibilities, etc, should be determined by legislatures
→ Additionally, because tribunal independence= CL principle of NJ, this independence could be removed thru express statutory langauge
How does this differ from Matsqui? In Matsqui court was dealing with subordinate legislation which can be reviewed on administrative law grounds- in this case they were dealing with primary legislation
→ High point for deference to leg. language- no general const. guarantee of ind. for ADM tribunals
→ "Lamer C.J. supported his conclusion WRT traditional separation of powers. The preservation of this tripartite constitutional structure, he argued, requires a constitutional guarantee of an ind. judiciary. The classical division between court and state does not, however, compel the same conclusion in relation to the independence of ADM tribunals...such tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts. "
→ Suggests it's legislature's responsibility to create tribunals w/ ind. decision-making processes- encourages policy-makers to rpomte factors that allow tribunals indepdnence

- Marks turning point in jurisprudence related to the ind. of ADMs

Keen v Canada: appellant is president of safety commission; reactor shut down- found to have safety, commission orders it to stay closed until safety violations remedied; led to shortage of medical isotopes
→ Minister issues directive to commission: take into account not only risk to public due to nuclear reactor but also the risk to the public owing to a lack of medical isotopes; commission ignores, Parliament passes a law to force the commission into following Parliament's directives
→ Minister tells McKeen she will be removed from her position; McKeen seeks JR at FC whether she got PF in her dismissal- court says PF requirements met
→ Minister wrote her re termination, provided reasons, and gave her opportunity to respond
What independence issues are raised here?

- decision emphasized fact that gov. undermines appearance of ind. when it changes terms of appointments- however clear (from *Ocea Port* too) that no legal blocks to removing appointees based on their decisions when their appointments are "at pleasure"

Further push for independence? While *Ocean Port* made clear no const. guarantee of ADM independence given their being part of executive, no need to insulate them from executive interfernece to the level of judicial independence.
→ However concept of the 'court' has expanded to give lesser judicial entities const. ind. guarantees
→ 3rd wave of tribunal independence= push to get same ind. for tribunals- thru unwritten const. principles
Mckenzie vs BC (Minister of Public Safety): Mackenzie= residential tenancies arbitrator; her appointment gets rescinded; b/c it used to be done by the courts, where principles of independncce would apply, it should also apply to these residential tenancy arbitration?
→ Court agreed that jud. independence came from *Charter* but also unwritten const. principles

- 'const. in similar…"; these principles protected jud. ind. of JPs- who previously it was unsure
- Given that other adjudicators apart from Js have been extended principles of ind. court ruled that jud. ind. should apply to residential tenancy arbitrators
    - rule of law required it- b/c if landlord/ltenant cases hadn't been carved out of court jurisdiction, these matters would have been settled by ADMs w/ greater independence

→ Rule of law (affirms jud. ind.) prevents legislature from creating tribunals w/ insuff. natural justice just b/c its convenitn to do so; serious judicial activism issues

Adjudication and Policy:
Decisions closeness to government: decision's closer to central government and ministerial power, the more it will look to courts like policy-making- in these cases it's hard to argue bias, absence of impartiality, absent obvious, actual bias

- Farther out from central government, when decision-makers publish policies- arguably there are other safeguards to ensure they perform their roles in a legitimate manner
- dividing line b/w adjudication and policy-making isn't always particularly clear- if you can argue that the decision is making or implementing a polciy, tends to attenuate bias arguments, even if it's an adjudicative process

Expertise- although it's a kind of bias it's one that the law actually likes- the fact that a tribunal has a particular expertise does not mean that it's an impartial or biased

Nfld Telephone:boards play many important roles and these include investigativem adjudicative, prosecutorial functions- these are normally for regulating specific, complex industries/sectors
→ Boards should reflect all parts of societies- including experts w/ technical knowledge, & gov + comm. reps, this includes consumer advocates

- Boards owe duty of fairness to parties they regulate- scope of this duty depends on nature/fxn of the ADM tribunal- but includes DoPF, which requires freedom from bias
- Freedom from bias= *actual* freedom but also unbiased apperance

Test: can R informed bystander (R and right minded) could R perceive bias on part of adjudicator?
→ Public confidence in the impartiality of boards charged with protecting the public interests is required
→ Wide spectrum of different ADM boards: those that exercise adjudicative fxns must comply to standards set on courts (conduct of members mustn't give rise to RAoB)

- other end is elected boards: much more relaxed standard- basically to disqualify they must show they have already made up their minds and won't be swayed by conflicting representations
    - ADM boards that deal with policy will lie towards this end- strict RAoB test would subvert the role that legislature intended for them

→ Utilities boards don't deal with questions of law, but rather resolving conflicting interests- no point to hold them to judicial neutrality standard- perfectly appropriate for members to represent different interests

- Just b/c a board member (on board dealing with policy) expresses strong opinions prior to an opinion ≠ bias; not invulnerable, but courts must be flexible towards the standards they apply in light of an entity's role and function
- However board member must base decisions on evidence presented- even while drawing on exp.

→ Board regulates public utilities, including NTC: At hearing the investigated party owed PF rights (notice of complaint, right to order witnesses to be called, right to make submissions)

- in terms of assessing unR rates, Board does economic analysis- basically policy questions- and one that lies closer to legislative than adjudicative end of spectrum of the fxns of admin. board

→ Once order made for hearing, NTC owed PF- more expected of board members in terms of conduct

- during investigation, 'closed mind' test is appropriate to assess board members for bias
- At hearing stage, higher standard- board must act so that no RAoB
    - this requirement is flexible- not as strict here given policy matter- not adjudication, however Wells statements still created RAoB; Hearing was therefore unfair and is invalid

→ "Everyone appearing before ADM boards entitled to be treated fairly...an independent and unqualified right...it is impossible to have a fair hearing or PF if a RAoB has been established. If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. PF is an essential aspect of any hearing before a tribunal. The damage created by AoB cannot be remedied. The hearing and any orders resulting from it, is void."

Consolidated Bathurst: SC recognizes important role of full-board meetings in drawing on the accumulated expertise of the full size board, and fulfilling the boards mandate of promoting dialogue b/w management and union; and improving the coherence of disputes so it's less dependent on the whims of individual decision-maker; privative clause also meant that board had to take particular care to prevent incoherence.
→ However promoting coherence shouldn't interfere w/ ability of ADM member to make a free and impartial decision- If there was *pressure* on DM to decide against their conscience + opinions this would be problematic- to ensure such meetings accorded with NJ the discussions had to be limited to law + policy- not facts- and if new grounds were raised at the meetings, the parties had be given R opportunity to respond
Issues: Rules of NJ violated? (1) he who decides must hear; (2) the right to know the case to be met

→ According to LB, full hearing was meant to inst. to increase understanding/appreciation of whole board about policy- and to evaluate consequences of policy initiatives on labour relations + economy.
→ Court concludes full meeting might have affected outcome- Board just says final decision still panel's
→ "party to ADM proceeding entitled to a meaningful hearing: (1) must be given an opportunity to deal with material that will influence the tribunal in coming to its decision, and (2) to deal with it in the presence of those who make the decision."
→ Board is quasi judicial so it must comply with rules of NJ, but when making a decision, ADM could overrule conclusion reached at hearing thru applying ADM policy- when performing ADM fxns, still subject to general duty of fairness- failure to disclose policy tribunal using may be breach of NJ- look to circumstances in which the tribunal operate

Gonthier: Did meeting corrupt decision b/c case discussed w/ members who didn't hear evidence/case?
→ Board Chair emphasized need for full board meetings to promote coherence and high quality decisions

- However purpose wasn't to promote absolute uniformity in decisions- policy issues discussed at meetings to allow each member to make up their minds as they like, and preserve panel's ultimate responsibility for the decision- thus discussions limited to policy issues; facts taken as presented
- "designed to promote discussion on important policy issues and to provide an opportunity for members to share their personal experiences in the regulation of labour relations"
- Court notes panel produced 3 sets of reasons- meeting didn't seem to impose policy directive

→ Divisional court- allowed app. for jud. review b/c full board meeting allowed people who didn't give evidence to participate in the decision; arguments may be proposed w/o opp. for parties to respond

- adopted *McRuer Report* recommendations to notify parties and give them opp. to be heard when important policy issues discussed before the full board

SCC: CB claims full board meeting violates NJ (see above)- DMs shouldn't be in position to be influenced by those who haven't heard arguments/evidence- danger rest of board might pressure them and change their opinion- even if it's an honest change; meetings also fail to provide party w/ FAaD opportunity

- not a claim of bias but that full meeting may prevent panel member from freely/ind. deciding decision after hearing opinions at meeting- independence= essential part of acting freely + jud~

→ board meant to help relations b/w employers + management by promoting collective bargaining;
→ Main argument- full board meetings limit independence of panel

- Why full meetings? (1) draw on accumulated experience of members- rules of NJ shouldn't discourage ADM tribunals from this- "reconcile exigencies of types of DM required by special tribunals w/ procedural rights"; (2) having many people at meetings promotes likelihood that panels will make coherent decisions
- court notes full meetings aren't perfect WRT to full opp. to be heard and DMs judicial ind
- Rules of NJ must account institutional constraints of ADM tribunal- NJ must be flexible and acknowledge such constraints- must be flexible
- Given policy considerations + need to maintain coherence + high-quality decisions, can board meet under conditions proposed? Tribunal couldn't fxn if allowed submissions at full meetings
- Though strong authority that only tribunal members who have heard the case can take part in decision, in this case all the members of the panel that made the decision heard all evidence and arguments- the presence of other board members ≠ participation in final decision.
- Gonthier- too far to say any discussion w/ who hasn't heard case vitiates decision, just b/c this might influence DM; here board isn't determining facts, just policy aspects to be considered
    - Distinguish b/w matters of fact and legal and policy matters- perfectly appropriate for full board to provide input on the latter- that's part of its purpose
    - Policy mattesr have a wider impact than case at hand- so treat them differently

- Indepndence doesn't require require absolute freedom from influence- " A discussion does not prevent DM from adjudicating in accordance with his own conscience and opinions nor does it constitute an obstacle to this freedom... the ultimate decision will be that of DM"

Dissent: "the full Board hearing deprived the appellant of a full opportunity to present evidence and submissions and accordingly constituted a denial of natural justice. It could not be determined with certainty from the record that a policy which was developed at the full Board hearing and was not disclosed to the parties was a factor in the decision. That this might very well have happened, however, was fatal to the Board's decision."

- yet to argue that the breach was only technical and resulted in no prejudice requires party asserting this to prove it- lack of evidence (minutes/etc) from board meeting makes this impossible; How can full board achieve consistency uniformity unless it can influence the decision? And (2) even the appearance of injustice can be damaging to the integrity of DM
- ADMs goal of uniformity and consistency can't be prioritized entirely over principles of NJt

Purpose:
- (1) ensure public confidence in DMs- that DMs won't be perceived to make decisions when the results may benefit them or their significant relations;
- (2) avoid 1 side being treated poorly due to decision-maker's partiality due to interests/relationships;
- (3) to prevent decision-makers from basing decisions on irrelevant factors- current/prior knowledge/relationships/actions/practises

2 sides:
- (1) perceptions of individual bias;
- (2) perception of inst. bias- body as a whole raises R perception of partiality in substantial # of cases

Effect: If claim successful, decision of DM will be quashed, proceedings reheard by newly constituted panel
Application: All ADM entities required to meet PF standard are subject to this rule
Test of RAoB:
Committee for Justice: "app. of bias must be a R one held by R and right minded persons, applying themselves to the question and obtaining theron the required information...what an informed person, viewing the matter realistically and practically- and having thought the matter through- conclude...think it more likely than not that the [decision-maker] would not decide fairly?"
→ apprehension of bias must be substantial- not mere suspicion - maybe describe as on a BoP?
→ institutional aspect= when RAoB arises in mind of informed person in substantial # of cases
→ No need to test whether person *actually* biased- just look at external considerations to test whether an objective person would have confidence in the decision-maker.
→ Standard varies widely depending on the context of the ADM- nature and content of of how decisions are made drives what PF includes, and therefore what constitutes impartiality.
- ADM= Quasi judicial + adjudicative= even limited interest in result may lead to RAoB
- ADM= minister makes an order= not very adjudicative= political natured work + public interest= prior involvement in the decisions doesn't create RAoB
- Procedural safeguards determined by balancing various aspects of ADM process- including nature of decision, statutory scheme, and choice of procedures

→ General principles: (1) legislative functions w/ receive more deference from PF viewpoint; (2) investigative work will also have lower PF standard b/c decision isn't binding; (3)
- Uncertain if academic publications that tend to arise from a certain viewpoint will lead to RAoB
- Tribunals designed to have experts so likely they will have some viewpoints
- RAoB is generally applied to individual bias; closed-mind test- different evidentiary burden and a higher standard, usually applied to policy-making and investigatory decisions

Perceptions of Individual bias: CL "presumes strong presumption of impartiality for adjudicators"

- There will always appear to be bias given that tribunals are often designed to represent different sectors and connections b/w them are typical
    - Tension between legislative desire to have experts on ADM tribunals and (SC's) general advisory that DMs shouldn't be mere advocates for those who nominate them but operate as "free, independement, and impartial minds"

Specific Components:
Pecuniary/material interest: indirect (*Energy Probe*) and direct pecuniary interests- latter much worse
Personal relationships w/ those involved: relationships with parties but also other actors- is it (1) an important enough relationship that it might affect ADM's impartiality? (2) Is it a current relationship?
→ *re Pinochet*: decision quashed due to RAoB, new hearing ; Hoffman's relationship w/ charity that aimed to promote same goals as intervenor suff. to show relationship, creating RAoB
Prior knowledge/information: if DM previously involved, consider "nature and extent" of involvement
→ *Wewaykum Indian Band v Canada*: Binnie J had been involved widely w/ litigation against gov; court ruled his involvement had no active role in the dispute;not involved in a suff. material way
Attitudinal predisposition to outcome: sometimes DMs comments/attitude during hearings and outside them may suggests this, suggested an ADM member is acting inappropriately as an advocate
→ *LSUC v Cengarle*: appeal panel found original assumed role of prosecuting advocate- excessive intervention cross boundary from active adjudi. to partisan interference
Other red flags suggesting RAoB?
→ Ex parte communications; sexist, irrelevant, condescending comments
→ Predisposition to particular outcome- arising from comments about case, outside hearing- standard is whether adjudicator has a closed mind such that they aren't amenable to having their mind swayed by submissions
→ Depends on nature + fxn of decision-making process- RAoB doesn't apply to municipal government b/c its natural that councillors would have advocated for positions prior to election (*St Boniface*; given fxn + nature of municipal council, only disqualify for bias if established in fact that councillor has closed mind

- ADMs w/ varying functions can adjust their standards as such; for investigations, policy making, adjudication= more freedom to keep fixed view during policy/investigation than at adjudicative stage
    - Sometimes unclear when to apply RAoB vs closed-mind test (eg. see Nfld telephone)

Perceptions of Institutional Bias: tribunals designed to promote inst. policy making, consistency, collaboration- how do these normative aims accord with adm. principles like adjudicative independence?
→ Bias/Adjudicative ind., and policy making: generally agreed that policy-making vital to tribunals
Ocean Port: SC rules that all tribunals (even if adjudicative) play policy-implementing role;
→ ADMs make policy in 3 ways: (1) decision-making; (2) informal rule making by using soft law as guidelines; and (3) formal rulemaking thru legislation

- promote law under statute ADM administers; promote consistency in decisions that the tribunal makes, and make the tribunal a more efficient process
    - Expertise of ADM tribunals is thus vital to their policy-making function

→ Problems arise when policy-making violates adjudicative independence- which requires that DMs have the ability to make decisions "free of inappropriate interference by other DMss"- adjudicative independence often particularly difficult to reconcile in ADM law with values like furthering the law as a whole- particularly WRT full-board meetings intended to promote consistency/coherence
Full-board meetings: Do tools like this- intended to promote tribunal consistency- create RAoB and compromise individual decision-makers adjudicative independence, b/c adjudicators may be deciding the based on considerations that haven't been raised?
Problem for large boards- policy essentially consistency of results- non binding guidelines people can use to arrange affairs in regulated industry or sector- regulation can't really be effective w/o it

→ **see *Consolidated Bathurst* (above)**

Lead Case Regimes: ***Gez v Canada***: Appellant claims use of lead case was biased, intended to reduce the # of successful claimants- argued successfully at CA- no single fact proving RAoB but collectively raised it

- RAoB can arise from evidence rather than a single fact

Adjudicative independence and legislative process**:** *Paperworks Union v Alberta*- LRB consulted by gov. to help develop act- LRB then attacked in number of cases thru allegations it lacked independence and impartiality WRT matters it worked with government on

Multifunctionality: tribunals designed to regulate areas w/ polycentric issues- thus the members they draw on are designed to include technical expterise in a given area, not just juristic experience

- Enabling statutes often contain specific requirements about how tribunal is to do plurality of fxns
- Primary fear is that overlapping fxns will result in tribunal acting as prosecutor and judge;
    - Some tribunals attempt to limit this appearance of closeness b/w those acting prosecutoirally and those acting adjudicatively- should these steps be considered in impartiality test?
        - Tribunals often have own methods to reduce bias- often thru enabling statutes

Pezim v BC: BC securities ~investigates company insider trading and failure to make timely disclosure;
→ *Securities Act* gives it broad powers to act in public interest; issuer must disclose ownership ASAP
- no privative clause- and enabling *Act* provides for right for appeal re questions of law to CA

SCC: even w/o PC, court should defer to tribunal given its specialized functions and expertise-
→ Central question when determining SoR= legislative intent in granting jurisdiction- this includes looking at ADMs role/function and presence/absence of privative clause- does issue go to jurisdiction of ADM?
- interpret it as a spectrum from Dicey ------> CUPE, with *Pezim* in the middle

→ commission also had public interest (policy) goal- heightens JR deference to ADM's decision
→ Q at issue wasn't matter of legal judgement but technical matters for commission to decide that goes to the centre of its "regulatory mandate + expertise"

Bell v OCHR: Bell says board has no jurisdiction based on answer to Q WRT application of Act; chair of board says he can't tell if it is w/i the meaning of the Act; decides to hold inquiry to see results
SCC: Can OSC issue prohibition to prevent investigation by OHRC in area outside Act's provisions?
→ Must Bell wait for HR board to investigate before asking court to see if HR even has jurisd.?
→ Court says board didn't get a chance to determine meaning of SCDU FTO of OHRA- if they get it wrong, then get a writ to quash; should have decided this first, if Act didn't apply, couldn't proceed further
- Q of law that determines scope of Act's effect and board's authority

Dissent: *Mcruer* report- courts shouldn't legislate- Leg. conferred power on ADM, judiciary shouldn't interfere w/ unless the ADM goes into matters outside its jurisdiction, or exceeds jurisd~ in inquiring into matter w/i its jurisd~, or removes its jurisdiction by making a decision it has no authority to make;
- s.13 gives clear authority to HR board to investigate and make recommendations but it has no authority to adjudicate- however courts have no authority to determine the "desirability or efficacy" of the inquiries the board makes, or inconvenience to those involved

Dissent 2: Agreed w/ CA- prohibition application premature: (a) minister had discretion to appoint inquiry board instead of prosecution; (b) board properly made under Act; (c) board hadn't made any decision; (d) character of premises= mixed Q of fact- and law for which no evidence had yet been before board

Preliminary/collateral Q doctrine: if statutory interpretation must be answered in a particular way for ADM to have jurisdiction, court will review that question w/o deference to ADM b/c it's a matter of policing jurisdiction
→ Wrong question- courts just tell ADM they asked the wrong question, legally speaking, therefore their analysis not owed any respect- allowed courts to substitute ADMs decisions with their own for the most part

CUPE v NBLC: CUPE claims NBLC illegally replacing strikers with managers contrary to the *Public Service Labour Relations Act;* NBLC counterclaims that CUPE picketing, violating *PSLRA*
→ The PSLRA has PC limiting judicial review; employers seek judicial review of PSLRB decision
Issue: How to interpret s.102(3)(a)? Limerick J: interpretation of 102(3)a is a matter of statutory interpretation- PSLRB must get it right before it has jurisdiction to deal with other questions;
→ no authority vested in the board unless 1st Q answered yes- and can't get jurisd. by answering wrongly
→ Old JR based on standard of correctness- ultra vires test: treats ADM like a lower court and feel able to substitute their answer- the correct one- for the ADM's decision, and final court has final say
→ SC makes clear they're going to stop treating as appeals- where majority in lower court gets last word
Dickson looks at reasons for PCs- leg. choice to give ADMs certain tasks- due to specialized expertise, accumulated experience, and judicial restraint- interpreting s.102(3) was at centre of the PSLRB's special jurisdiction- therefore court should only intervene to substitute it's own decision if the board's interpretation was "patently unreasonable...its construction cannot be rationally supported"- or interpretation gives statute a meaning it can't supoort
→ PSLRB's decision can't be construed as so PunR that it takes exercise of its powers outside shelter of

PC- multiple interpretations of s.102(3) at different courts- clearly open to different interpretations
- Evidence of clear leg. mandate to give PSLRB jurisd~ over public sector labour matters-
- In interpreting s.102(3), the board can err- needn't be "correct"

→ Emphasized importance of deference to ADM and their specialized mandate and capabilities
- The PSLRB created specially to balance maintaining public services w/ collective bargaining- and its members have unique skill/awareness of the problems of this balance

→ Jurisdictional issues should be dealt with at outset of inquiry- and let board decide jurisdiction based on their specialized expertise

→ courts can review ADMs exercise of interpretation- but only if ADM did so in a patently unR manner- otherwise respect the privative clause
- Won't review for jurisdiction as AC would- but will review for jurisdiction in some circumstances
- Even w/ PC + deference to technical expertise of ADMs, AC still need a supervisory role

→ **3 sources grounding doctrinal change:** (1) case placed in broader context, reassessing the roles given by leg. to courts and ADMs and role in running regulatory regimes- SCC says courts need to recognize the roles assigned to specialized DMs in implement statute- and they may be better at interpretation; (2) no one perfect interpretation for the statute in Q- and thus PSLRB's could not be described as patently unR- this led to wider critique of idea that there's 1 correct interpretation- and court's should keep this in mind given indeterminacy; Dickson considered meaning of provision in context of statute, its purpose, the effects of different interpretations WRT advancing leg.'s objectives- rather than just construing statute using canons; (3) notes failure to create "coherent, principled" way to differentiate reviewable questions vs those sheltered by privative clause- and that prelim./collateral Q doctrine was not helpful; courts shouldn't be overeager to label issue as jurisdictional- but jurisd~ issue should be determined at the beginning of inquiry- here the board's authority (thru statute) was clear- over parties, and the issue, allowing inquiry
- then court has to ask if the board exercised its powers in a way that would remove privative clause
  - Short of patently unR interpretation, courts shouldn't interfere with ADM decision

→ Jurisd~ question- assess according to correctness standard; Questions w/i jurisdiction= patent unR

→ Rejigged relationship b/w ADM institutions and judiciary- seemed to step back from interventionism

Changes when jurisdiction error doctrine should be used- be cautious about labelling issue jurisd~

→ Series of cases read s.96 to say that ADMs could not entirely oust jurisdiction of courts of original juris~
- essentially a CL principle- of judicial review- was constitutionalized;

Bibeault v Quebec: SCC: P&F analysis for determining the standard of review + Correct

→ If within its jurisdiction of ADM actor, only a patently unR error can be reviewed; if it's a jurisdictional question, it's subject to correctness standard

→ if wrong in interpreting its decision- so it exercises jurisdiction it does not possess, any error=fatal

→ How to determine jurisdiction? Look at whether leg. intended Q to be within ADMs jurisdiction
- If ADM has expertise, might presume legislator intended ADM to be able to use that expertise
- Consider wording of enabling Act, the purpose of the enabling Act, reasons for ADM's existence, expertise of its members, and nature of problem before ADM

Southam: *Tribunal***:** ADM considers a bunch of evidence WRT to complex economics questions

FCA: tribunal failed to consider relevant factors= matter of law, and unprotected by the privative clause
- Failure to consider relevant issues= error of law, therefore no deference to that decision
- Any tribunal decision WRT matter of law can be appealed- not sheltered by PC

SCC: if tribunal ignored evidence required to consider= error at law; if they considered all the proper evidence but came to wrong conclusion= error of mixed law and fact

Statutory right of appeal: review standard varies from vary from correctness to patently unR

→ no PC - so juris~ not an issue; tribunal gets juris~ from statute, court from statutory right of appeal-

→ b/c of statutory right of appeal, no need to look at whether tribunal has exceed jurisd~

→ SoR instead as if tribunal is lower court- look at enabling statute, nature of problem, and expertise
Nature of Problem: it's mix of law (what's proper legal test) and fact (what took place b/w parties)
→ Tribunal didn't err at law by not considering relevant factors; nor did they err at law by failing to give enough weight to certain factors- nature of balancing test is that adjudicator doesn't give decisive weight to one factor- if error, it was in applying law to facts= mixed Q of law and fact
→ weighing of factors is a matter for tribunal- not a Q of law, provided they *do* consider them
→ ADM answers to Qs of mixed law and fact are owed some deference by appellate courts
Enabling Statute: provides broad right of appeal (as if TC) suggesting less deferential attitude is appropriate- especially considering lack of PC- but not determinative
Purpose of Statute: primarily economic rather than legal, involving matters better understood by business~- part of the rationale behind creating a competition tribunal
→ b/c of complex issues addressed by tribunal, AC's less able to understand factors at play in ADM decisions- thus owed relatively more deference b/c courts less able to implement purpose of the Act
Tribunal's Expertise: most important factor when determining SoR- helps to find leg.s intent re. how much deference reviewing courts should show if "no full privative clause"
→ dispute at issue relates to economic issues- better dealt with by businessperson than judge

- Expertise of may members of tribunal vital to applying the "principles of competition law"

Standard: b/c of the complexity of issues dealt with by tribunal, courts should be deferential- therefore standard= reasonableness; With factors weighing both for and against deference, no clear choice of either correctness or patent unR standard- so court chooses R standard
Standard of reasonableness- unR decision= one that "is not supported by any reasons that can stand up to a somewhat probing examination."
→ SoR b/w PunR and correctness- PunR basically a jurisd~ test and appeal right puts aside jurisd~ issue
→ New standard helps with new focus on expertise- rather than just looking for PC- which was amenable to patent unR standard for issues w/i jurisdiction, and correctness standard for issues *of jurisdiction*
→ SoR of R accounts for complexities of issues that tribunal deals with and "need for effective regulatory instruments administered by those most knowledgeable and informed about what is being regulated"- but still allows for jud. intervention if it acts unR
→ R standard requires considerable deference to tribunal decisions on matters w/i their expertise

- Not enough to say Tribunal acted unR- reasons w/ logical grounding + coherence- not correctness

→ If defect facially obvious in reasons, likely PunR ; if more difficult to find error, more likely to be unR.
→ Most deferential standard (patent unR) only if privative clause- when you need jurisd. issue to intervene

Binnie Speech: development of concept of restraint and judicial review-
→ Deference now the rule if ADM has any expertise- yet political accountability is much weaker at the local level within executive branch- the real decision-makers now receive far less scrutiny
→ Legislative intent WRT who should decide issues is a shell-game
→ Core jurisdiction of s.96 superior courts is being eroded- both by voluntary abdication of power + deference but also anti-terror legislation that removes some of their powers- and super-tribunals for dealing with administrative complaints- instead of the courts

- Binnie concerned that courts are beginning to avoid policing general law
    - no longer following lead of UK courts in terms of doctrine of substantive legitimate expectations
- What checks executive power in modern ADM?

→ *Southam's* creation of a 3rd SoR was heavily critiqued- balancing test created contrary indicators WRT deference and thus didn't offer much guidance or predictability- tough to distinguish unR vs patently unR

Pushpanathan v Canada: Central factor to determine SoR is finding legislative intent in creating the ADM
→ Did leg. intend Q to receive deference- sole right to determine meaning- look at (1) privative clause?; (2) expertise; (3) overall purpose of act + relevant provision; (4) nature of problem- law, fact, mixed?
- arguably boils down to legislator's view on judicial supervision- and courts view on ADM's expertise

PC: favours deference- not determinative- b/c whether issue is jurisdictional (correctness) or w/i jurisdiction (patently unR) relies on courts expertise assment
→ lack of expertise can outweigh PC- and it may not outweigh courts view on ADM's lack of expertise
Expertise- most important factor for determining SoR
→ Look at ADM's expertise- relative to court, and nature of specific issue relative to this expertise- if specialized broad expertise WRT general questions- considerable deference (*Southam* + *Corn Growers*- court applies patent unR given specialized functions of ADM)
→ Court will defer to technical knowledge in regulatory issues (eg. economic/financial/technical matters) when ADMs have experience/expertise/specialized knowledge
→ Less tolerant of expertise of HR-related ADMs given importance of 'rights adjudication" to judicial fxn
→ Tho expertise important to SoR, only focusses on ADM's role- not abilities, training, experience of indvl
Purpose of Statute and Provision: If they are polycentric (interest balancing, contains sign. policy element,or vaguely describes legal standards)- greater judicial deference/restraint
- more adversarial statutes require less deference- courts more experienced in such matters

Nature of the Problem: divided into Qs of law (less deference), mixed law and fact (neutral), and fact (more deference)- basically flows from courts relative expertise;

Dunsmuir: Presumption of deference for substantive JRs- arguably default, unless exception applies
- Deference is central element of judicial review- and applying R standard won't attack decisions that might have been protected by more deferential patent unR standard

→ 'functional and pragmatic test' → 'standard of review' analysis
→ Court asks that precedent be applied: (1) check whether jurisprudence has decided the level of deference in similar categories; (2) If not, go to standard of review analysis
(A) Rule of law must be balanced with democracy concerns- courts must ensure they uphold law while respecting the functions that legislators and executive have delegated to administrative entities
- can courts act to promote collective goodness as advocates or to place constraints

→ Rule of law= exercise of legal authority must be sourced in law- prevent arbitrariness (see appendix)
- DMs exercise power according to statutes that are also confined
- para 30- RoL affirmed by ensuring courts can police jurisd~ limits; leg. authority affirmed by narrow circumscription of tribunal jurisd~ limits
    - Judiciary isn't sole place to decide Qs of law- executive has its own skills

(B) New SoR analysis: Court critiques the old 3 way standard: (i) too hard to choose between so many- and hard to distinguish b/w unR and patent unR; (ii) patent unR standard means you might have to accept an irrational decision- if it's not irrational enough to meet patent unR standard
- Old doctrine of facially unR (patent unR) vs less clear unR (unR standard)

→ Backwards step to remove R standard and go back to pre-*Southam* all/nothing standard (strong PC= R; weak/absent PC= correctness)
→ **Reasonableness**: "R= deferential standard animated principle underlying previous standards of reasonableness: some questions faced by ADMs don't lend themselves to a specific, particular result. Rather, they may have multiple, R answers. Tribunals have a certain scope w/i the range of acceptable and

rational solutions. A court conducting JR review for R inquires into the qualities that make a decision R, referring both to the process of articulating the reasons and to outcomes.
→ **When to show deference?** R is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"
appropriate attitude for courts to use when approaching these questions- (i) court should respect ADMs; (ii) pay attention to their reasons and what they might have said, and their application of expertise; (iii) respect ADM's legal analysis- particularly WRT field sensitivity (get appreciation for legal Qs around issues you frequently do); and (iv) their decisions WRT to facts and law; (v) respect choice of legislature to place admin. schemes in "hands of ADMs" and their resulting expertise and different roles of ADMs and courts in constitutional framework

- However correctness standard needs to be retained for jurisdictional and certain other Qs

→ Somewhat confusing- would new R standard set aside earlier decisions judged as not *patently unR*? Yet new R likely doesn't simply mean patently unR
→ WRT Qs of fact, discretion or policy, or mixed fact and law, fairly easy to apply the R standard and show deference- but many legal issues will attract correctness standard
→ privative clause= strong indicator that R standard should apply- evidence of Parliament's intent; but not determinative as this would undermine JR power and rule of law
→ Qs of law involving interpretation of enabling statute= R standard (deference)- assumed ADMs have experience in such matters; also where ADM has particular familiarity- eg. labour context

- application of general CL rule for the purposes of statutory interpretation= R standard
- Provided that the ADM has developed expertise "in relation to specific statutory context"

When to apply correctness standard? Correctness= no deference, court will analyse questions to see if it agrees with ADM's decision; if not, court's decision substituted
→ **Q of *law*=** Correctness standard due to concerns WRT consistency and predictability for law Qs
(I) Q of law relevant to "legal system as a whole" and outside adjudicator's area of expertise; (II) Qs of interpreting *Constitution Act 1867*; (III) Qs of overlapping jurisdiction between multiple tribunals; (IV) True Qs of jurisdiction or vires- eg. does city have jurisdiction to make by-laws controlling # of taxi-plates; (V) Qs of such character are preliminary to tribunal considering it= Q of vires

- Not meant to be a return to jurisdiction/prelim. Q doctrine, but ensure ADM had authority to make inquiry- "true jurisdiction" arise when ADM determines if it was granted statutory authority to inquire

→ Court renames P&G analysis, the "standard of review analysis"- uncertain how the "P&F approach" from *Pushpanathan* accords with presumption of deference in standard of review-
Test: (1) check if jurisprudence has determined degree of deference for given category of Qs; if no precedent for SoR given context, (2) apply presumption of deference perhaps supplemented by balancing of factors- look to presence/absence of PC, purpose of tribunal (based on enabling statute), nature of Q at issue, and expertise of tribunal
Adjudicator's PF decision? Separate from statutory interpretation- was Dunsmuir entitled to PF?

- Court overturns *Knight* (at-pleasure office-holder entitled to reasons and opp. to make submissions) - use principles from private law K rather than her/his status as a public-office holder
- Focus on nature of employment relationship b/w public employee and employer- if there's a K of employment, K law applies, not general principles from public law

PF determination: Adjudicator did have jurisd. to consider PF but failed to first identify the nature of employment relationship and the applicable law- if he had, would have recognized it was K, thus no PF
→ *Ridge v Baldwin* and later *Nicholson* re-enervated PF and NJ concerns- soon PF required for a wide set of ADM decisions; recognized as general legal principle applicable to all public authority

→ Distinction b/w office holders and K employees to determine if right to PF- however this is a difficult one because most office holders are employeed K- so unclear if PF applies

- If public-office holder has K, most of the reasons to impose PF lose force

→ If public authority dismisses employee under K, no public purpose to impose DoF; Court says discard distinction b/w office holders and K employees- at least for public law DoF- the nature of employment relationship is what matters- and if K, private law K applies, even for public office~

Judicial Review: closely linked to tension between rule of law and democracy- in exercising const. power of judicial review, courts must balance RoL and legislative decision to delegate certain functions to ADMs

- Rule of law goes to the purpose of JR and helps ot determine its functions and operations

→ Use of public authority must be grounded with law- when entities exercise legal authority, it's limited by CL, enabling statute, or constitution- JR helps to ensure their legal authority isn't exceeded

- "function of judicial review= to ensure the legality, R and fairness of ADM process and its outcome"
- If ADM acts outside legal authority, violates rule of law- SoR analysis tries to determine the authority intended to be granted to the ADM
- JR maintains rule of law (b/c courts decide jurisdiction) and legislative supremacy because SoR analysis determined by looking for legislative intent
- Legislature can't remove courts power to review the const. of ADM decisions- const. protected- esp. for finding/enforcing jurisdictional limits

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Dissent (Binnie): majority basically went through same process they said needed reforming

Correctness: enabling + closely connected statutes attract R, other matters should attract correctness

Basic Limits on Allocating DM: (i) legislature can't give ADMs jurisdiction over issues assigned to courts under s.96; (ii) any ADM action/use of power must be based on statute/CL powers;*Vires*- whether or not power exists should be a matter for courts to decide- not DM- these are basically Qs of law; rather than debating over whether an issue has central importance to legal system as a whole, merely exempt home statute provisions and closely related statutes from correctness standard; otherwise leave Qs of law to court; (iii) courts should have final say on requirements of PF

→ **What if substantive outcome challenged?** When this occurs, reviewing judge Once courts question substantive outcomes, intruding more into ADMs functions- why should court view of R of a policy or exercise of discretion be preferred to ADMs who leg. allocated power to- except if fulls tatutory right of appeal or standard of correctness

- ADMs are usually respected for their expertise- rather than their seniority/lack thereof
    - However in quasi-legislative matters, less expert people may warrant greater deference

→ Correctness standard straightforward- but 'R' standard may require a range of attitudes of deference

- Given diverse set of actors/issues/expertise weighed by P + F analysis, how can these be simplified into 2 standards of deference? Sure they cause delay, uncertainty, unpredictability
    - One major objection to P&F analysis was the amount of time it required spent in court arguing over it, rather than focussing on the issues- and may be overturned

→ Binnie suggests majority's choice won't resolve this but will require 'heavy-lifting' to be completed when R standard applied- will result in R standard to turn into a "spectrum of deference" depending on the factors that would have been balanced in P + F analysis- underlying problem of deciding precise degree of deference remains

- Arguably collapsing all but correctness into "R' standard will result in "applying the R standard more deferentially and sometimes less deferentially depending on circumstances(see para 153)
- Danger of calling most deferential standard 'R" is that judges might not just ID usual issues (failure to consider relevant matters or vice-versa), but reassess what went into ADMs decisions
- Here, "judge's role is to ID outer boundaries of R outcomes w/i which the ADM is free to choose."

→ **Privative clauses-** should preclude JR unless applicant can show some reason why it shouldn't be given effect- don't assume inconsistency b/w court's and legislature's view of the law-
- strong presumptive factor against judicial review on substantive grounds

→ Standard of review for PF is correctness;
→ **Presumption for substantive review= R**, given that legislature has allocated DM power to ADM this requires deference, absent statutory right of appeal; presume decision was R, until applicant shows not
- If applicant wants correctness standard, they must show error in determination of Q of law that ADM had no jurisdiction over (jurisd question or constitutionally)

→ UnR can't just mean irrational- as majority suggests- you can make a rational but unR decision
→ New R standard has a number of contextual indicia of reasonableness- how to determine if outcome was outside R responses that DM had authority to make? Look at nature and fxn of DM considering its (i) expertise; (ii) terms/objectives of home statute; (iii) privative clause?; (iv) nature of issue; together determines how much discretion is conferred- eg. does it implement policy?
- may require consideration of DM's balancing b/w impacts of decision on people and public policy
- though these were previously used to determine SoR

→ Excessive complexity of the P + F test has led to significant inefficiencies in litigation

Dissent #2 (Deschamps): Focus on the nature of the Q- if of law, don't defer unless there's a privative clause; if mix of law and fact maybe defer; pure Qs of fact= Attract deference
→ basically treat like appeal from lower court unless privative clause- or issue of interpreting home statute
→ Would unsettle quite a few cases
→ Regardless of the complexities at issue, standard of review for Qs of law= correctness
→ Extremes of Qs of law and Qs of fact are fairly settled- mixed Qs of fact and law is less clear what type of deference it will receive
- Maybe likes idea of expertise too much to go here- wants to preserve deference to expertise?
- In *Southam* not clear what the just outcome was- perhaps in such cases court needs a reason to advocate for

3 Wider Questions that ground judgements:
(1) do I know enough to make an informed decision about what is just or unjust? If no, the court will be seriously deferential towards ADM's decision
(2) Is it possible judger has biases that make them the wrong person to decide what's just/unjust?
    a) See history of labour relations and judicial role in this matter
(3) Important public issues that go beyond the immediate consideration of justice/injustice of immediate facts
    a) If one of these issues, court will show serious deference

→ Absent one of these factors, judges may just pay make a show of deference- but then just decide it's unR anyways

Role of Jurisdiction: jurisdiction had been used to avoid PCs by labelling decisions as outside jurisdiction- what happens when PCs become much less importance post *Southam*- when deference can be justified w/o privative clause, or correctness applied even with PC?
→ *Dunsmuir*: breathes life into jurisdictional issues as creating outer boundaries- answer to this Q can rebut deference presumption- post *Dunsmuir* courts are hesitant to call issue jurisdictional- invoking correctness
Are there jurisdictional questions?
Alberta *(Info and Privacy Commissioner*) questioned whether jurisdiction existed as a “true question” WRT judicial review and whether it was needed to determine standards of review
→ Decades of jurisprudence hadn’t produced clear response to true Q of jurisdiction
→ *Dunsmuir* listed criteria for correctness standard- and judicial review had received const. protection, meaning that loss of jurisdictional category doesn’t mean a danger to judicial review or correctness
→ Cromwell disagreed WRT jurisdiction- arguing that if there’s a decent argument that a provision should fall into correctness standarf of review, outside presumption of R, look to legislative intent-
→ Binnie: agrees (Cromwell) that jurisd~ is fundamental but agrees w/ majority’s attempt to discard the issue due to its limited usefulness

- Repeats belief that R will devolve into spectrum of deferential attitudes- and thus in some cases may look like correctness- and revises the deference exception of Q of central importance to whole lega system, to a broader concept of Qs of law WRT legal matters outside ADMs statutory scheme under review- and that aren’t within ADMs “core functions and expertise”

→ Arguably the grounds for applying correctness as listed in *Dunsmuir*, are similar to the jurisdictional situations prior to *Dunsmuir*- eg. issues of PF, const~, competing jurisdiction b/w tribunals, and Qs of law outside ADM’s experience and of wider importance (

Patent unR: courts justified disregarding privative clauses by const. JR and viewing it as part of a balancing act between the rule of law and parliamentary sovereignty
→ Post-*Southam* some laws adjusted to explicitly state the requisite standard of review depending on various grounds- this created problems when statutes post-*Dunsmuir* included patent unR

- Basically requires interpretation in light of the CL context- so PunR can live on but its content and and degree of deference it will receive, will depend on general principles of ADM law

→ *BC v Figliola*: SCC considered if BCHR exercise of discretion was PunR- court didn’t interpret PunR because the BC *Administrative Tribunals Act* defined it.
→ *Shaw v Phipps*: court interprets PunR in light of legislative intent, holding that the use of this standard in the OHRC was meant to create highest level of deference- but once highest level of deference became mere R, meant that you had to respect Qs “within ADMs’ specialized expertise” unless unR

Central Q to Legal system as a whole/Outside ADMs Expertise?
→ Shift in SoR towards deference assumes the ADM’s expertise in in interpreting their enabling statutes unless evidence suggests otherwise

- Jurisdiction and constitutionality Qs simply lie outside this expertise
- Qs of central importance to whole legal system have correctness standard applied only if outside the ADMs specialized area of expertise

Celgene Corp v Canada: R standard usually applies when ADM is intepreting enabling statute
Smith v Alliance Pipeline: adds that nature of task and mix of fact and law will support R standard
Mowat v Canada: for the purposes of CHRA, does ‘any expenses’ include legal fees- so offender has to pay the legal fees victim incurs due to discriminatory conduct
→ HRT decisions don’t receive much deference- particularly on general Qs of law; little deference for HR interpretation of enabling statute; these factors suggest standard of correctness- but *Dunsmuir*’s discussion of expertise suggests more R

→ SCC just decided R standard while avoiding disregard for pre-*Dunsmuir* authority that invariably applied correctness to HR tribunals

- Held that the matter of costs incurred due to discrimination fit well within the tribunal's mandate and expertise "to make factual findings related to discrimination" and the Q of whether the ADM could grant compesnation can't be said to be a Q of general importance to legal system and outside ADMs specialized expertise
- At *FCA* level there were 2 conflicting interpertaions of same part o fstaute by different panels of same tribunal; decided that they couldn't decide conclusively whether answer fell w/i range of reasonable outcomes
    - Thus on the basis that rule of law requires public statutes to have a "universally accepted intepretation," FCA held that consistency and predictability concerns meant that the Q of whether ADM could order costs was one of central importance to general legal system- and outside tribunal's expertise
        - Conflicted with *Domtar*, where SCC said that inconsistent interetations didn't give rise to inde. reasons for stricter judicial review, if otherwise deferential

→ SCC didn't really address problem of conflicting decisions- just was unR for HRT to include legal costs

Charter, Discretion, and SoR: if JR app involves several issues, the SoR will sometimes vary for each

→ This will occur when "1 link in a decision chain attracts a different SoR than other links"

- *Dunsmuir* simplified this by increasing the frequency of deference

→ Can arise when appellant advances different grounds to quash decision- ADM interpreted general law wrong; OR ADM interpreted general law correctly (reviewing courts view of correctness wins) but ADM didn't apply peroperly to the facts (ADM gets deference for this decision)

→ When discretion and *Charter* issues arise, will complicate through segmentation

Suresh: deportation based on various questions- some of which attract deference, others which require correctness- on the Q subject to correctness standard (does deportation of non-citizen to torture violate s.7?) they answer with 'no unless in exceptional circumstances'- and then asks minister to consider if the benefits of deportation them outweigh the harm of deporting them to torture

- Court doesn't specify standard for review for this further Q- usually weighing of factors will attract discretion- but in this case it seems like court allows deference to minister's decisions to decide whether their "discretionary decision violates an individual's Charter rights"- seems contrary to "normative and inst. foundation of the Charter"

Purpose of Reasons:

→ PF: meant to help claimant know why decision is made- and let reviewers assess its validity

- Perhaps if reasons don't show basis for decision they fail to qualify as reasons

→ Also help to show the substance of the decision- fact finding, interpretation, application of law to fact, exercises of discretion- essentially they show R/correctness when statutory authority exercised

→ Some overlap b/w looking at reasons for their formal adequacy- for PF reasons- vs looking at their substantive content- if you look at them in terms of procedure instead of substance may produce excessive intrusion up correctness standard

→ *NFLD Nurses*: SCC ends debate over form of reasons vs content of reasons as a basis for judicial review

- *Dunsmuir* didn't mean adequacy of reasons alone is good enough reason to quash decision or that reviewing courts have to separate analysis of reasons and result
- Instead Abella significantly narrowed duty to give reasons- breach of DoPF= error of law; if no reasons where required- nothing review; but if reasons no breach of DoPF- so any challenges to the decision should be based on R standard

Conclusion: SCC seems to shift towards deference: Pay attention to Binnie in *Dunsmuir*- simplifying of standard of review and making deference into just R, resolving the standard of deference in its various context now will likely occur at the stage where correctness or R is applied to actual decisions

Wildeman:
Dunsmuir combined SoRs into 2- correctness and reasonableness; the majority hoped that this would simplify task the of choosing a SoR and shift the focus of litigation on the ADM decisions

- Rather than mess around with trying to determine appropriate SoR, the reviewing court could get the substantive matter of whether challenged decision is good under the law
- Historically much of the work has been done at SoR stage- actual application of the SoR less difficult
    - When correctness applied, the court's consideration of legality has looked at the matter as if you only need to make the law "speak for itself" (327) that requires autoamtic assent to the judicial interpretation of legislative intent
        - Doesn't seem like there's suff. justification of the substantive legality of the decision

Standards of Review in Theory and Practise:
Correctness Review Theory: correctness applies automatically for cases involving const. Qs, true Qs of jurisdiction/vires, Qs involving relative jurisdictional scope between tribunals, and Qs of law central to whole legal system + outside adjudicators expertise
→ ***Dunsmuir*** may have had the effect of reducing scope of correctness by specifying what specific Qs attract correctness, and showing that jurisdictional Qs should be assessed narrowly

- However didn't seem to require change doctrine on how to apply correctness- the standard seems relatively simple- but it's not- what does getting the decision "right" mean?

→ *Ryan* described correctness as court taking its own reasoning process to get a result it sees as correct- yet key feature of deference is considering ADMs reasoning- *Ryan* suggests that correctness requires little to no effort to consider ADMs reasons

- This was further confirmed by *Dunsmuir*- court won't defer to ADM but will do its own analysis- if court doesn't agree with ADMs decision, they will substitute its own view + answer
- **3 rationales from *Dunsmuir* to apply correctness:** (1) Jurisdiction- ADMs assigned authority has certain boundaries- and decisions outside their authority don't require deference- this would be unconstitutional- and certain courts are uniquely equipping to police jurisdiction; (2) Expertise- ADMs shouldn't receive deference for matters it has less expertise compared to generalist judge (eg. legal interpretation)- though Diceyan approach undermined by exceptions recognizing interpetive expertise of certain ADMs inc ertain areas; (3) consistency and predictabiltiy concerns- judges are best able to resolve disputes about legal interpretation, particularly when needed to ensure equality under law
    - These buttress the force of the correctness SoR as a part of substantive review- however jurisprudence seems to be trending towards a const. plurliast model that requires greater incorporation and recogniztion of the perspectives/reasoning processes of ADMs- is it antiquated given the "strengthened rationales for and guidnace on the application of context-sensitive standard of R"?

Correctness Review Practise:

Bibeault: Beetz said it was a jurisd. issue, so no deference- basing this decision this on a look at statute, which included "terms of art at civil law" (requiring general legal expertise to interpret), the purpose of the relevant provision given the broad principles of the statutes; Beetz held that the labour board + courts construction of the the provision gave the relevant "terms of art" a non-legal, uncommon meaning, out of sync with the purpose of the *Labour Code*, - Beetz's judgement seems to prefer coherence b/w statute and civil law- vs context-focussed interpretation of the tribunal;
Mossop: SC overturns HRT decision because the "family status" prohibited ground couldn't be interpreted as including same-sex couple; they adopt correctness standard;

→ Majority adopts positivist approach to interpretation- b/c no Charter claim, the court argued that they were bound by contextual indicators that family status ≠ same sex;

- Given absence of PC + lack of expertise of the HRT, deference only owed on findings of fact, not law-; Strict question of statutory interpretation (correctness) was there discrimination based on "family status"?
- *HRA* didn't have sexual orientation as a prohibited grounds- Parl. had chosen not to include it even while adding family statuts (despite HRC's recommendation) which SC took as clear Parliamentary intent to not refuse to protect sexual oreintation as a prohibited grounds for discrimination- thus no ambiguity in terms of meaning/scope- which otherwise might require looking at purpose and perhaps using the Charter as a means to interpret the statute

→ Concurring judgement also looked at leg. intent- based on usual/normal meaning of words in statute, given context and purpose, La Forest looked at meaning of the word family, which he held as a traditional family in view of general Canadian public b/c that must have been Parliament's intent at time statute created; and contrary to Mosopp's claim, La Forest didn't think it the traditional family had yet come to include SS relationships

- La Forest noted that although courts are deferential to the expertise of ADM's (esp. labour boards, who have expertise even on Qs of law w/i their expertise, given their role and functions)- however HRT are quite different and thus receive less deference; they have a much wider field; their expertise only relates to fact-finding, not general Qs of law like this case- these are in realm of the judiciary and subject to correctness SoR
- " In sum, neither ordinary meaning, context, or purpose indicates legislative intention to include same-sex couples within "family status"

LHD (**Dissent**): takes normative approach to statutory interpretation- even if Parl. had some idea about scope of family status, failure to include definition in Act means that concepts of equality + liberty from HR sources aren't bounded by statute and thus HR statutes should be considered in light of HR principles- such principles are statute-specific not fundamental

- At tribunal level, 'family status' considered ambiguous- needed to be given a meaning R in context of the term, Parl. intent, and object/scheme of Act;

- Need to balance leg. intent to give ADMs capacities to resolve issues quickly and efficiently, by reducing appeals to courts; they may also develop expertise; However the multitude of ADMs w/ varying degrees of expertise means more than 1 SoR required lest efficiency comes at cost of harming vulnerable, eroding public confidence;

-LHD emphasizes deference- noting that review power is discretionary, and given rationales for deference, errors should be serious to invoke supervisory power- the Act gives the CHRC wide powers (=more deferential); No privative clause but no provisions present that weigh *against* deference either; clear Parl. intent to create a specialized tribunal w/ significant powers and capacities to balance "a variety of social needs and goals"; the tribunal should have jurisdiction in interpreting its home statute

- And the Q of whether Mosopp suffered discrimination= Q of fact at heart of ADM"s jurisdiction
- Courts should recognize specialized expertise of certain ADMs- and field-sensitivity they develop
- Disliked majority's interpretation that favoured an inferred legislative intent as holding the "will of the majority over HR principles"- preferred CL constitutionalism where statutes should be read w/ the "animating principles and values of social/legal tradition"- she notes the unsettled definition (compared to majority's assertioN) of "family status" by looking at wide set of social science sources- social facts should be considered when looking at legislative intent- the bounds of a statute aren't enough; And she suggests HR legislation should be interpreted broadly and purposively consistent with its overall goals and values it's designed to protect-

- By taking a normative approach, she finds the tribunal's choice to look at the wide and varying purposes underlying "family status" could easily support the tribunal's decision- and this lay within the ADM's jurisdiction

→ In choosing patent unR standard seems to balance the considerable power placed on jduges in CL const. by showing deference to role of tribunal in doing this; LHD sees tribunal's decision also as statutory interpretation, considering both facts and values.

- Proper SoR is based on whether Parl. intended the Q to be w/i ADMs jurisdiction? If yes, courts should only intervene if ADM's decision is patently unR.
- Balances respect for Parl. giving authority to ADM and idea that tribunal should "transcend narrow constructions of Parl. will" while administering statute
- Concurring Js agreed statute should be considered in light of social context and in HR principles

Northrop: Tribunal decides non-Canadian companies have standing based on analysis of their home Act and the AIT- no basis to say only Canadian companies had standing to complain under AIT

→ FCA + SC apply correctness standard to quash it (jurisd~ issue) based on analysis of the AIT and related statutes- court looked at the express purpose of the AIT and the overall consequences for Canada's international trade if foreign companies given same rights.

- FCA's correctness review took into account the CITT's reasoning and specifically noted its errors as well- more of a dialogue with the tribunal

→ SC correctness review didn't take much notice of tribunal's reasoning- and neither court accounted for the CITT's purposive interpretation that the Act's objectives could be advanced by recognizing non-Canadian companies

- Though this was in line with correctness review, the FCA's reasoning took more seriously the CITT's analysis- is this preferred as a method to help everyone involved (public, CITT, etc) to decide whether quashing of CITT's decision was justified?

Government Attempts to standardize law WRT Administrative Tribunals:

→ ADMTs had been set up as an alternative to courts for efficiency reasons, expertise, etc

- However judicialization of ADMs, aimed at reducing costs/increasing efficiency
- The ATA represented an effort by the legislature to, among other goals improve quality/timeliness of decisions, provide more opportunities for earlier review of decisions; give tribunals more statutory power over dispute resolution; promote certainty and finality by reducing appeals; restructure tribunals so their mandates are focussed on technical expertise rather than legal matters
    - These goals were advanced through the ATA codifying and standardizing laws around ADMTs and standards of review:

→ General aims of *ATA*? increase accountability for appointments; dispute resolution; Charter and human rights jurisdiction; SoR

- Many of the issues that had been addressed by caselaw; inter alia independence issues related to ADM remuneration, the procedural rights at tribunals (eg. right to compel witnesses, representation) , ADM jurisdiction in areas like constitutional and Charter Qs; the provision of reasons and notice, standards of review depending on certain factors, and what certain standards of review entail

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

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

(a) a finding of fact/law/exercise of discretion by ADM WRT a matter over which it has exclusive jurisdiction under a PC must not be interfered with unless it is PunR

(b) questions about the application of CL rules of NJ and PF must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
(c) for all matters other than those IDedin paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

- anything outside of tribunals' exclusive jurisdiction

(3) For purposes of subsection (2) (a), a discretionary decision is patently UnR if the discretion
(a) is exercised arbitrarily or in bad faith,
(b) is exercised for an improper purpose,
(c) is based entirely or predominantly on irrelevant factors, or
(d) fails to take statutory requirements into account.

S.59- SoR if tribunal's enabling Act has no PC:(1) In JR proceeding, SoR to be applied to a decision of the tribunal is correctness for all questions except those WRT exercise of discretion, findings of fact and the application of the CL rules of NJ and PF

- all legal findings subject to correctness standard

(2) Court shouldn't set aside ADM's fact finding unless no evidence or if (patently unR), in light of all the evidence, the finding is otherwise UnR
(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
(4) For the purposes of subsection (3), a discretionary decision is patently UnR. if the discretion
(a) is exercised arbitrarily or in bad faith; (b) is exercised for an improper purpose; (c) is based entirely or predominantly on irrelevant factors, or (d) fails to take statutory requirements into account.
(5) Qs about the application of CL rules of NJ and PF, consider, given all circumstances, did ADM decide right?

Khosa: How do *Dunsmuir* CL principles interact with judicial use of statute-based JR power?
Binnie: Romantic const. pluralist view of JR;
→ With or w/o PC, ADM decision owed some deference- on facts, policy, and ADM's interpretation of enabling statute- multiple valid interpretations + ADMs develop significant expertise
→ 18.1 can't have meant to create 1 SoR- needs to be flexible to address variety of ADMs and contexts

- to invoke FC's review jurisdiction, you need to have 1+ of the grounds found in s.18.1- these specify the boundaries/threshold which permit courts to grant relif, but not which SoR applies

→ Provisions of s18.1 provide for relief to FC when ADMs, inter alia, act outside jurisdiction, errs in law or fact, fails to observe PF, but doesn't specify SoR or in what cases, if the issues has been proven, relief will be withheld- for these matters you need to turn to CL

- Clear that ADM fact-finding should receive high deference; Adopts "R" standard; weak privative clause; "R" standard aims at transparency, intelligibility, justifications

→ Binnie acknowledges that legislature can oust CL thru clear and express language- as has been done in some jurisdictions- and this includes specifying SoRs, if intent is clear;

- However courts will interpret it, if possible such that (a) grounds of review ≠ SoR; (b) apply *Dunsmuir* to find proper SoR; (c) presume they have discretion to grant/withhold relief, based on guidelines from *Dunsmuir* demanding restraint in judicial intervention into ADM matters

→ 2 step JR: to get JR through FC need to fit your claim within its provisions- past this threshold, Dunsmuir applies, regardless of presence/absence of PC: (1) Precedent- SoR already determined?- if no, go to SoR analysis from Dunsmuir; (2) If jurisprudence, inconclusive, consider a whole (a) presence/absence of PC- presence weighs against JR, tho right of appeal may counter; (b) purpose of ADM as determined by enabling Act; (c) nature of Q at issue before ADM; and (d) ADM's expertise;
→ "R takes its colour from its context. *Dunsmuir* liberated JR from undue complexity and formalism. When R applies, requires deference. Reviewing courts can't substitute their own appreciation of appropriate

solution, but must determine if outcome falls w/i "a range of possible, acceptable outcomes which are defensible in respect of the facts and law". May be 1+ R outcome. But provided the process and outcome fit comfortably w/ the principles of justification, transparency and intelligibility, reviewing court can't substitute its own view of a preferable outcome."

- Given deference owed to the tribunal and broad scope of discretion under its enabling act, FCA shouldn't have interfered with IAD's exercise of discretion to not grant relief-
- *Khosa* seems to be in line with *Dunsmuir* emphasis on importance of deferring to expert tribunal decision on issues w/i expertise, as well as *Southam* caution against questioning ADMs weighing of relevant factors

Rothstein (dissent): less deference to ADMs- particularly WRT Qs of law; leg. can. speak in a plain and determinable manner- if they want/intend deference, they will ask for it via PC; if not, they want the RoL;
→ *FCA* s.18 specifies deference for fact-finding, therefore jurisd~ Qs, Qs of law, and matters of NJ should be reviewed on a correctness standard
→ "SoR developed as means to reconcile tension of privative clauses b/w RoL and leg. supremacy"

- For Rothstein, *Dunsmuir* principles shouldn't apply when no strong PC; deference and SoR developed as a response by courts so that they could perform their supervisory roles while respecting leg. desire to shield ADMs from judicial scrutiny
- Given the practical/conceptual origins of SoR + juris on statutory SoR, explicit statutory provisions should oust CL WRT SoRs
- Rothstein acknowledges role of PCs- but says mere creation of ADM shouldn't give it deference if there's no PC - no clear legislative intent to limit supervisory power of JR

→ Majority thinks any JR of ADMs is about tension b/w legislature and judicary- for Rothstein, w/o PC , no legislative intent to limit supervisory power of courts- and no rational for SoR analysis

- PCs aimed to restrict JR, creating tension b/w principles of judicial upholding of the law and legislative supremacy- leg. desire to remove ADMs decisions from review, conflicts w/ accountability principle of RoL- which requires access to courts
- "deference approach emerged to reconcile Parls. intent to immunize certain ADM decisions from review w/ supervisory role of courts in a RoL system...give effect to leg.'s recognition that the ADM had relative expertise on certain Qs. The PC indicated the area of tribunal expertise that the legislature was satisfied warranted deference."
- Whole jurisprudence from CUPE to Bibeault involved evolving judicial responses to different leg. demonstrations intent to shield ADMs from review based on different considerations- whether expertise, subject matter (labour relations); for Rothstein "Expertise alone was not interpreted as indicating a legislative intent for finality. If the legislature intended to protect DMs from review, it did so through a PC"

→ *Pezim* departed from jurisprudence- court took tribunal's expertise (based on its statute) as a factor worthy of deference- despite absence of PC
→ Agrees that Qs of fact and mixed law and fact (if you can't pull out Q of law) merit deference, however don't presume deference if no PC- instead use appellate court rule and apply correctness to Qs of law: looks to Diceyan RoL justification for giving courts power to interfere even when legislature demands deference: (a) universality of principle- divergent application of legal rules will undermine RoL; if no consistent application of law people won't know how to guide themselves; (b) courts are better interpreters of legal rules

- Consistency/predictability positive goals but efficiency/practicality/sensitivity also good-
- If leg. thinks an ADM has superior expertise (on Qs of law too) it can show this through a PC , *then* the court can undertake SoR analysis- don't impute legal expertise to an ADM as this is basically a legislative function- and who are courts to judge which is the expert?

→ PC was a sufficient indicator of an ADM's expertise- courts shift away from that has resulted in "often artificial judicial determinations of expertise" of ADMs- a task for legislatures in R's view, and one which they're better suited to.
→ CL review SoR hasn't helped to promote certainty WRT which standard may apply- difficult to predict, costly, and lengthy;
→ Doesn't find majority's claim that even when SoR laid out in statute, CL JR still used to evaluate it, suggesting that only fairly specific statutes providing for SoR will apply- Rothstein doesn't like this- would severely undermine leg's ability to improve "predictability and certainty into SoR process"- would have to create separate SoR acts for every ADM

- agrees that CL can be used as an interpretive tool when Act uses poorly defined CL terms, but says it can't be used (as Binnie wants) to calibrate degrees of deference in a broad statute- goes against leg's choice to create "discrete SoR"; can't simply apply CL when ousted by leg. scheme
- Using FCA isn't creating a strict, inflexible regime- there are already only 2 standards- and the analysis isn't supposed to be focused on the ADM, but the nature of the Q; and if there's a PC, deference applies and SoR analysis can go forward.
- Also clear from leg. proceedings that leg. intended to "codify SoRs that would oust a duplicative common law standard of review analysis" to focus trials on the case rather than SoR process.

→ "no indication in these provisions [*FCA* s18.1] that leg intended for reviewing court to show any deference to ADMs in determining Qs of jurisdiction, NJ , PF and fraud or perjured evidence.
→ Critiques majority's claim they support single SoR: application they use a spectrum- but alternatives?

- Binnie just says *Dunsmuir* went far enough- flexibility needed for deference to expertise;pluralist view that ADMs + exec better at answering certain Qs; and *Pezim* applied too often to overrule it.

→ Rothstein implies significant degree of legislative intent- simplifies area of law and clarifies the SoR

- Helpful in arguing that the ATA should simply mean what it says rather than requiring recourse to the CL- but what about tribunals that aren't subject to ATA?

Fish J: disagrees w/ majority on the application of SoR- IAD board too much weight placed on denial of street- racing given all the other evidence of his rehabilitation; failure to consider this evidence could even be considered grounds for review under *ATA*;

- Discretion- any exercise of discretion must be consistent w/ purpose for which discretion granted

→ FIsh focusses on fact that ADM hadn't paid sufficient attention to justification, transparency, and intelligibility principles "inherent in R" review according to *Dunsmuir*- the tribunal irrationally ignored relevant evidence, evidence which weighed in K's favour; ADM's failure to consider this= legal error;

- For the majority this was reweighing evidence

Text: How to reconcile deference and supervision when judges review decisions for substantive legality?
(A) **Conduct of Deferential Review:** Dunsmuir endorsed idea that statutes may have multiple R interps- so defer to ADMs interps of law, provided they're R- but how do you determine the limits of R?
→ In *Ryan*, court suggested staying "close" to ADMs reasons- look for path analysis from the evidence to the ADMT's decision; so it could meet R SoR if supported by "tenable explanation"
→ Avoding comparing decision vs court's view of correct answer? In *Cupe*, court analysed both the ADM view of its statute and its entire reasoning about it, engaging closely with the ADMs construction of the statute while testing its supportability; an analysis is based on a careful consideration of ADMs reasons

- Dickson in *CUPE*= good example of a const. pluralist approach to statutory intepretation
- In *CUPE v Ontario*, court displayed an attitude of "judicial supremacy"- it analysed the statute and identifies factors of mandatory relevance WRT an ADMs use of discretion *prior* to adopting a deferential SoR- it finds the correct answer/determinative statutory construction w/o identifying the SoR to be applied, essentially coming to a decision without considering the ADM's decisions

(B) **Indicators of UnR and Weighing Factors:** Imperative of R review that courts follow ADMs reasons closely upon JR; relations b/w 3 SoRs is essentially based on reason- that judges can understand ADMs reasons, and that ADMs can communicate how their decisions are R; thus in *Southam* the court noted that R SoR requires the court to allot significant weight to tribunals in areas they have expertise; (Wildeman)
→ When reviewing on R standard, courts should stay close in their analysis to the ADM's reasons- while checking that ADM"s decision is based in reason, but this can be more difficult when ADMs must construe the purpose/values of their enabling statutes - how to ID "substantive limits of legality" here? (Wildeman)
→ B/c of alternative R interpretations of a statute's purpose, when ADMs prioritize/give weight to a given statutory purpose, courts should be cautious to interfere, provided ADM considered all factors of mandatory relevance (*Ryan*) (Text-Wildeman)

- This requirement doesn't always fit well- such as in Baker when the court said that the ADM failed to consider a relevant factor- and for this reason quashed the decision- yet it looked quite a bit like reweighing.

→ *Suresh*: clarified and affirmed that reviewing courts don't reweigh, but may intervene if ADM fails to consider relevant factors- uncertain if courts demand some factors be prioritized- b/c of statute/laws
→ ADMs may receive deference when they choose statutory purposes and thus the factors they must consider, but the choice of these factors may need to conform with values behind their discretion- including the weight that a given factor must receive (*Baker*, *Suresh*)

- Base tension in R SoR- ADMs are expected to be able to identify and exercise their power w/ "appropriate sensitivity to the values" that ground their use of power
- Romantic account requires JR decisions to be publicly justified

Reasonableness Post-Dunsmuir: Dunsmuir built on earlier caselaw (Ryan, CUPE) that Js should stay close to ADM reasoning + allow decision to stand unless can't statute/evidence can't rationally supprt it
→ Arguably R review in Dunsmuir helps promote romantic view that ADMs and jduges should be working together in substantive review, promoting a "culture of justification"
→ **Deference as respect:** idea that courts should respect the reasons provided for/in support of a decision- flows partly from legislative intent and respect for leg. decision to give ADMs DM powers; also flows from idea that ADMs develop significant expertise/field sensitivity WRT the Acts they frequently deal with; and the different roles of courts and ADMs w/i const. framework

- Animating premise behind deference is that some Qs faced by ADMs don't have 1 specific result- but multiple, R answers, so discretion has some role in statutory interpretation, which courts should recognize and allot to ADMs- provided the solution is acceptable and rational

→ **Targetting R?** Courts should consider how a decision is R- both in terms of how reasons are articulated- and the outcomes; Inquire if DM process is "justified, transparent, and intelligible" and if the outcome "falls w.i a

range of possible, acceptable outcomes", but don't separate this into 2 stages- R review should read the reasons with the outcome- R inquiry must look at whether reasons support the outcome; don't look at outcome without looking at the reasons.
→ **Criteria for R?** *Dunsmuir* majority focusses on "justification, transparency, and intelligibility" rather than probing and seriousness of error; in *Khosa* these criteria seem to be applied to both the reasons and outcomes- "if proces and outcome" fit well with "principles of justification, transparency, and intelligibility" review court shouldn't replace decision

Post-Dunsmuir:
(1) **"No reasons" versus review for substantive R:** Gaps in reasoning? Either failure to address determinative factors or no clear path b/w evidence/law and outcome
→ If reasons are incomplete/garbage is this a matter of PF (duty to give good reasons)- or substantive R?

- *Nurses Union*: (a) there's a low threshold to determine whether duty to provide reasons met under PF and (b) claims against the quality of reasons= substantive review; Generally had effect of making Qs related to adequacy/justificatory force of reasons a matter for substantive review.

→ How to show deference when decision has "fatal reasoning gaps"?

- In *Nurses Union* union claimed arbitrator's decision wasn't supported by reasons; court went through reasoning and primary inferences; concluded provided a R basis for the conclusion, even if a deeper explanation would have been good- suggests deference as respect may mean looking past reasons to the evidentiary record to asses R

→ Potential reasons? Awkward position for judges- how well can they decide, ind. from ADM, why decision was made? In *Alberta* court made clear that offering reasons that could be offered shouldn't just become automatic submission to decisions, even if thin basis in evidence and law

(2) **Contextual dimensions of R**: One critique of Dunsmuir was that collapsing SoRs into a single R standard would likely result in a spectrum of reasonable at the application stage.
→ Once judges contextualize the review through factors (eg. nature/fxn of DM- its expertise, purpose and terms of statute , nature of issue) this will reveal the amount of discretion given- and in turn the breadth of "permissible considerations" compared to when the decision must be made narrowly (Wildeman)

- When a DM has to balance the effects of a decision on someone's RPIs vs the public purpose, this will further contextualize the review. (Wildeman)

→ Rothstein in *Alberta* rejected Binnie's fears about a spectrum of deference- once R standard chosen, no further assessment of the intensity of the review, even tho each review informed by context

- Affirmed in *Catalyst*- the R review "is essentially contextual...fundamental Q is the scope of DM power conferred on the DM" by the enabling legislation

(3) **Proportionality**: Generally substantive review prohibits questioning of relative weight that ADMs assign to "competing factors of relevance" whether "evidentiary considerations…policy goals or stat. purposes"
→ However this principle has been eroded- by *Baker*- where discretion had to be exercised in line with "the values underlying the grant of discretion"- so why separate substnative review from weighing of factors?
→ In *Dore* SC suggested that for cases of involving exercise of discretion and Charter values, JR should use CL doctrines of substnative review- not Charter s.1 Oakes test.
→ SoR in such cases is R, with proportionality a central consideration of R; arguably proportionality analysis already a part of R review- *Dore* made it official that courts could regualte how much weight ADMs could assign to Charter interests during substantive review
→ Instead of s.1 analysis, use CL discretion when Charter values involved in ADM decision

- *Oakes* meant specifically for JR of legislation- doesn't consider factors relevant to ADM decisions; CL framework of substantive review recognizes legal and const. limits behind ADM discretion, and is thus contextualized;
- If the Q is whether ADM suff. considered Charter values in making decision, assess using ADM law; will usually attract deference and R SoR- break from *Dunsmuir* rule that generally issues of const~ are based on correctness
  - Adjudicative discretion is separate from when ADMs assess a law's const~
  - Why deference? ADMs have significatn expertise WRT power exercused under home statute and familiarity w/ weighing competing issues involved in Charter

→ Deference from courts when ADMs make decisions affecting Charter values is limited by principle that decisions must acknowledge fundamental importance of Charter values- thus in such decisions, proportionality is at the centre of the R review- decision can't disprop~ impair Charter value= would be unR; must balance mandate with Charter rights= R

- How to balance *Charter* with objectives of statute? Consider statutory objectives, and how to best protect Charter values given these objectives; how to balance weigh relative importance of the 2?
  - Does the decision proportionally balance the Charter protections at issue, given effect of protection and nature of decisions/and statutory/factual contexts

→ Dore as Romantic approach to substantive review? Charter values must be fully considered when affected by ADM decisions- even tho ADMs balancing of Charter and other values gets deference

Judicial supremacy vs judicial abdication (wildeman) was not resolved by Dunsmuir "R"

→ Despite statements in *Dunsmuir* that ADMs should be deferred to when a decision involves "field sensitive interpretations of statutes," the court still quickly to rule the arbitrator's decision unR

- majority did this by emphasizing CL rules over values that ADM had used in construction of Act
- Mullan suggests that there was a whole range of normative considerations behind majority's decision, that prioritized certain values/interests, and that should have been made clear at all levels including at JR

Celgene: JR of ADM's decision WRT interpreting its enabling act; SC confirms ADM's decision was legal, viewing it issue of interpretation; SC says R standard; → Court pays close attention to ADMs reasoning- tho it had departed from traditional legal principles → The statute had different interpretations, and ADMs interpretation was justified- the board's broad purposive interpretation of the relevant words (broader than their definition in commercial law) was influenced by its consumer protection objectives- and the alternative interpretation would run counter to these objectives; after looking at the values animating the board's statutory mandate, court notes legislative support for this interpretation. - Respects ADMs decisions w/o being submissive- close analysis of its reasons but also assessing them against the "statutory scheme" and context of the case- - "accounts for value-laden purposive analysis explicitly driving the tribunal's decision" while verifying that the "reasoning is rationally grounded in the statutory mandate"
Catalyst Paper: Further tensions b/w judicial supremacy and abdication- what are the limits of R? → R standard applied- court looked to caselaw for the "scope and limits of municipal bylaw-making power- Is relying on caselaw to judge-centric given importance of context in R? (insuff. deference)? → Municipal politicans have significant discretion to make by-laws, grounded in very wide set of considerations; court affirms breadth of this discretion, rejecting argument that municipality exceeded authority by expanding considerations grounding by-law to those claimed by the paper company

→ Majority drew on *Wednesbury* for the principle that a bylaw will only be set aside if no R body, w/ knowledge of these factors could have made the bylaw, provided decision was w/i its competence

- Given vagueness of this court also considers *Kruse v Johnson* which says if a decision is partial/unequal b/w different classes, manifestly unjust, showing bad faith, or oppresively and gratuitously interfered w/ rights of those subject to it, court can say that leg. never intended to give the municipality such powers- so they're UnR and ultra vires

→ *Catalyst* seems to emphasize courts desires to separate the determination of the limits of ADM authority, from ADM reasoning, as well as an attempt to ID contextual factors that favour deference *and* factors that may indicate illegality (see *Kruse v Johnson*)- unR favouring 1 class of interests or "oppressive interference with individual rights"

→ Importance of context when applying R: when Charter valeus are weighed against other legal values, creates a tension b/w judicial supervisory role (based on proportionality) and judicial abdication- discarding a focus on effects on individual right using s.1 *Charter* analysis.

→ *Dore's* R standard: (1) Although courts should stay close to reasons, they should first determine the range of acceptable options for the decision; (2) old prohibition against reweighing the ADM's assignation of weight to certain factors or legal values is weakened- though mainly for adjudicative decisions effecting *Charter* values

Conclusion:
→ Substantive review isn't just comparing decision vs obj. legal standard- requires consideration of relationships between legislature, ADMs, judiciary, etc and how they shape the RoL
→ Main tension in R review is balancing deference- to field sensitivity, expertise, familiarity with enablign statute, etc- with judicial role to police the legal boundaries of ADM use of authority and support RoL

Discretion: when ADM is making a decision where law doesn't require a specific outcome- there are a range of options in the space between pParliament's will and how the executive operates government
→ Thus the role of the administrative state goes beyond simply conveying leg. instructions to the public
Are ADMs subject to the rule of the law when they exercise discretion? Is discretion a legal matter- subject to JR and legal principles- or is it political?

- Former distinction between quasi-judicial (based on law thus controlled by law) and administrative decisions (discretionary, policy based, and therefore uncontrolled) has been mostly discredited

2 aspects to discretion: (1) Decision-making flexibility: executive needs some flexibility in carrying out gov. decision- A statute can't provide a rule for every situation- ADMs need to adapt their decisions to the facts; (2) Adopt general rules: ADMs have discretionary powers thru statute to do this (regulations, bylaws, etc)
Grounds for Discretion: (1) Expertise- ADMs/ministries may have greater specialized knowledge; (2) Time and Info constraints; delegation of power to make rules increases "efficiency and flexibility" of the ADM state

- Discretion also includes power to adopt soft rules that are non binding but can be useful to ensure decisions are fair and coherent- and in line with policy
- Increased discretion became much more common as the ADM state grew in size and importance

Debate over discretion:
Diceyan (19th): RoL required that a person is only punished if they breached the law, and it precludes the exercise of arbitrary state power against citizens; Wide discretion (or any!) allow for arbitrariness
→ Dicey acknowledged the need for discretionary power in some cases (basically emergencies) but disapproved of legislative delegation of discretion- (1) it seemed designed effictively to remove the supervisory power of courts (2) and the discretionary issues delegated to executive weren't legal Qs that judges could really answer

- Thus courts could control legally based executive decisions but discretionary decsiosns were basically "public business' that court couldn't really control (Cartier)

Hayek and and Hewart: built on Dicey, critiquing legislation that provided for excessive discretion and undermined the RoL; because of arbitrary uncertain nature of discretion and the lack of rules around it, citizens couldn't predict when state would use coercion
Welfare State: Supporters of a more interventionist state supported the use of discretion to promote social welfare, provided it was exercised power judicially (eg. open mind, proper purposes, no irrelevant factors)

- Jennings + Willis didn't think Js could properly supervise ADMs and believed judiciary inappropriately hostile to it- this would guide early attitudes with respect to ADMs- specially labour ADMTs

→ Dicey's view of the opposing dictates of law vs discretion remains powerful

Grounds for JR of discretion: Traditionally JR of ADM discretion based on grounds for review
Unauthorized Purpose, Irrelevant Considerations: DMs can't use discretion for purposes outside enabling Act; nor can it be exercised based on irrelevant considerations, or w/o accounting for relevant ones.

- Thus in *Duplessis*, exercise of discretion was based on Roncarelli helping the JWs

Bad Faith: In *Roncarelli*, Rand suggested that discretion required good faith in its exercising- clear departures from the manner in which statute was supposed to operate is as bad as "fraud or corruption"
Acting under influence: power is delegated to a DM who is the only who can exercise it; the suggestion that ADM acted under influence another would mean it was outside the power granted by Parliament
Fettering of discretion: DMs can't decide how they will use discretion but must exercise it based on the facts/merits of each case; can be a problem when ADMs employ soft law- rules and procedures to guide their exercise of discretion- if this goes too far their power ceases to be discretionary

- Relevant to legi. expectations courts won't hold DMs to promises/conduct b/c it fetters their discretion

Unreasonableness: fairly tough to get to- an outrageous decision against all logic/moral standards

Modern Grounds for JR view of Discretion (see *Suresh, Roncarelli*)

(a)Discretion based on arbitrary factors; b) exercised for an improper purpose; (c) decision based partly/entirely on irrelevant factors; (d) fails to take statutory requirements into account

→ What other factors might the court be taking into account?

- Who the DM (decision-maker) is?
- If the ADM has significant internal accountability/inconsistency, courts less likely to intervene
- Exercise of discretion related to national-security issue?

Law vs Discretion: As is clear from the grounds for a wrongful exercise of discretion, JR of discretion assessed very differently from decisions of law- historically done along preliminary/collateral Q doctrine

→ Grounds of review for discretion all based on view that aims to give DMs significant freedom to make substantive decisions and keep JR on the outside

→ Rise of deference seems to bring JR of law and JR of discretion closer- both aimed to limit discretion

- Whereas deference to ADMs on Qs of law was based on idea that ADMs could interpret *some* Qs of law as well as courts (shift from strong separation of powers), respect for discretion based on a desire to maintain a strict separation of powers;
- B/c discretion involved policy + political choices, JR for substantive value considered problematic
    - Cartier: restraint not on deference (recognizing role for ADMs when interpreting law) but judicial abstinence- courts shouldn't review certain decisions as they're not legal

Nicholson: severely undermined law vs discretion distinction- recognized the difficulty of distinguishing legal/quasi-judicial decisions and discretionary/ADM ones

Discretion- Post Baker:

Baker: LHD made clear that original distinction between discretionary (w/ need for ADM to have a scope for making decisions when using discretion- w/i certain limits) and non-discretionary decisions wasn't really supportable- both involved similar characteristics,

→ LHD applied P&F to discretion given the flexibility of P&F it could include discretionary powers

→ In evaluating executives use of discretion, LHD went to statute to assess how DMs had to exercise discretionary power.

→ Using P&F test to review discretionary decisions eliminated distinction b/w law and discretion, at least for substantive JR

→ Shift from Diceyan approach- Dicey suggested that the sort of decisions made through discretionary power were outside the law- i*Baker* acknowledged that discretion/non-discretionary decisions were hard to tell apart, so you couldn't use this difference to justify apply different methods of JR

→ Weakened procedure vs substance- if decision significantly impacted individual, reasons had to show consideration for them, regardless of whether the decision was carried out through discretionary mean

- Similarly to *Haldimand*, focussed on effects on individual of exercises of power to assess "the legality of executive action"- not about the power being exerted but how it affects the individual.

→ Cartier suggests that view sees discretion as almost controlled by law- its not inherently political or lawless, a sharp rebuke to Dicey

→ ***Dunsmuir***: discretionary Qs attract R- and deference will usually apply.

→ *Baker* suggested that the traditional grounds for review of discretion could still guide exercise of discretion

- How does this fit with new SoR analysis? The grounds closer to interpretation of statutes likely need to accord with SoR, while Qs of fact needn't
    - Reviewing courts only need to intervene if ADM unR considered a given factor, or unR labelled 'X' as a statute's purpose

- Discretion had to be exercised w/i a R range of what legislature intended (*Baker*) which works with *Dunsmuir*'s note that discretionary Qs reviewed on R grounds.

Reweighing of considerations: despite SC's ruling in *Baker* that the ADM had failed to give sufficient weight to children's interests, *Suresh* made clear that reviewing courts should not question the weighing of factors by ADMs- they can only check to ensure only relevant factors considered
→ But given the confirmed prohibition on re-weighing factors, how can this be squared with idea that difference between a R and unR decision sometimes depends on a weighing of the relevant factors
→ Historically, a core justification for discretion was the requisite flexibility it provided to the ADM state- but it's not settled how it can be reconciled with the RoL and jurisprudence is still unsettled as to whether should be treated as a political matter or an area controlled by legal principles.

- Unsettling for demo. reasons- esp. if discretion defines the norms for how individual cases decided

Two concepts of discretion
(1) Discretion as dialogue (see Rand J in *Roncarelli*)- ADM use of dsicretion as a dialogue b/w affected individual and the ADM, which encourages relationship b/w them rather than arbitrary imposition of power
→ ADM needs to given individual chance to express their interests and be responsive to thsoe in making their decision, and both sides must work together to consider the values/norms affecting the exercise of discretion- has effectof limiting the ADMs range of outcomes
→ Helps to explain why courts have imposed PF requiremetns and duty to give reasons- these wouldn't make sense in a discretion as power concept
→ Also helps to reconcile discretion with RoL and democratic concerns- first rule of law accountability and participation promoted by ADM dialogues w/ affected persons who get to participate in creating and affecting the norms that will affect their interests,while ADMs are required to justify their decisions in line with RoL concerns
(2) Discretion as power (Cartwright - *Roncarelli*): discretion as a "top-down" exercise of power and authority
→ Cartier is uncertain if discretion as dialogue will become the dominant viewpoint: (1) hesitancy of courts to critique discretionary decisions any more strictly than R (thus no re weighing of factors); (2) distinction between procedure and substance has been reinvigorated; (3) when governments are concerned about security/emergency situations, less willing to incorporate a form discretion that encourages "partiicpation and accountability"

Rule of law: What's it all about?
Principle of legality: there must be lawful authority for all state actions that interfere with the rights and liberty of citizens
→ *Principle of constitutionality*- appropriate if you accept that unwritten principles
→ *Political morality*?
→ *Normative ideal*- how institutions should operate with respect to each other
→ How flexible is the rule of law? Does the content change over time?
→ Who has the responsibility for policing the RoL?
→ To what extent is RoL a procedural matter- or a substantive matter?
Requirements:
→ If public institutions involved, must exercise power in a R manner, and that this power must be legitimate.
→ May be a matter of respecting the proper role of an institution- legislative role is making laws
→ Contemporarily, RoL requires that the state be responsive to a certain extent- how?

- Access to jsutice?

→ Equality before the law- related to arbitrariness- all individuals before the law must be treated equally by it; Thus laws are considered of general application

→ Judicial independence- to supervise relationship b/w individuals and the state
→ Generally, judicial independence, equality before the law, lack of arbitrariness serve to justify and legitimize the use of public power

Arbitrariness- how to avoid this?
→ Procedures- consistent, sensitive to the facts/contexts; based on relevant facts; decider isn't biased`
→ Substantive- When legislature specifies the powers available to an ADM, without specifying the outcomes when there are a range of acceptable outcomes in a discretionary power, grant of power is still constrained by the purpose for which the powers were granted
    - Purpose= implict restraint on ADMs exercise of authority- however it's difficult to ascertain the exact boundaries
- When is exercise of power arbitary? When it's irrational, capricious, frivolous, or unreasonable
    - If exercise of power treats peoples subject to it as unworthy of respect or in a manner offensive to shared moral standards

Diceyan View of Rule of law:
(1) Governments must act only with lawful authority
- absence of arbitrary authority: there must be lawful authority for all state actions that interfere with rights and liberty of citizens
- There should be clear and knowable legal rules – broad discretionary power is therefore suspect and dangerous for Dicey (might be used in an arbitrary or discriminatory manner and makes accountability difficult)
- All power is legally limited; courts can determine the limits of government power and hence the lawfulness of government action

(2) No one is above the law: Everyone subject to the law- governments and individual citizens alike: see *Roncarelli*
- formal legal equality- everyone treated teh same regardless of differences between them

(3) Role of courts is to impose the law:
- Courts can act to prevent arbitrary use of government power to infringe the rights of citizens
- Courts are the ultimate authority to decide the meaning and boundaries of a statutes

(4)Suggested that unwritten rule of law combined with judge-made law, was better for promoting rule of law- the formality of written constitutions provides a false security which makes people less cautious about attacks on the rule of law
- One criticism is that this 'rule of law' conception is rooted in judeo-christian legal/moral order, separate from its positive attributes

(5) Dicey disliked the delegation of power to ADM bodies apart from cabinet/parliament- inherent arbitrariness in delegating power away from direct parliamentary oversight
- Believed that grants of discretionary authority created a "zone of arbitrary lawlessness"
    - Yet government is too complicated now to have all legal authority exercised so close to central government- so other forms of legitimacy must be found

Fuller View of Rule of Law: more reflective of the conditions of modern welfare state
→ Saw rule of law as animated by an "inner morality," by which law was made communally, and the rule of law was intended to create/promote a "framework of successful social interaction"
→ Compliance with the law is a result of a bargain- due to the benefits they attain by following the law
→ 8 requirements of the rule of law: (1) Laws should be general; (2) laws must be promuglated and public; (3) laws must be prospective- not retroactive; (4) must not be contradictory; (3) laws must have some temporal constancy; (6) Laws must be reasonably clear; (7) laws must be capable of being performed; (8) Some congruence between descriptions of laws and their application

→ Fuller saw nothing inherently wrong in the delegation of power to ADMs- provided they follow these principles- use of authority will be both morally both in terms of their role and institutional functions

- Concept of rule of law that is more concerned with procedure than content

Raz: clarifies RoL- suggests that RoL can be reduced to 2 simple concepts: (1) all people, including gov. actors, should be ruled by the law and obey it; and (2) the law should be made so that it can guide people
→ To attain these goals, laws should aim to be certain, equality, and general, while avoiding vagueness

- Rule of law as a means to an end- that of controlling power; less focussed on content than Fuller-

→ Principles of rule of law; laws should be (1) prospective, open, and clear; (2) be relatively stable; (3) should be interpreted through open/stable/general rules; (4) Judicial independence should be guaranteed; (5) Principles of NJ must be observed; (6) courts review power should be limited; (7) Courts should be easily accessible; (8) Discretion of government agencies that aim to prevent crime should not be perverted
→ Instrumentalist view of rule of law- way to protect ____ and to achieve certain normative goals
→ Principle of state neutrality- as far as possible, state should allow individuals freedom to pursue their own perceptions of good
How do these ideas of rule of law inform judicial activity?
→ Focus on jurisdiction- courts carefully supervise jurisdictional boundaries- sometimes imputing it
→ Fuller's focus on accountability + participation reflected in idea that ADM/courts reasons should be public
→ Raz focus on independence informs doctrine that ADMs should be able to create and administer their own procedures

Roncarelli v Duplessis:

Rand J: Duplessis' exercise of discretion was in bad faith- was meant to punish R and warn others against doing certain things- basically the essence of arbitrariness
→ Privilege of liquor license? longer you have privilege, the more your business/prosperity relies on that privilege, which should raise the threshold to remove that privilege;
→ Highly important that exercise of public power that can discontinue someone's job, which would be free and legitimate in the absence of regulation, should be done with "complete impartiality and integrity"

- If there was no regulation, anyone could sell alcohol- so when QLC regulates it, people subject to the law have a right expect integrity and impartiality from it; Existing permit= legal interest that R was entitled to have protected from improper interference (eg. unrelated to board's mandate)
- QLC has discretion to grant the license- but its decision should be based on the object/purpose that it was granted that discretion in the first place-

→ No legislative act- absent express language- should be considered to provide an unlimited, capricious discretion for exercising power, regardless of purpose/nature of statute- if Parliament wants to grant discretion to make decisions based on irrelevant, arbitrary, etc factors, it needs to be explicit

- Fraud/corruption are always implied as legitimate limits on exercise of discretion- by inference you can't exercise discretion in bad faith- discretion implies good faith
    - Good faith requires exercising statute powers with a view to its intent and purpose
- A statute always has a scope w/i which it's supposed to operate- obvious departure from its purpose is as bad as fraud or corruption
- Denying/revoking permit based on Roncarelli exercising a perfectly valid right, irrelevant to liquor sales, is beyond scope of discretion granted under the statute

→ Prospective denial is also highly problematic- law isn't being applied generally if R is presumptively denied from getting a liquor license, even while every other person in Quebec is free to apply

- removes an incident of membership as a citizen from Roncarelli
- Punishment aspect- effectively punishes Roncarelli ability to be a restaurant owner, breaching an implied public law duty towards Roncarelli

→ Implied limits to discretion always exist- even when statute doesn't specify any; Public regulation thru statutes where otherwise no restrictions on the activity can't be done thru absolute discretion
→ Rule of law at risk if ADM can exercise its discretion in an arbitrary manner, on irrelevant critiera, to

remove a citizen's deeply important privilege: discretion ≠ pure exercise of power
→ Proper exercise of discretion must be for "legitimiate purpose" and consider interests of those affected
→ Uncertain if the legal principles restraining discretion could be drawn from (a) the enabling act (the principles that ground it) by trying to identify legisaltive intent, or (b) unwritten legal principles that ground our legal order.

- Views the matter from perspective of the individual affected and how discretion should be exercised given these interests;

Martland: critiques wrongful delegation of discretion- the discretion was Archambault's to exercise but he gave it to Duplessis instead, who had no authority as premier or AG to cancel the license
→ Decision to grant/cancel license was Archambault's to make, not Duplessis'- AG has no authority under *Liquor Act* to order permit cancellation- the *Act* is meant to place control in hands of ind. commission; power to cancel a permit is a substantial one- can't be exercised by anyone but the QLC

- The use of discretion to cancel the license was based on reasons unrelated to the purposes underlying grant of power to the QLC;

→ Cancellation of the permit based on request from a 3rd party was outside the reasons for which discretion was granted in the first place

Cartwright(dissent): No restraints on use of discretion- Act's grant of discretion completely unfettered;
→ Disagrees that there was bad-faith; Duplessis honestly believed JWs actions were seditious, so no bad faith in exercising unfettered discretion to constrain actions they honestly believed were seditious?

- based on his construction of the statute, Parliament intended QLC to have unlimited discretion; and it's powers were ADM, not judicial- so no JR- and its powers aimed at policy and expediency
- Discretion= basically no laws, as per Diceyan approach.

→ Yet many statutes don't provide guidance WRT constraints on statutory powers- looking for legislative intention in such cases bascially requires imputing unlimited discretion
→ Arbitrariness? Bad-faith; vague statutory wording; lack of reasons from ADM; excessive grant of discretionary power; lack of notice; lack of opportunity to respond; violation of legitimate expectations; discrimination against minority; DM acting on the orders of someone else
→ In contrast to Rand J, focusses on the need for ADMs to have free range of options to carry out their tasks (w/i legislative mandate of course),

Categorical approach: Until Baker, judicial review was based on certain categories- improper purpose/consideration; bad faith; dictation/influence on the outcome; wrongful delegation of discretion to unauthorized party; fettering of discretion- constraining discretion beyond what legislature intended; *Wennesbury* unreasonableness- entirely immoral, irrational decisions
→ if your complaint lay outside these categories, no opportunity for judicial review
→ *Nicholson* significantly undermined the categorical approach- reject differentiation b/w judicial and quasi-judicial decision-making; followed in *Baker* with an attempt to create a more unified approach through consideration of various factors
→ Categories may still be important because supervising discretion is difficult when multiple outcomes are acceptable- how do courts decide when to intervene?

- Mullin suggests distinguish based on grounds related to fact, vs grounds related to statutory interpretation- statutory interpretation incorporated into SoR while fact-related grounds remain as separate heads to challenge ADM

Suresh: guy is a refugee fo; faces deportation;he gets new hearing on PF grounds
→ Statute prohibits admission for those R believed to be a member of a terrorist organization, but another section prohibits deportation of refugees if R grounds to believe they will be tortured upon deportation
→ Suresh argues that minisiter's discretion had been exercised in a patently unR manner
→ Court held that it must ensure only relevant considerations taken into account- but if satisfied that only relevant considerations taken into account, the court mustn't reweigh the ADMs balancing of considerations- in *Baker* they only intervened because irrelevant considerations considered

Constitutionalization of the rule of law? Solid foundation for constitutional basis for judicial review
Cooper v CHRC**:** however HR law makes an exception for age-based mandatory retirement
→ Did this exception violate the *Charter*? Government argues that HRC can't invalidate enabling statute based on the *Charter*- legislature can't have intended the HRC to have discretion to interpret and apply the *Charter* because of the judicial monopoly on *Charter* remedies.

- La Forest suggested it depended on the tribunal- if legislature explicitly grants discretion to tribunal to consider Qs of law, courts should respect this choice; HRC does *not* have discretion to consider Qs of law related to interpreting the home statutes- it merely screens applicants for who gets to appear before the tribunal so legislature didn't intend it to get such a discretion;

Preamble "similar const to UK" argued to constitutionalize unwritten norms of UK constitution- *Re Manitoba Language*;
Re Quebec Secession: RoL and judicial independence meant that constitution requires judges remuneration be secure; did this mean rule of law in general was constitutionalized?
Christie v BC: court limited idea that rule of law was constitutionalized- Christie claimed that law was unconstitutional in its limitation on access to justice; court limits this- right to counsel only present when liberty at stake, no general right to access the courts

- However separate case struck down hearing fees based on

Imperial Tobacco**:** BC act intended to recover costs related to tobacco was struck down- it reversed onus on defendant to disprove that they were liable for social costs to government related to tobacco- argued as against the ruel of law; court makes clear that rule of law wasn't constitutionalized beyond judge's remunieraton- didn't prohibit giving state special privileges, doesn't require fair trial

- Need to go to the *Charter* for a remedy- rule of law only relevant for ADM law attack