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Justice Wilson's Administrative Law Legacy: The *National Corn Growers* Decision and Judicial Review of Administrative Decision-Making

Philip Bryden*

I. INTRODUCTION

On November 8, 1990, the Supreme Court of Canada released its decision in *National Corn Growers Assn. v. Canada (Import Tribunal)*.¹ Justice Wilson's concurring judgment in the *National Corn Growers* case was among the last of her contributions to the Supreme Court of Canada's jurisprudence prior to her retirement on January 4, 1991. This decision was not, perhaps, among the highlights of an extraordinarily distinguished judicial career,² but for a variety of reasons it seems to me that the *National Corn Growers* case is a particularly appropriate focal point for consideration of Justice Wilson's contribution to Canadian administrative law jurisprudence.

During Justice Wilson's tenure on the Supreme Court of Canada, the Court released 80 decisions that held sufficient significance for persons interested in Canadian administrative law to be reported in the

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¹ [1990] S.C.J. No. 110, [1990] 2 S.C.R. 1324 (S.C.C.) [hereinafter "*National Corn Growers*"].

² In his keynote address to the symposium held in Justice Wilson's honour at Dalhousie Law School on October 5, 1991, Chief Justice Brian Dickson paid particular attention to her contributions to the Court's jurisprudence concerning the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11, as well as criminal law, Aboriginal law and family law. See B. Dickson, "Madame Justice Wilson: Trailblazer for Justice" (1992) 15 Dalhousie L.J. 1, at 6. Justice Wilson's decision in *National Corn Growers* was referenced by Chief Justice Dickson (at 13, note 29) but it occupies a minor place in his discussion of her judicial legacy.

Administrative Law Reports.³ Justice Wilson wrote reasons for judgment in 19 of these cases. Ten of them were constitutional decisions that had significant implications for administrative law.⁴ Five of the cases dealt with areas of substantive law that were of importance for particular administrative bodies but in which the reasons did not comment extensively on the general principles governing judicial review of administrative action.⁵ Only in the four remaining cases did Justice Wilson comment at length on the principles governing common law judicial review of the decisions of administrative tribunals that are the focus of my observations in this article.⁶

³ A Westlaw e-Carswell search of Supreme Court of Canada decisions reported in the Administrative Law Reports in which Justice Wilson participated in the decision produced 155 hits. Since English- and French-language versions of the same case were recorded separately, the elimination of duplicate cases produced the result of 80 relevant decisions.

⁴ These cases were: (1) *Cuddy Chicks v. Ontario (Labour Relations Board)*, [1991] S.C.J. No. 42, [1991] 2 S.C.R. 5 (S.C.C.) (dealing with the availability of remedies for Charter violations from administrative tribunals under s. 24 of the Charter and s. 52 of the *Constitution Act, 1982*); (2) *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] S.C.J. No. 124, [1990] 3 S.C.R. 570 (S.C.C.) (concerning the scope of applicability of the Charter and the availability of remedies from labour arbitrators for Charter violations); (3) *MacKeigan v. Hickman*, [1989] S.C.J. No. 99, [1989] 2 S.C.R. 796 (S.C.C.) (dealing with the scope of judicial immunity from public inquiries); a series of cases concerning the applicability of s. 11(d) of the Charter in administrative proceedings: ((4) *R. v. Wigglesworth*, [1987] S.C.J. No. 71, [1987] 2 S.C.R. 541 (S.C.C.); (5) *Burnham v. Metropolitan Toronto Police Assn.*, [1987] S.C.J. No. 70, [1987] 2 S.C.R. 572; (6) *Trumbley v. Metropolitan Toronto Police Force*, [1987] S.C.J. No. 68, [1987] 2 S.C.R. 577 (S.C.C.); and (7) *Trimm v. Durham Regional Police Force*, [1987] S.C.J. No. 72, [1987] 2 S.C.R. 582 (S.C.C.)); (8) *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549 (S.C.C.) (concerning the language rights guarantees of s. 19(2) of the Charter); (9) *Operation Dismantle Inc. v. Canada*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 (S.C.C.) (concerning the “political questions” doctrine and the extent of rights guaranteed under s. 7 of the Charter); and (10) *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.) (dealing with s. 7’s guarantee of fair hearing rights for refugee claimants).

⁵ They were: (1) *Bhinder v. Canadian National Railway Co.*, [1985] S.C.J. No. 75, [1985] 2 S.C.R. 561 (S.C.C.) (concerning the duty of reasonable accommodation under human rights law); (2) *Kamloops (City) v. Neilsen*, [1984] S.C.J. No. 29, [1984] 2 S.C.R. 2 (S.C.C.) (addressing the liability of public authorities for negligence); (3) *James Richardson & Sons Ltd. v. Minister of National Revenue*, [1984] S.C.J. No. 28, [1984] 1 S.C.R. 614 (S.C.C.) (dealing with the interpretation of investigative powers granted under the *Income Tax Act*); (4) *Hartel Holdings Ltd. v. Calgary (City)*, [1984] S.C.J. No. 17, [1984] 1 S.C.R. 337 (S.C.C.) (concerning the interpretation of Alberta land use planning law); and (5) *R. v. Eldorado Nuclear Ltd.*, [1983] S.C.J. No. 87, [1983] 2 S.C.R. 551 (S.C.C.) (addressing the scope of Crown immunity for Crown corporations being prosecuted under the *Combines Investigation Act*, R.S.C. 1970, c. C-23).

⁶ In addition to *National Corn Growers*, *supra*, note 1 case, these decisions were: (1) *W.W. Lester (1978) Ltd. v. United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] S.C.J. No. 127, [1990] 3 S.C.R. 644 (S.C.C.) [hereinafter “*Lester*”]; (2) *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14, v. Paccar of Canada, Ltd.*, [1989] S.C.J. No. 107, [1989] 2 S.C.R. 983 (S.C.C.) [hereinafter “*Paccar*”]; and (3) *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, [1985] S.C.J. No. 49, [1985] 2 S.C.R. 164 (S.C.C.).

The *National Corn Growers* decision is the most interesting of these four cases in terms of its contribution to Canadian thinking about judicial review of administrative decision-making. First of all, it is concerned with two central and abiding questions in administrative law, namely, the rationales for judicial deference to the substantive decisions of administrative tribunals and the methodology courts should employ in reviewing those decisions. Second, Justice Wilson's reasons in this case are very satisfying to an administrative law purist since they focus almost exclusively on the administrative law dimensions of the case and have relatively little to say about the substantive law underlying the tribunal's decision being reviewed. In contrast, in the other significant substantive review decisions Justice Wilson wrote during her time on the Supreme Court, it is more difficult to tease out how much of her decision was driven by her administrative law philosophy and how much by her approach to the issues of labour law⁷ and land use planning law⁸ that were being addressed by the bodies whose decisions were under review. Finally, Justice Wilson's reasons in the *National Corn Growers* case continue to exercise an influence on contemporary Supreme Court of Canada jurisprudence on substantive review of the decisions of administrative tribunals,⁹ notwithstanding considerable critical commentary on Justice Wilson's reasoning¹⁰ and the twists and turns of that jurisprudence itself.¹¹

It is not my goal in the following article to argue that Justice Wilson's thinking about substantive judicial review as exemplified by her reasons in the *National Corn Growers* case has played a dominant role in Canada's administrative law jurisprudence. Nor is it to attempt to

⁷ See *Lester and Paccar*, *id.*

⁸ See *Oakwood*, *supra*, note 6.

⁹ See, for example, the reasons of Bastarache J. writing for the majority of the Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982 (S.C.C.), at paras. 36 and 48 [hereinafter "*Pushpanathan*"] and Abella J. writing for the majority of the Court in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] S.C.J. No. 15, [2007] 1 S.C.R. 650 (S.C.C.), at para. 104 [hereinafter "*Via Rail*"].

¹⁰ See, for example, David Mullan, "Of Chaff Midst the Corn: *American Farm Bureau Federation v. Canada (Canadian Import Tribunal)* and Patent Unreasonableness Review" (1991) 45 Admin. L.R. 264, at 270-71; David Jones & Anne De Villars, *Principles of Administrative Law*, 2d ed. (Scarborough, ON: Thomson Canada Ltd., 1994), at 419-22 and 436-37; David Jones & Anne De Villars, *Principles of Administrative Law*, 4th ed. (Scarborough, ON: Thomson Canada Ltd., 2004), at 461.

¹¹ See, most recently, *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.) [hereinafter "*Dunsmuir*"] and *Assoc. des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*, [2008] S.C.J. No. 32, 2008 SCC 32 [hereinafter "*Proprio Direct*"].

spark a revival of Justice Wilson's thinking about administrative law in order to remedy deficiencies in the more recent jurisprudence in the area of substantive judicial review. Rather, my observations are designed to evaluate Justice Wilson's reasoning in the *National Corn Growers* case in light of subsequent judicial attempts to develop a more comprehensive approach to common law judicial review of substantive administrative decision-making in Canada. I conclude that Justice Wilson's approach to judicial review managed to avoid certain pitfalls that were to plague later attempts to develop a unified theory of substantive judicial review. Nevertheless, in my view her reasons share with more recent jurisprudence the weakness that insufficient attention is paid to the considerations that justify judicial intervention notwithstanding a more general posture of deference to tribunal decision-making.

I will conduct this analysis in three parts. In the first, I will describe the nature of the dispute in the *National Corn Growers* case and the contrasting reasons of Justice Gonthier for the majority and Justice Wilson concurring in the result. Second, I will situate Justice Wilson's reasoning in the *National Corn Growers* case within the framework of the evolution of contemporary judicial review doctrine. Finally, I will explore some of the key areas of disagreement that have emerged during the evolution of substantive judicial review doctrine over the past 20 years and consider in more detail the relationship between Justice Wilson's insights in *National Corn Growers* and the resolution of those tensions.

II. THE *NATIONAL CORN GROWERS* DECISION

The *National Corn Growers* case came to the Supreme Court of Canada as an appeal from a decision of the Federal Court of Appeal¹² dismissing an application for judicial review under section 28 of the *Federal Court Act*¹³ of a decision of the Canadian Import Tribunal.¹⁴ I will set out the decisions at each stage in some detail because the shifting nature of the debates that took place as the case wound its way through the legal system help to sharpen the focus of the disagreement between

¹² [1988] F.C.J. No. 1154, [1989] 2 F.C. 517 (Fed. C.A.) [hereinafter "*National Corn Growers* (Fed. C.A.)"].

¹³ R.S.C. 1970, c. 10 (2nd Supp.).

¹⁴ *Grain Corn* (1987), 14 C.E.R. 1 (Canadian Import Tribunal) [hereinafter "*Grain Corn*"].

the reasons offered by Wilson and Gonthier JJ. for concluding that the courts should not interfere with the Tribunal's decision.

The Tribunal had concluded that subsidization of the production of corn by the United States was causing a material injury to Canadian corn producers within the meaning of section 42 of the *Special Import Measures Act*,¹⁵ which rendered American corn vulnerable to the imposition of a special import duty. This determination had been the subject of controversy even within the Tribunal itself. The majority of the panel (President Bertrand and Member Perrigo) concluded that it was not necessary to demonstrate that subsidized corn was actually being imported into Canada in order to reach a finding that the subsidies were causing "material injury" to Canadian producers. It was sufficient if, as in this case, the threat of importation of the subsidized product had the effect of depressing the prices obtained by Canadian producers of the product.¹⁶ Member Bissonette, who dissented, took the view that the countervail remedy was not available unless it could be demonstrated that the harm being suffered was the result of subsidized imports.¹⁷ Member Bissonette conceded that United States subsidies were a contributing factor to a depressed world market price for corn,¹⁸ but that was not a sufficient basis for a finding of material injury to Canadian producers within the meaning of SIMA in the absence of evidence that subsidized American corn was actually being imported into Canada.

The Federal Court of Appeal divided along lines similar to the Tribunal, though the reasons for its conclusions were slightly different than those of the Tribunal. Chief Justice Iacobucci, which whom Mahoney J.A. concurred, concluded that the majority of the Tribunal did not, in the language of section 28 of the *Federal Court Act*, "err in law or in jurisdiction" in interpreting section 42 of SIMA in a manner that

¹⁵ R.S.C. 1985, c. S-15 [hereinafter "SIMA"]. Section 42 reads, in relevant part:

42.(1) The Tribunal, forthwith after receipt by the Secretary pursuant to subsection 38(2) of a notice of a preliminary determination of dumping or subsidizing in respect of goods, shall make inquiry with respect to such of the following matters as is appropriate in the circumstances, namely,

(a) in the case of any goods to which the preliminary determination applies, as to whether the dumping or subsidizing of the goods

(i) has caused, is causing or is likely to cause material injury or has caused or is causing retardation, or

(ii) would have caused material injury or retardation except for the fact that provisional duty was imposed in respect of the goods; ...

¹⁶ See *Grain Corn*, *supra*, note 14, at 15 and 21-22.

¹⁷ *Id.*, at 36-40, 43.

¹⁸ *Id.*, at 32-36, 42-43.

allowed material injury to be demonstrated by the effect of American corn subsidies on Canadian corn producers even in the absence of the importation of subsidized corn.¹⁹ Chief Justice Iacobucci made no reference in his reasons to deference to the Tribunal's interpretation of its enabling legislation, and in fact his reasoning for reaching the interpretive conclusion he did is quite different than the reasoning of the majority of the Tribunal.

The Tribunal majority took the view that its interpretation of section 42 of SIMA was consistent with Article VI of the *General Agreement on Tariffs and Trade* (GATT)²⁰ whereas Member Bissonnette drew support from the *GATT Subsidies and Countervailing Duties Code* for his interpretation that section 42 of SIMA only dealt with the effect of subsidized imports as distinct from the effect that foreign subsidies have on the domestic price of Canadian products in the absence of importation of the subsidized product.²¹ While Iacobucci C.J. accepted the general proposition that domestic legislation should be interpreted in a manner that is consistent with Canada's international obligations,²² in his view the focus of the interpretive exercise was the wording of the legislation implementing an international obligation rather than the treaty itself.²³ Chief Justice Iacobucci's conclusion on the interpretive issue before him is expressed in the following passage:

In my view section 42 is clear and unambiguous: although other sections of the *Act* refer to the *GATT* and *Subsidies and Countervailing Duties Agreement* which in turn use the term subsidized imports, section 42 refers only to subsidizing of goods or subsidizing and makes no reference to subsidized imports as being the cause of material injury to producers.²⁴

It is worth noting that Iacobucci C.J. acknowledged that this interpretation might be incompatible with Canada's fulfilment of its international obligations under the GATT, but in his opinion that was a matter to be addressed by Parliament rather than by the courts.²⁵ He recognized that the Tribunal majority had taken the view that its

¹⁹ *National Corn Growers* (Fed. C.A.), *supra*, note 12, at 527, 536-37.

²⁰ See *Grain Corn*, *supra*, note 14, at 21-22.

²¹ *Id.*, at 37-40.

²² See *National Corn Growers* (Fed. C.A.), *supra*, note 12, at 528.

²³ *Id.*

²⁴ *Id.*, at 530-31.

²⁵ *Id.*, at 532-33.

interpretation was consistent with a liberal understanding of the GATT but he concluded: “I need not make any comment on whether that approach is appropriate or not in matters of this kind because the language of section 42 has in my view been otherwise correctly interpreted by the Tribunal majority.”²⁶

Justice MacGuigan dissented. He accepted Mr. Bissonnette’s view that if section 42 of SIMA were read in light of the GATT *Subsidies and Countervailing Duties Code*, it would be necessary to demonstrate that material injury was caused by the presence in Canada of subsidized imports rather than by the mere fact of foreign subsidization of a product. Indeed, he concluded that “[t]here was no serious dispute in argument”²⁷ that this was the case. Justice MacGuigan took a different view than Iacobucci C.J. of the jurisprudence concerning the use of international treaties as an aid to the interpretation of domestic legislation, particularly in situations in which it was evident from both external and internal evidence that the legislation was intended to implement the international obligation.²⁸ In MacGuigan J.A.’s view, SIMA

is so enmeshed with the *Code* that it must be taken to be an implementation and reflection of it. It must therefore be presumed that Parliament intended that *SIMA* should be interpreted in accordance with the *Code*. Consequently, to the extent that the majority decision of [the Tribunal] depended upon an interpretation of *SIMA* contrary to the *Code* it was vitiated by error of law.²⁹

In MacGuigan J.A.’s opinion, material injury in the past or present as a result of subsidized imports could only be demonstrated if there was evidence of an increase in the importation of subsidized goods, which was not present in this case.³⁰ Justice MacGuigan recognized that SIMA provided for relief not only where material injury had been caused but where the foreign action “is likely to cause material injury”.³¹ In his opinion, however, such a determination could only be supported if the Tribunal was able to draw an inference from the evidence before it with respect to the likelihood of subsidized imports entering into the country

²⁶ *Id.*, at 533.

²⁷ *Id.*, at 545.

²⁸ *Id.*, at 552-54.

²⁹ *Id.*, at 554.

³⁰ *Id.*, at 557.

³¹ *Id.*, at 558, quoting s. 42(1)(a)(i) of SIMA.

in future. In MacGuigan J.A.'s view the Tribunal majority's findings on this point were based on mere speculation rather than reasoned inferences from the evidence, and he would have returned the matter to the Tribunal for reconsideration on whether there was a likelihood of future injury that could be causally linked to subsidized imports.³²

Neither Court of Appeal judgment made reference to section 76(1) of SIMA, which at the relevant time stated: "Subject to this section and paragraph 91(1)(g), every order or finding of the Tribunal is final and conclusive." This section of the Act assumed greater significance in the Supreme Court of Canada, since Gonthier J. (with whom La Forest, L'Heureux-Dubé and McLachlin JJ. concurred) treated it as a privative clause that prevented judicial interference unless "the tribunal acted outside the scope of its mandate by reason of its conclusions being patently unreasonable".³³ Justice Wilson (with whom Dickson C.J.C. and Lamer J. concurred) also applied the "patently unreasonable" standard of review, but it is less obvious from her reasons how significant the existence of the privative clause was to her choice of this standard of review. On one hand, she does make reference to it in her recitation of relevant statutory provisions³⁴ and in her description of Gonthier J.'s reasons for applying the "patently unreasonable" standard of review.³⁵ On the other hand, at several points in her reasons she makes reference to judicial deference to tribunals whose decisions are not protected by privative clauses³⁶ and the general tenor of her reasons speaks as much to judicial deference to the specialized expertise of tribunals in interpreting their enabling legislation as to other rationales for a restrictive approach to judicial review.³⁷ I will return to the question of the rationales for judicial deference to tribunal decision-making later in this article, but for now it is sufficient to observe that all members of the Supreme Court of Canada were satisfied that a deferential standard of review ought to be applied to the Tribunal's decision.

³² *Id.*, at 559-61.

³³ *National Corn Growers*, [1990] S.C.J. No. 110, [1990] 2 S.C.R. 1324, at 1370 (S.C.C.).

³⁴ *Id.*, at 1350-51.

³⁵ *Id.*, at 1347.

³⁶ *Id.*, at 1340-41, Wilson J. referred to the Supreme Court of Canada's decisions in *Volvo Canada Ltd. v. U.A.W., Local 720*, [1980] S.C.J. No. 104, [1980] 1 S.C.R. 178 (S.C.C.); *Douglas Aircraft Co. of Canada v. McConnell*, [1980] S.C.J. No. 106, [1980] 1 S.C.R. 245 (S.C.C.) and *Alberta Union of Provincial Employees, Branch 63 v. Olds College*, [1982] S.C.J. No. 46, [1982] 1 S.C.R. 923 (S.C.C.) advocating deference respectively to the decisions of consensual arbitrators, statutory arbitrators and labour boards even in the absence of a privative clause.

³⁷ See, in particular, *National Corn Growers*, *supra*, note 33, at 1335-37, 1343, 1346.

Justice Gonthier proceeded to address three issues using the “patently unreasonable” standard of review:

- (1) whether it was patently unreasonable for the Tribunal to give consideration to the terms of the *GATT* in interpreting s. 42 of the *SIMA*;
- (2) whether it was patently unreasonable for the Tribunal to conclude that, in applying s. 42 to this case, reliance could be placed on potential as well as actual imports; and
- (3) whether the Tribunal’s conclusion, on the evidence, that American subsidization of imports had caused, was causing and was likely to cause material injury to Canadian producers was patently unreasonable.³⁸

With the greatest of respect, the framing of the first issue is somewhat surprising. The appellant’s case did not depend on a finding that the Tribunal erred in using the *GATT* to interpret section 42 of *SIMA*; in fact, the appellant’s success depended on the use of the *GATT* to colour the interpretation of statutory language that, in the view of the majority of the Court of Appeal, clearly favoured the conclusion reached by the majority of the Tribunal. The appellant’s position was that the Tribunal majority fundamentally misunderstood the *GATT Subsidies and Countervailing Duties Code*, and therefore erroneously concluded that the interpretation they gave to section 42 did not create a conflict between that provision and Canada’s international obligations under the Code.³⁹ Justice Gonthier noted that no party to the appeal had argued that the Tribunal acted unreasonably in referring to the *GATT* in interpreting section 42 of *SIMA*,⁴⁰ and it is evident that this part of his reasons was directed more toward Iacobucci C.J.’s comments on the use of international agreements as an interpretive aid than toward the Tribunal’s decision itself. Justice Gonthier rejected Iacobucci C.J.’s suggestion that recourse to an international treaty is unavailable as an interpretive aid where domestic legislation is unambiguous on its face, and indicated that at least where the legislation was designed to implement the treaty obligation, the treaty could be used not only to

³⁸ *Id.*, at 1367-68.

³⁹ Justice Gonthier appeared to recognize this in his description of the appellant’s position, *id.*, at 1368.

⁴⁰ *Id.*, at 1371.

resolve a patent ambiguity but also to determine whether or not a latent ambiguity exists.⁴¹

Having concluded that it was not unreasonable for the Tribunal to have recourse to the GATT in interpreting section 42 of SIMA, Gonthier J. moved on to the centrepiece of his reasons, namely, whether or not the Tribunal's interpretation of section 42 was patently unreasonable. Justice Gonthier began this discussion by concentrating on an important passage from the Tribunal majority's judgment in order to undercut the argument that the Tribunal majority had misunderstood a key distinction between subsidized goods and subsidized imports. In this passage, the Tribunal majority appeared to agree with the position taken by the appellants that section 42 was designed to address the problems created by subsidized imports rather than by subsidization more generally.

On the other hand, the Tribunal majority took the view that "imports" had to include not only goods that were actually imported into Canada but "potential or likely imports".⁴² In Gonthier J.'s view, the role of the Court was to determine whether or not this was an interpretation that was open to the Tribunal under SIMA and the GATT, and whether the Tribunal had sufficient evidence before it to be able to reasonably conclude that the potential import of subsidized corn gave rise to material injury in this case.⁴³

Justice Gonthier concluded that neither SIMA nor the GATT made it unreasonable for the Tribunal to have reference to potential imports in determining the existence of material injury.⁴⁴ Justice Gonthier disagreed with the view expressed by MacGuigan J.A. in dissent in the Federal Court of Appeal that the GATT *Code* forbade a finding of material injury in the absence of an increase in the importation of a subsidized product. In Gonthier J.'s view, an increase in subsidized imports was only one way in which material injury could be demonstrated.⁴⁵ He then reviewed the evidence before the Tribunal and concluded that it was reasonably open to the Tribunal to find in this particular case that potential imports of subsidized corn from the United States gave rise to material injury to Canadian corn producers, even in the absence of evidence of growth in the importation of subsidized corn from the

⁴¹ *Id.*, at 1371-72.

⁴² *Id.*, at 1373, quoting *Grain Corn*, *supra*, note 14, at 22.

⁴³ *Id.*, at 1374.

⁴⁴ *Id.*, at 1374-78.

⁴⁵ *Id.*, at 1378-79.

United States. This was because there was evidence of a considerable surplus of United States corn that could easily have been imported had Canadian producers failed to reduce their own prices in order to fend off competition from imported American corn.⁴⁶

As noted above, Wilson J. agreed with Gonthier J.'s disposition of the appeal but she disagreed with the reasoning he employed to come to this conclusion. Justice Wilson's own reasons can be broken down into two parts. The first was an extended discussion of the general approach courts ought to take to judicial review of administrative tribunals, the cornerstone of which was her analysis of the implications of the Supreme Court of Canada's decision in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*⁴⁷ The second was a much briefer application of these general principles in order to address the decision of the Canadian Import Tribunal that was under review.

Justice Wilson took the position that the *C.U.P.E.* decision was designed to leave behind an approach to judicial review that was premised on the assumption that courts played a dominant role in ensuring that administrative bodies operated within the strict limits of their statutory mandates. It was necessary, in her view, to overcome judicial resistance to the proposition that tribunals should not be subject to the same review standards as courts. In an important passage, she observed that judicial decisions imposing an intrusive standard of review:

. . . reflect a lack of sympathy for the proposition that if administrative tribunals are to function effectively and efficiently, then we must recognize: (1) that their decisions are crafted by those with specialized knowledge of the subject matter before them; and (2) that there is value in limiting the extent to which their decisions may be frustrated through an expansive judicial review.⁴⁸

Having identified the type of approach to judicial review that in her view *C.U.P.E.* was designed to avoid, Wilson J. then sought to put forward a positive vision of what the *C.U.P.E.* approach to judicial review was designed to achieve. Justice Wilson initially sought to enumerate the reasons for judicial deference to the interpretations administrative tribunals gave to their enabling legislation. She identified, in greater or lesser detail, four different rationales for judicial deference

⁴⁶ *Id.*, at 1379-83.

⁴⁷ [1979] S.C.J. No. 45, [1979] 2 S.C.R. 227 (S.C.C.) [hereinafter "*C.U.P.E.*"].

⁴⁸ *National Corn Growers, supra*, note 33, at 1335.

to the decisions of tribunals, all of which were relevant to this particular case. It is less clear whether or not Wilson J. recognized that these rationales do not always reinforce each other, and that in some instances they lead to quite different conclusions about when deference is and is not appropriate, or when judicial interference is warranted notwithstanding a general posture of deference.

The first rationale for deference that Wilson J. identified is what might be described as the “statutory indeterminacy” rationale. This rationale draws on the observation of Dickson J. (as he then was) in *C.U.P.E.* that statutes rarely have a uniquely “correct” meaning that judges are specially qualified to ascertain.⁴⁹ This rationale is not so much a justification for judicial deference as a rebuttal of the traditional claim that the role of judicial review is to ensure that administrative bodies confine themselves to the mandate conferred on them by the legislature. At a minimum the indeterminacy rationale suggests that judges should not use the cloak of statutory interpretation to substitute their policy preferences for those of the tribunal that is interpreting its mandate, but it is less obvious what guidance it offers about the circumstances in which judicial intervention is warranted.

The second rationale for deference pointed out by Wilson J. could be described as the “presumed expertise” rationale. This rationale, which is also present in the *C.U.P.E.* decision, rests on the suggestion that specialized tribunals may actually be better placed than courts to make assessments of the interpretation of the tribunal’s mandate that best serves the statutory purposes for which the tribunal was established.⁵⁰ I call it the “presumed expertise” rationale because Wilson J. did not spell out how one is to decide whether or not the presumption that a tribunal is better placed than a court to make these types of assessments is justified. It is worth noting that this rationale carries with it, at least obliquely, the seeds for greater judicial intervention than the “statutory indeterminacy” rationale. This is because the presumed expertise rationale suggests that the object of the interpretive exercise is not merely to ensure that decisions fall within a range of justifiable choices, but to select the choice that best serves the tribunal’s statutory goals. In many instances the tribunal is likely to make that choice more effectively than a reviewing court, but it is not obvious that it will always do so.

⁴⁹ *Id.*, at 1337-38.

⁵⁰ *Id.*, at 1338-39 and 1341-43.

Justice Wilson's third rationale for deference overlaps with but is slightly different than the second, and it can be described as the "economic management" rationale. The idea here is that some agencies are established in order to carry out economic regulatory or management functions with which courts are particularly ill-equipped to interfere. Even though these agencies often have to interpret their enabling legislation in order to carry out their regulatory or managerial functions, there may not be a sharp demarcation between statutory interpretation and policy-making. Moreover, interpreting legislation in a manner that reflects sound policy choices is likely to call upon technical skills or specialized knowledge of an industry that are quite different than the skills of textual analysis that judges typically rely upon in interpreting legislation.⁵¹ Although Wilson J. does not spell this out, the implication is that some types of tribunal activity are more appropriate for judicial intervention than others, and this idea emerges explicitly in subsequent jurisprudence.⁵² The distinction between the "presumed expertise" rationale and the "economic management" rationale is that the subject matter of the tribunal's expertise makes a difference, with the decisions of some expert tribunals (for instance, human rights tribunals) being more vulnerable to judicial intervention than the decisions of other tribunals (for example, securities commissions).

The fourth rationale for judicial deference Wilson J. identified can be called the "legislative choice" rationale. This rationale rests on the right of the legislature, within constitutional limits,⁵³ to curtail statutorily the scope of judicial review of administrative decision-making. The strong form of such limitations consists of the privative clause, and Wilson J. did discuss the significance of privative clauses as a rationale for limiting the intensity of judicial review, as did Dickson J. (as he then was) in the *C.U.P.E.* case.⁵⁴ Justice Wilson did not confine this rationale to situations in which the legislature had expressly chosen to restrict the

⁵¹ See *id.*, at 1336-37.

⁵² See *Pushpanathan*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982, at paras. 36 and 48 (S.C.C.), where Bastarache J. referred to Wilson J.'s reasons in *National Corn Growers*, *supra*, note 33 in support of the idea that judges should exercise restraint in reviewing the decisions of tribunals engaged in management or regulatory activities that involve polycentric interest balancing. These types of regimes can be contrasted to regimes that engage in rights-based decision-making, where this rationale would suggest that judicial intervention is more easily justified.

⁵³ For a discussion of these limits, see *Crevier v. Quebec (Attorney General)*, [1981] S.C.J. No. 80, [1981] 2 S.C.R. 220 (S.C.C.); *MacMillan Bloedel Ltd. v. Simpson*, [1995] S.C.J. No. 101, [1995] 4 S.C.R. 725 (S.C.C.).

⁵⁴ See *National Corn Growers*, *supra*, note 33, at 1339, 1341-42.

scope of judicial review, however, and embraced the broader argument that the legislative choice to confer adjudicative authority on a specialized tribunal was itself a reason for presuming that the legislature intended courts to play a limited role in supervising the tribunal's exercise of its statutory mandate.⁵⁵ A variation on the "legislative choice" rationale for deference, to which Wilson J. did not give as much attention as she might have, is a legislative preference for decision-making arrangements that sacrifice some level of quality control in order to promote goals such as speed, accessibility or affordability. This line of argument appears most often in procedural review cases as a justification for significant departures from procedures modelled on those used by courts, but it is not entirely irrelevant as a justification for limits on judicial review, since any gains in quality of outcomes that may be produced by more expansive judicial review are inevitably purchased at a cost in terms of lack of finality, delay and financial expense, both to parties and to the justice system.

Justice Wilson did not go so far as to adopt Professor Brian Langille's thesis that the Supreme Court of Canada had deliberately adopted through a series of decisions in the late 1970s and early 1980s a "restrictive and unified" theory of judicial review.⁵⁶ Nevertheless, the overall tone of her remarks suggests considerable sympathy with this approach. Moreover, she did explicitly take aim at the possibility that in its more recent decisions the Court had "shown signs of hesitation about its commitment to the position set out in *C.U.P.E.*."⁵⁷ In particular, she emphasized that courts should be careful not to be excessively eager to classify a statutory provision being interpreted by a tribunal as one that conferred jurisdiction on the tribunal. According to the jurisprudence at the time, tribunal interpretations of these types of statutory provisions were to be reviewed by courts using the "correctness" standard, and Wilson J. saw the possible expansion of this category of provisions as having the potential to undermine the progress Canadian courts had made toward adopting a deferential approach to tribunal decision-making.⁵⁸ Having made that observation, Wilson J. refrained from a more detailed discussion of the proper approach to identifying

⁵⁵ *Id.*, at 1340-42.

⁵⁶ See *id.*, at 1340-42, in which Wilson J. referred to two articles by Professor Langille: "Developments in Labour Law: The 1981-82 Term" (1983) 5 S.C.L.R. 225 and "Judicial Review, Judicial Revisionism and Judicial Responsibility" (1986) 17 R.G.D. 169.

⁵⁷ *National Corn Growers, id.*, at 1343-44.

⁵⁸ *Id.*, at 1345.

jurisdiction-limiting statutory provisions since there was no dispute in the present appeal that the interpretation of section 42 of SIMA fell squarely within the Canadian Import Tribunal's jurisdiction.⁵⁹

Justice Wilson's observations on the rationales for judicial deference to the interpretations specialized tribunals give to their enabling legislation formed the backdrop to her analysis of the *National Corn Growers* case itself. This analysis was centrally concerned with the methodology the Court should adopt in reviewing the Tribunal's decision. Her criticism of Gonthier J.'s reasons was that he did not concern himself exclusively with the question of whether the Tribunal's interpretation of section 42 of SIMA was patently unreasonable, but also addressed a variety of other questions, such as whether or not it was appropriate for the Tribunal to refer to the GATT in interpreting section 42 of SIMA, whether the Tribunal's interpretation of section 42 conflicted with Canada's international obligations under the GATT, and whether there was sufficient evidence to support the Tribunal's findings of material injury.⁶⁰ In the context of this case, Wilson J. concluded that:

. . . [T]he only issue which this Court may consider, once it accepts that the interpretation of a given provision is a matter that falls within a tribunal's jurisdiction, is whether the Tribunal's interpretation of the provision is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation". Thus, if one determines that the Canadian Import Tribunal's interpretation of s. 42 of the Act is not "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation", then the inquiry must come to an end.⁶¹

In light of the foregoing discussion it is hardly surprising that Wilson J. concluded that the Tribunal's interpretation of section 42 of SIMA was not patently unreasonable. Section 42 may not have been a provision that "bristles with ambiguities" in Dickson J.'s famous phrase,⁶² but it is evident that a number of Canada's finest judicial minds experienced difficulty in agreeing on whether it was directed at subsidized foreign products that had a material impact on Canadian producers of those products (Iacobucci C.J.), subsidized imports that actually made their way into the Canadian marketplace and therefore had

⁵⁹ *Id.*, at 1346.

⁶⁰ *Id.*, at 1348.

⁶¹ *Id.*, at 1350.

⁶² See *C.U.P.E.*, *supra*, note 47, at 230.

an impact or potential impact on Canadian producers (MacGuigan J.A.) or subsidized foreign products that were potentially imported into Canada and therefore had a material impact on Canadian producers (Gonthier J.). This interpretive disagreement extended not only to section 42 of SIMA but to the GATT *Subsidies and Countervailing Duties Code* itself, so even if one accepted the argument that the Tribunal ought to interpret SIMA in a manner consistent with the Code, this did not represent a significant advance in addressing the question of how the Tribunal ought to have interpreted section 42. Under the circumstances, all four of the rationales for judicial deference identified by Wilson J. militated in favour of judicial acceptance of the Tribunal majority's conclusion on the proper interpretation of the statute.

Nevertheless, it is worth examining how Wilson J. expressed her conclusion that the Tribunal's decision should stand. She wrote:

... [W]hile the Tribunal's interpretation of s. 42 might well be unsatisfactory to those concerned to secure a more liberal international trade policy, in my view it can hardly be described as an interpretation that is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation". The terms "subsidy" and "subsidized goods" are defined in very broad terms indeed and the definition of "material injury" certainly cannot be said to preclude the "broader" interpretation of s. 42(1) that the Tribunal favoured. If the Tribunal's interpretation is one that the legislature concludes is not in Canada's interests or is not consistent with Canada's international obligations, then it is for the legislature to amend the Act to provide narrower definitions of the terms used in the relevant provision.⁶³

The focus of this passage seems to be on Parliament's choice of the Tribunal as opposed to the courts as the body to provide authoritative meaning to SIMA rather than on the likelihood that the Tribunal was better equipped than the courts to provide the interpretation most consistent with the effective administration of the statute. To this extent, the "legislative choice" rationale for deference seems to be the most significant influence on Wilson J.'s own conclusion, notwithstanding the emphasis she gives to the "presumed expertise" and "economic management" rationales earlier in her reasons.

This does not resolve the methodological disagreement between Wilson J. and Gonthier J., however, and it is useful at this stage to make three additional observations about this disagreement before considering

⁶³ *National Corn Growers*, *supra*, note 33, at 1352-53.

Wilson J.'s reasoning in a larger context. The first is that despite their methodological disagreement, both Wilson J. and Gonthier J. used the words "patently unreasonable" and "unreasonable" interchangeably.⁶⁴ This level of agreement in the earlier case law is particularly significant in light of the jurisprudential odyssey beginning with the Supreme Court's decision in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*⁶⁵ and ending with the Court's recent decision in *Dunsmuir*,⁶⁶ in which Canadian judges struggled valiantly to find a workable distinction between two different "reasonableness" standards of review ("reasonableness *simpliciter*" and "patent unreasonableness") before finally abandoning the effort.

The second point is that it is not entirely clear whether Wilson J.'s comments on the limited role of courts on judicial review represented a general statement about the limits of judicial review or a specific statement about the limits of judicial review in the context of the *National Corn Growers* case itself. Certainly the first sentence of Wilson J.'s conclusion on the limited scope of judicial review quoted above⁶⁷ is expressed in categorical terms. A number of commentators have understood her observations in this way and have criticized them, in my respectful view correctly, as representing too limited a conception of the role of judicial review.⁶⁸ A more charitable reading of Wilson J.'s comments, focusing on the second sentence in the passage quoted above, might be that she believed that the appellant's arguments in this particular case all hinged on the willingness of the Court to intervene to modify the Tribunal's understanding of the mandate it was given under section 42 of SIMA, and once the Court concluded that it would not do so, its role was at an end. Even if one accepts this reading of Wilson J.'s comments, it seems to me that there is some merit in Gonthier J.'s response that it is important for a reviewing court to take the Tribunal's own reasoning process seriously in order to determine whether the

⁶⁴ *Id.*, at 1380, 1373, 1374, 1378, 1379 and 1382-83 (*per* Gonthier J.) and at 1339-41, 1344-45, 1346, 1348, 1350 and 1352-53 (*per* Wilson J.).

⁶⁵ [1996] S.C.J. No. 116, [1997] 1 S.C.R. 748 (S.C.C.) [hereinafter "*Southam*"].

⁶⁶ [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.).

⁶⁷ See the text at note 61.

⁶⁸ See the comments of David Mullan, "Of Chaff Midst the Corn: *American Farm Bureau Federation v. Canada (Canadian Import Tribunal)* and Patent Unreasonableness Review" (1991) 45 Admin. L.R. 264, at 270-71, and David Jones & Anne DeVillars, *Principles of Administrative Law*, 2d ed. (Scarborough, ON: Thomson Canada Ltd., 1994), at 419-22 and 436-37; David Jones & Anne De Villars, *Principles of Administrative Law*, 4th ed. (Scarborough, ON: Thomson Canada Ltd., 2004), at 461.

interpretation the Tribunal gave to its enabling legislation was a reasonable one.⁶⁹

The final observation I would make about the methodological debate between Wilson J. and Gonthier J. in the *National Corn Growers* case is that it is important to bear in mind that all of their jurisprudential references and their discussion about the role of judicial review are concentrated on a particular segment of the administrative law world, namely, the specialized adjudicative or regulatory tribunal. As Canadian courts have pursued the more ambitious goal of developing “an overarching or unifying theory for review of the substantive decisions of all statutory or prerogative decision makers”,⁷⁰ it should hardly be surprising that we see coming into play a broader range of considerations along with a more sophisticated understanding of the full array of institutional arrangements available. This observation is not meant to belittle the contribution the debate between Wilson J. and Gonthier J. has made to our collective understanding of the approach judges ought to take on judicial review applications, but it is helpful to remind ourselves that this debate took place within a frame of reference that was somewhat more limited than the one that has come to be employed over the past decade.

III. THE EVOLUTION OF CANADIAN SUBSTANTIVE REVIEW JURISPRUDENCE

It is useful to divide the recent development of Canadian jurisprudence governing the substantive judicial review of administrative decision-making into three phases or stages. The first stage is marked by the attempt to establish a general framework for deciding when courts should show deference to the decisions of administrative tribunals. In terms of the Supreme Court of Canada jurisprudence, it can be said to begin with the Court’s 1978 decision in *C.U.P.E.*⁷¹ and culminate in the *Pushpanathan*⁷² decision in 1998. The second phase is characterized by the elaboration of the *Pushpanathan* decision and its expansion into a

⁶⁹ *National Corn Growers*, [1990] S.C.J. No. 110, [1990] 2 S.C.R. 1324, at 1383 (S.C.C.).

⁷⁰ *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No. 18, [2003] 1 S.C.R. 226 (S.C.C.) [hereinafter “*Dr. Q*”], at para. 25 (*per* McLachlin C.J.C.), quoting David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at 108.

⁷¹ *Supra*, note 47.

⁷² *Supra*, note 52.

“unifying theory” as described in *Dr. Q*⁷³ in 2003. While this phase is identified with the expansion of the *Pushpanathan* decision into new corners of administrative decision-making, it is also characterized by expressions of dissatisfaction with elements of the *Pushpanathan* framework. We are currently in the third stage, which is marked by an attempt to simplify and scale back elements of the framework. This represents an attempt to reconcile those whose criticisms had been largely rejected during the second, expansionist phase to a modified version of the dominant jurisprudence. The boundary between the second and third phase is not as sharp as the one between the first and the second, and it could be argued that it only began in earnest with the Court’s attempt to recast standard of review jurisprudence in *Dunsmuir*⁷⁴ in 2008. On the other hand, one can see signs of this phase emerging as early as the Court’s decision in *Law Society of New Brunswick v. Ryan*,⁷⁵ released the same day as *Dr. Q*.

It would be a gross over-simplification to suggest that the jurisprudence developed in a seamless fashion during each of the stages described above. The Supreme Court of Canada’s decisions on substantive judicial review were far from unanimous during any of the phases I have just identified, and a different chronology could be constructed by concentrating on areas of disagreement rather than by putting the focus on areas where a consensus seems to emerge over time.⁷⁶ Nevertheless, it seems to me that with the benefit of hindsight it is possible to discern a pattern of development within which Wilson J.’s reasons in the *National Corn Growers* case can be usefully located.

Chronologically, the *National Corn Growers* case belongs in the middle of the first phase, during which the Supreme Court of Canada made deference to tribunal decision-making an express part of the jurisprudence governing substantive review but grappled to find a framework for determining when deference would be available and when it would not. In the Supreme Court jurisprudence between *C.U.P.E.* and *National Corn Growers*, much attention was focused on drawing a distinction between cases where tribunals were interpreting statutory provisions that conferred jurisdiction on them or expressed the limits of their jurisdiction, in which case the tribunal’s interpretation was

⁷³ *Supra*, note 70.

⁷⁴ *Supra*, note 66.

⁷⁵ [2003] S.C.J. No. 17, [2003] 1 S.C.R. 247 (S.C.C.) [hereinafter “*Ryan*”].

⁷⁶ For a helpful example of a slightly different chronology, see David Jones & Anne de Villars, *supra*, note 68, 4th ed., at Chapter 12.

not entitled to deference, and the interpretation of provisions falling within the tribunal's jurisdiction, which were entitled to deference, at least if the tribunal's decision was protected by a privative clause.⁷⁷ On the face of it, because this issue did not arise in the *National Corn Growers* case itself, Wilson J. had little to say about how the distinction should be drawn other than to suggest that it should not be drawn in a manner that undermined the Court's general posture of deference to the decisions of specialized tribunals.⁷⁸ As the case law evolved over the course of the 1990s, however, this line of authority became subsumed in a more general discussion of the circumstances in which deference was or was not warranted, and Wilson J.'s general observations on the rationales for deference are relevant to this discussion.

Three themes emerged during the course of this debate. The first was that deference to tribunal decision-making was not confined to tribunals whose decisions were protected by privative clauses. This development had already occurred prior to the *National Corn Growers* decision, as Wilson J. pointed out in her reasons, but it was to accelerate as the 1990s wore on.⁷⁹ The second theme was the emergence of a very restrictive definition of when a tribunal's interpretation of its enabling legislation could be deemed "patently unreasonable".⁸⁰ This development was somewhat at odds with the willingness of the Supreme Court of Canada majority in the *Lester* case,⁸¹ and Wilson J. herself in a dissenting judgment in *Paccar*,⁸² to invalidate tribunal decisions using the "patently unreasonable" standard of review. This tension was to intensify in the expansionist phase that followed the Court's decision in *Pushpanathan*⁸³ and was one of the factors that contributed to the retrenchment we are seeing in the current stage of jurisprudential development. The third theme, which was influenced by the first and second, was the

⁷⁷ See, for example, *Teamsters Union Local 938 v. Massicotte*, [1982] S.C.J. No. 37, [1982] 1 S.C.R. 710 (S.C.C.); *Blanchard v. Control Data Canada Ltd.*, [1984] S.C.J. No. 51, [1984] 2 S.C.R. 476 (S.C.C.); *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] S.C.J. No. 49, [1984] 2 S.C.R. 412 (S.C.C.); *Union des employés de service, Local 298 v. Bibeault*, [1988] S.C.J. No. 101, [1988] 2 S.C.R. 1048 (S.C.C.).

⁷⁸ See *National Corn Growers*, [1990] S.C.J. No. 110, [1990] 2 S.C.R. 1324, at 1343-46.

⁷⁹ See, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] S.C.J. No. 58, [1994] 2 S.C.R. 557 (S.C.C.); *Southam*, *supra*, note 65.

⁸⁰ See, for example, *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] S.C.J. No. 35, [1993] 1 S.C.R. 941 at 963-64 (S.C.C.).

⁸¹ [1990] S.C.J. No. 127, [1990] 3 S.C.R. 644 (S.C.C.).

⁸² [1989] S.C.J. No. 107, [1989] 2 S.C.R. 983 (S.C.C.).

⁸³ [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982 (S.C.C.).

development of a spectrum of standards of review to fill in the conceptual territory where some deference was warranted but where the Supreme Court was uncomfortable confining courts to an extremely limited review role using the restrictive version of the “patently unreasonable” standard. The view at the time, expressed most clearly by Iacobucci J.,⁸⁴ was that the logic of a sophisticated and comprehensive system of judicial review required at least one intermediate review standard to occupy the ground between correctness review and review employing a very deferential “patently unreasonable” standard.

Although Bastarache J.’s decision in *Pushpanathan* has become the foundation for the subsequent development of standard of review jurisprudence, the structure of Bastarache J.’s reasons suggests that he saw the exercise as a consolidation of the previous jurisprudence rather than a fresh start in the Court’s thinking about standards of review. Perhaps for that reason, the decision tends to blend different strands of jurisprudence together as factors in a four-part test for determining the appropriate standard of review. These factors are: (1) the presence or absence of a privative clause or right of appeal;⁸⁵ (2) the relative expertise of the court and the tribunal with respect to the issue in dispute;⁸⁶ (3) the purpose of the statutory scheme, and in particular the statutory provisions that are in dispute;⁸⁷ and (4) the nature of the problem, and in particular whether it involved mainly legal or factual questions.⁸⁸ By analyzing these factors in respect of each issue in dispute, a reviewing court was to identify the appropriate standard of review for each issue along a spectrum of standards ranging from correctness to the “patently unreasonable” standard of review.⁸⁹

The first three of these factors are linked respectively to the “legislative choice”, “presumed expertise” and “economic management” rationales for judicial deference to tribunal decision-making identified by Wilson J. in the *National Corn Growers*⁹⁰ case. Justice Wilson herself did not create these rationales, but she did express them in a particularly

⁸⁴ See, for example, *Southam*, *supra*, note 65, at para. 55; Hon. Frank Iacobucci, “Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis” (2002) 27 Queen’s L.J. 860.

⁸⁵ *Pushpanathan*, *supra*, note 83, at paras. 30-31.

⁸⁶ *Id.*, at paras. 32-35.

⁸⁷ *Id.*, at para. 36.

⁸⁸ *Id.*, at para. 37.

⁸⁹ *Id.*, at para. 27.

⁹⁰ *Supra*, note 78.

clear fashion and Bastarache J. acknowledged his intellectual debt to her reasons in *National Corn Growers* in two passages in his reasons in *Pushpanathan*. He referred generally to *National Corn Growers* to illustrate the proposition that courts may defer to expert tribunals even with respect to matters of statutory interpretation⁹¹ and specifically to Wilson J.'s reasons in support of the view that judicial deference was particularly appropriate in reviewing decisions of agencies engaged in economic management.⁹²

To the extent that Wilson J.'s reasons in *National Corn Growers* were designed to promote a general posture of judicial deference to tribunal decision-making, however, her views did not carry the day. To some extent this development was inevitable as the Supreme Court of Canada moved from thinking about the proper approach to the review of decisions made by specialized tribunals, whose members could be considered to be subject matter experts and whose decisions were often protected by privative clauses, to review of the full range of administrative action that extended to decisions of mass justice bureaucracies, elected local government officials and beyond. On the other hand, the multi-factor analysis developed in *Pushpanathan* was sufficiently malleable that the courts were able to grant and withhold deference on a much more selective basis than one would expect if Wilson J.'s reasoning in the *National Corn Growers* case were being applied.

Two illustrations are sufficient for present purposes. The first is the *Pushpanathan* case itself. It had significant parallels to *National Corn Growers* since the Court was reviewing a decision of a specialized federal tribunal charged with interpreting a statute that was designed to implement an international obligation, in this case the United Nations *Convention Relating to the Status of Refugees*.⁹³ It would not be difficult to imagine a court drawing an analogy with *National Corn Growers* and concluding that the Immigration and Refugee Board's interpretation of its enabling legislation ought to be entitled to judicial deference. Notwithstanding these similarities, however, the Supreme Court of Canada was unanimous in concluding that the "correctness" standard of review should be applied.⁹⁴

⁹¹ *Supra*, note 83, at para. 34.

⁹² *Id.*, at para. 36.

⁹³ *Convention Relating to the Status of Refugees*, 1951, [1969] C.T.S./R.T.C. 6; 189 U.N.T.S./R.T.N.U 150.

⁹⁴ See *Pushpanathan*, *supra*, note 83 at paras. 42-50 (*per* Bastarache J.) and 80 (*per* Cory J., dissenting, but not on this point).

Justice Bastarache's elaborate reasons for choosing the correctness standard certainly offered plausible grounds for distinguishing the decisions of the Immigration and Refugee Board in *Pushpanathan* from those of the Canadian Import Tribunal in *National Corn Growers*. The decisions of the Board were not protected by a privative clause,⁹⁵ and arguably the scheme of limiting access to judicial review to situations in which a "serious question of general importance"⁹⁶ was certified by the Federal Court Trial Division (as it then was) signalled a legislative intention to have the courts review decisions that were so certified using the correctness standard.⁹⁷ Likewise, the Convention Refugee Determination Division of the Immigration and Refugee Board was determining legal rights and obligations rather than engaging in the type of polycentric interest balancing characteristic of a regulatory agency carrying out economic management functions.⁹⁸

Nevertheless, the *Pushpanathan* decision also sowed the seeds of greater intervention in the work of economic regulatory bodies through the approach the Court took to the definition of a tribunal's specialized expertise. Justice Bastarache concluded that the Board did not have greater expertise than the courts in interpreting its enabling legislation because its work involved "general questions of law" and its enabling legislation did not require all members to have specialized legal expertise.⁹⁹ Justice Wilson in *National Corn Growers* presumed that the Canadian Import Tribunal had expertise because of the specialized character of its adjudicative role, but after *Pushpanathan*, courts would be able to define the relative expertise of courts and tribunals by concentrating on the precise nature of the issue in dispute and by close scrutiny of the structure of the administrative body whose decisions were under review.¹⁰⁰

The second illustration can be found in a Supreme Court of Canada decision from the second phase of development of the standard of review

⁹⁵ See the reasons of Bastarache J. in *Pushpanathan, id.*, at para. 49.

⁹⁶ See *Immigration Act*, R.S.C. 1985, c. I-2, s. 83(1).

⁹⁷ *Pushpanathan, supra*, note 83, at paras. 43-44.

⁹⁸ *Id.*, at para. 48.

⁹⁹ *Id.*, at paras. 45-47.

¹⁰⁰ For a particularly insightful discussion of the difficulties Canadian courts have experienced in determining when relative expertise justifies judicial deference to administrative decision-making, see Robert Hawkins, "Reputational Review I: Expertise, Bias and Delay (1998) 21 Dal. L.J. 5.

framework: *Barrie Public Utilities v. Canadian Cable Television Assn.*¹⁰¹ In that case, the Supreme Court majority held that the Canadian Radio-television and Telecommunications Commission did not have specialized expertise relative to the courts in interpreting a provision of its enabling legislation governing access to the supporting structures of transmission lines since this was not considered to be a question of a technical nature. Justice Bastarache disagreed. He adopted Wilson J.'s view that an expert tribunal is normally entitled to deference in its interpretation of its enabling legislation because the tribunal is typically in a better position than the Court to understand both the policy context and the policy implications of different interpretive choices.¹⁰² In contrast, by segmenting the tribunal's expertise into technical matters that were entitled to deference and matters of general statutory interpretation that were not, the majority effectively undermined the tribunal's ability to authoritatively interpret its mandate in the manner that was most consistent with the interplay between statutory language and public policy goals, and asserted the primacy of the textual approach to interpretation typically favoured by judges.

As the *Barrie Public Utilities* case demonstrates, the *Pushpanathan* decision provided Canadian courts with a framework for addressing questions of when they should defer to the decisions of administrative bodies rather than a set of bright line tests for answering those questions. The Supreme Court of Canada obviously thought that answers would become clear as courts at all levels of the justice system gained experience in using the framework. The Court quickly embraced the framework, and expanded its use from the review of the decisions of administrative tribunals to the review of discretionary decisions by public officials¹⁰³ and then to the substantive review of the exercise of delegated legislative authority and other policy decisions by local government.¹⁰⁴ By 2001, Canada's leading academic commentator on

¹⁰¹ [2003] S.C.J. No. 27, [2003] 1 S.C.R. 476 (S.C.C.) [hereinafter "*Barrie Public Utilities*"].

¹⁰² *Id.*, at para. 86. Justice Bastarache also made reference to Wilson J.'s reasoning in the *National Corn Growers* case, *supra*, note 78, directly at para. 77 and indirectly at para. 128.

¹⁰³ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.) [hereinafter "*Baker*"]; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] S.C.J. No. 43, [2001] 2 S.C.R. 281 (S.C.C.) [hereinafter "*Mount Sinai*"].

¹⁰⁴ *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] S.C.J. No. 14, [2000] 1 S.C.R. 342 (S.C.C.); *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (S.C.C.) [hereinafter "*Chamberlain*"].

administrative law, Professor David Mullan, was describing the *Pushpanathan* framework as “an overarching or unifying theory for review of the substantive decisions of all manner of statutory and prerogative decision-makers”,¹⁰⁵ a description that was explicitly adopted in 2003 by McLachlin C.J.C. writing for a unanimous Supreme Court of Canada in the *Dr. Q* case.¹⁰⁶

While disagreements about the application of the framework in particular cases were to be expected,¹⁰⁷ there were also disquieting signs of dissatisfaction with the framework itself even during the expansionist phase of its development. At the Supreme Court of Canada, these expressions of dissatisfaction were put forward most forcefully by LeBel J. in a series of dissenting and minority judgments beginning with the *Chamberlain* case in 2002. The concern he expressed in *Chamberlain* was that it was inappropriate to use a framework designed with reference to administrative tribunals in order to assess the proper standard of review of decisions of local government bodies. In his view, the attempt to do so was likely to distort rather than clarify judicial thinking about how to approach the relationship between the courts and these organizations.¹⁰⁸ In *Toronto (City) v. Canadian Union of Public Employees, Local 79*,¹⁰⁹ and *Voice Construction Ltd. v. Construction and General Workers’ Union, Local 92*,¹¹⁰ however, LeBel J. raised more fundamental questions about the way the *Pushpanathan* framework was being used by the courts. First, he asked whether the four-factor analysis was not overly complicated in at least some cases, with the result that the courts risked going through a formulaic exercise to reach a result that could have been obtained much more simply.¹¹¹ Second, and more fundamentally, he raised serious questions about how the “patently unreasonable” standard of review had been defined and applied in recent

¹⁰⁵ David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at 108.

¹⁰⁶ [2003] S.C.J. No. 18, [2003] 1 S.C.R. 226 (S.C.C.).

¹⁰⁷ In particular, members of the Supreme Court of Canada continue to have difficulty agreeing on the circumstances in which a specialized tribunal’s interpretation of its enabling legislation will be entitled to deference from the courts. Justice Abella seems to me the most consistent defender of the use of a deferential standard of review in these circumstances, and Deschamps and Rothstein JJ. appear to take the most expansive view of the circumstances in which the use of the correctness standard is appropriate. See, for example, *VIA Rail*, [2007] S.C.J. No. 15, [2007] 1 S.C.R. 650 (S.C.C.), *Dunsmuir*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.), and *Proprio Direct*, [2008] S.C.J. No. 32, 2008 SCC 32 (S.C.C.).

¹⁰⁸ *Chamberlain*, *supra*, note 104, at paras. 190-95.

¹⁰⁹ [2003] S.C.J. No. 64, [2003] 3 S.C.R. 77 (S.C.C.) [hereinafter “*Toronto v. C.U.P.E.*”].

¹¹⁰ [2004] S.C.J. No. 2, [2004] 1 S.C.R. 609, (S.C.C.) [hereinafter “*Voice Construction*”].

¹¹¹ *Toronto v. C.U.P.E.*, *supra*, note 109, at para. 62.

Supreme Court of Canada decisions¹¹² and about the utility of the conceptual distinctions the Court had attempted to draw between review using the “patent unreasonableness” and “reasonableness *simpliciter*” standards.¹¹³

The Supreme Court of Canada did not concede that major surgery on the *Pushpanathan* framework was needed until it released its decision in *Dunsmuir*¹¹⁴ in 2008, but there were earlier signs that the Court was sensitive to the argument that the framework was excessively complicated. Even the *Ryan* decision,¹¹⁵ released at the peak of the Court’s commitment to the *Pushpanathan* framework in 2003, represents a concession to the demand for simplicity since it signals a shift from the idea that a variety of standards of review existed on a continuum to a commitment to use only three standards of review: correctness, reasonableness *simpliciter* and patent unreasonableness. Justice Iacobucci, who wrote the reasons for a unanimous Court, acknowledged that greater refinement in the standard of review framework is not always productive. He observed:

At this point, the multiplication of standards past the three already identified would force reviewing courts and the parties that appear before them into complex and technical debates at the outset. I am not convinced that the increase in complexity generated by adding a fourth standard would lead to greater precision in achieving the objectives of judicial review of administrative action.¹¹⁶

Other gestures in the direction of simplification were soon to follow. In *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*,¹¹⁷ decided in 2004, the Court decided that where the question at issue was whether or not a municipal by-law was *ultra vires*, the *Pushpanathan* analysis was unnecessary because correctness would always be the appropriate standard of review. And in her reasons for the majority in *VIA Rail*, decided in 2007, Justice Abella signalled that the Court was open to collapsing the distinction between the two “reasonableness” standards of review.¹¹⁸

¹¹² *Id.*, at paras. 63-66, 77-99.

¹¹³ *Id.*, at paras. 100-134; *Voice Construction, supra*, note 110, at paras. 40-42.

¹¹⁴ [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.).

¹¹⁵ [2003] S.C.J. No. 17, [2003] 1 S.C.R. 247 (S.C.C.).

¹¹⁶ *Id.*, at para. 25.

¹¹⁷ [2004] S.C.J. No. 19, [2004] 1 S.C.R. 485 (S.C.C.).

¹¹⁸ *VIA Rail, supra*, note 107, at paras. 101-103.

If the Supreme Court of Canada's retreat from elements of its previous standard of review jurisprudence in *Dunsmuir* cannot be said to come as a complete surprise, the reasons of Bastarache and LeBel JJ. for the majority in *Dunsmuir* nevertheless represent a significant concession to those who had expressed concerns about the complexity of the *Pushpanathan* framework for judicial review. In particular, the explicit abandonment of the third standard of review,¹¹⁹ an idea that had been part of the Court's jurisprudence since 1997¹²⁰ and had been expressly endorsed by a unanimous Court in *Ryan*¹²¹ as recently as 2004, suggests that those who believe that the standard of review jurisprudence had become unnecessarily complex have won the upper hand. Moreover, the minority judgment of Deschamps J. in *Dunsmuir* (concurring in by Charron and Rothstein JJ.) and her dissenting judgment in *Proprio Direct*¹²² (concurring in by Rothstein J.) indicate that at least some members of the Court are interested in further shrinking the range of circumstances in which courts defer to the decisions of tribunals.

Despite these concessions, however, the majority reasons in *Dunsmuir* represent a retreat from the most elaborate expression of the *Pushpanathan* framework rather than a wholesale abandonment of judicial deference to tribunal decision-making. In particular, the discussion Bastarache and LeBel JJ. offered on the selection of the appropriate standard of review was designed to simplify the use of the *Pushpanathan* framework without fundamentally compromising the framework's basic features. While Bastarache and LeBel JJ. identified a number of situations in which courts would be able to select the appropriate standard of review without going through a full standard of review analysis using the *Pushpanathan* framework,¹²³ the factors that make up the framework remain intact and continue to be applicable where it is not possible for a court to reach a definitive conclusion using a simplified analysis.¹²⁴

Justice Wilson's reasons in *National Corn Growers*¹²⁵ are not referred to in *Dunsmuir*, and the use of three distinct standards of review was

¹¹⁹ See *Dunsmuir*, *supra*, note 114, at paras. 44-50.

¹²⁰ The intermediate "reasonableness *simpliciter*" standard of review was introduced in Iacobucci J.'s reasons in *Southam*, [1996] S.C.J. No. 116, [1997] 1 S.C.R. 748 (S.C.C.).

¹²¹ *Supra*, note 115.

¹²² *Supra*, note 107.

¹²³ *Dunsmuir*, *supra*, note 114, at paras. 52-61.

¹²⁴ *Id.*, at paras. 62-64.

¹²⁵ [1990] S.C.J. No. 110, [1990] 2 S.C.R. 1324 (S.C.C.).

developed after she left the Court, so it is difficult to predict how she would have viewed the Court's abandonment of the third standard of review in *Dunsmuir*. On the whole, however, I do not believe this development would have troubled her. As her dissenting judgment in the *Paccar* case reveals, she did not believe that a general posture of deference to tribunal decision-making prevented courts from intervening where a tribunal made an interpretive or policy choice that was not consistent with or supportable by the tribunal's enabling legislation.¹²⁶ In the same case, she indicated that she did not favour an approach to judicial review using the "patently unreasonable" standard that would "define patent unreasonableness in terms of rational indefensibility",¹²⁷ arguing that the substitution of one phrase for another was not helpful and that a "rational indefensibility" test might be viewed as even more restrictive of judicial intervention than the "patently unreasonable" standard. As I noted earlier, in *National Corn Growers* both Wilson J. and Gonthier J. used the terms "patently unreasonable" and "unreasonable" interchangeably, and I do not believe that she would have found it offensive for the courts to use a unified "reasonableness" standard to express their deference to tribunal decision-making.

What is less clear is how she would have viewed the approach to reasonableness review endorsed by Bastarache and LeBel JJ. in *Dunsmuir*. Their thoughts on this subject are worth quoting at some length:

The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" [*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-

¹²⁶ [1989] S.C.J. No. 107, [1989] 2 S.C.R. 983, at 1022-23 (S.C.C.).

¹²⁷ *Id.*, at 1022.

Dubé J., dissenting]. We agree with David Dyzenhaus where he states that the concept of “deference as respect” requires of the courts “not submission but a respectful attention to the reasons offered or which could be offered in support of a decision”: “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, per L’Heureux-Dubé J.; *Ryan*, at para. 49).

Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime”: D.J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.¹²⁸

Insofar as Bastarache and LeBel JJ. were endorsing the “legislative choice” rationale for deference in this passage, their reasons are consistent with Wilson J.’s general observations in the *National Corn Growers* case and the primacy her conclusions appear to accord to that rationale. It is less obvious how this rationale is to be reconciled with the notion of deference as respect. It has never seemed to me that disagreement with another decision-maker’s conclusions automatically implies lack of respect. A reviewing court (or, for that matter, an academic commentator) can sometimes fail to give serious consideration to the reasoning that influenced a decision-maker to select a particular course of action, and that failure can be said to indicate a lack of respect. But serious consideration is not the same thing as agreement, and it is not clear to me why deference as respect should require a reviewing court to prefer a tribunal’s interpretation of its enabling legislation to the interpretation that seems more persuasive to a court where the issue is one on which reasonable people could disagree, which will often be the case. At a minimum, it seems to me that the idea of deference as respect implies an approach to judicial review that is more consistent with

¹²⁸ *Dunsmuir*, *supra*, note 114, at paras. 48-49.

Gonthier J.'s detailed analysis of the reasons offered by various decision-makers in the *National Corn Growers* case than Wilson J.'s approach, and that it is likely to lead to greater judicial intervention in tribunal decision-making than if her preferred methodology were adopted.

IV. THE SIGNIFICANCE OF JUSTICE WILSON'S REASONING FOR CONTEMPORARY STANDARD OF REVIEW ANALYSIS

Having situated Wilson J.'s reasoning in *National Corn Growers*¹²⁹ within the framework of the development of contemporary standard of review analysis, what conclusions can we draw about the significance of her reasons for that jurisprudence? I have already touched on a number of the areas of disagreement that have featured prominently in the jurisprudence since the *National Corn Growers* decision was rendered, but it may be convenient to enumerate them for purposes of this discussion. The first is the scope of judicial review, and more particularly whether courts are confined to reviewing purely legal questions addressed by administrative bodies in the course of making decisions. The second is how to decide when reviewing courts should accord deference to administrative decision-makers and when they should not do so. And the third is how to conceive of judicial deference to administrative decision-making, or in practical terms, how a reviewing court is to decide that an administrative decision is sufficiently unreasonable that it must be overturned notwithstanding the court's general posture of deference to the administrative decision-maker.

With respect to the first issue, the general scope of judicial review, I agree with earlier commentators who observed that, if Wilson J.'s reasons in *National Corn Growers* are read as limiting all substantive judicial review to an assessment of an administrative decision-maker's interpretation of its enabling legislation, that conception of judicial review represents too narrow a view of the court's mandate.¹³⁰ It may be

¹²⁹ *Supra*, note 125.

¹³⁰ See the comments of David Mullan, "Of Chaff Midst the Corn: *American Farm Bureau Federation v. Canada (Canadian Import Tribunal)* and Patent Unreasonableness Review" (1991) 45 Admin. L.R. 264, at 270-71, and David Jones & Anne de Villars, *Principles of Administrative Law*, 2d ed. (Scarborough, ON: Thomson Canada Ltd., 1994), at 419-22 and 436-37; David Jones & Anne De Villars, *Principles of Administrative Law*, 4th ed. (Scarborough, ON: Thomson Canada Ltd., 2004), at 461.

possible to reconcile Wilson J.'s observations with mainstream jurisprudence by noting that courts are not bound by the parties' characterization of the nature of the issues in dispute, and there will be circumstances in which the true nature of the dispute can be characterized as one that turns on a tribunal's interpretation of its enabling statute. Nevertheless, it is clear from the jurisprudence that sufficiently serious errors in making factual findings¹³¹ or sufficiently unreasonable exercises of discretion¹³² can form the basis for judicial intervention as well as unreasonable interpretations of statute.

With respect to the second issue, when deference is owed, it is clear from the foregoing discussion that Wilson J.'s views have been influential but have not entirely carried the day. Even if her general approach to deference has not been followed consistently by Canadian courts, Wilson J.'s methodological insights have been persuasive in identifying the perils of what has come to be known as "segmentation" of tribunal decision-making.¹³³ As far back as the use of the "preliminary and collateral questions" doctrine¹³⁴ and the "wrong questions" doctrine,¹³⁵ courts were expanding opportunities for intervention into administrative decision-making by separating a tribunal's decision into a number of discrete questions and finding that if the tribunal failed to answer one or more of those questions correctly in the view of the court, the tribunal had exceeded its jurisdiction. Excessive use of these doctrines was criticized by Dickson J. (as he then was) in *C.U.P.E.*,¹³⁶ and one seldom sees reference to them in contemporary judicial review decisions. Nevertheless, their modern equivalent is found in such things as the tendency illustrated in the *Barrie Public Utilities* case¹³⁷ to segment a specialist tribunal's expertise into technical questions, on which the tribunal is entitled to

¹³¹ See, for example, *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] S.C.J. No. 27, [1997] 1 S.C.R. 487 (S.C.C.) [hereinafter "*Toronto v. O.S.S.T.F.*"]; *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] S.C.J. No. 39, [1997] 1 S.C.R. 793 (S.C.C.).

¹³² See, for example, *Baker*, *supra*, note 103; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28, [2003] 1 S.C.R. 539 (S.C.C.) [hereinafter "*C.U.P.E. v. Ontario*"].

¹³³ See the reasons of Binnie J. in *Dunsmuir*, *supra*, note 114, at para. 142.

¹³⁴ See, for example, *Bell v. Ontario (Human Rights Commission)*, [1971] S.C.J. No. 66, [1971] S.C.R. 756 (S.C.C.).

¹³⁵ See, for example, *Anisimic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers Local 796*, [1970] S.C.J. No. 9, [1970] S.C.R. 425 (S.C.C.).

¹³⁶ [1979] S.C.J. No. 45, [1979] 2 S.C.R. 227, at 233 (S.C.C.).

¹³⁷ *Supra*, note 101.

judicial deference, and general questions of law and interpretation, which the tribunal must decide correctly in the eyes of a reviewing court.

Unfortunately, it has been easier to identify the risks of excessive segmentation than it has been to propose the abandonment of segmentation entirely. Indeed, even though Wilson J. seemed attracted by Professor Langille's idea of a general posture of judicial deference to specialized tribunals, she did not fully embrace the idea that there were never circumstances in which correctness review was appropriate, and left that question for another day.¹³⁸ The majority decision in *Dunsmuir* identified a number of situations in which it is presumptively appropriate for reviewing courts to use the correctness standard in reviewing an administrative decision, including determinations of constitutional questions by administrative bodies¹³⁹ and determinations relating to the jurisdictional boundaries between two or more specialized tribunals.¹⁴⁰ These types of issues will rarely be the sole question facing an administrative body; they will more typically arise as part of a determination being made by the body in the course of exercising its statutory authority. If these types of issues are to be fully addressed by reviewing courts, therefore, it seems to me that more often than not the court will be engaged in segmentation of the administrative body's decision. To say that segmentation in these circumstances is always inappropriate seems to me to represent an abandonment of a central function of judicial review, so in my view a sophisticated and comprehensive system of judicial review has to be prepared to countenance segmentation of decision-making in at least some circumstances. The key is to draw principled boundaries around when segmentation is appropriate, and to avoid the temptation to use segmentation as a vehicle to enable courts to engage in more searching review than is warranted by the circumstances.

I want to concentrate my concluding observations on the third issue, our concept of deference, because this is the area in which I believe that neither Wilson J. in *National Corn Growers* nor the subsequent jurisprudence has offered sufficient guidance. It seems to me that where Wilson J.'s reasons made their most lasting contribution to contemporary judicial review jurisprudence was in identifying with clarity the different rationales for judicial deference to administrative decision-making.

¹³⁸ See the discussion in the text at notes 56-59.

¹³⁹ *Dunsmuir*, *supra* note 114, at para. 58.

¹⁴⁰ *Id.*, at para. 61.

Unfortunately, the tension inherent in these different rationales for deference was not resolved by her or in the jurisprudence to date. Moreover, as I have argued elsewhere,¹⁴¹ a deferential standard of review is of limited practical utility until reviewing courts develop a sophisticated understanding not only of the rationales for deference but of the rationales for intervention notwithstanding a general posture of deference.

It seems to me that the “statutory indeterminacy” rationale for deference sounds a useful precautionary note for courts in entering into the process of deferential review of administrative interpretations of statutes, but it is not an adequate explanation for why the court should accept an expert tribunal’s interpretation of a statute in preference to its own once it has taken careful account of the tribunal’s reasoning. The “presumed expertise” rationale provides a reason for the court to be willing to accept the tribunal’s interpretation as a general proposition, but it seems to me that it is not a particularly compelling reason. This rationale invites a reviewing court to presume that a specialized tribunal is more likely than the court to be able to identify the interpretation of the legislation that best combines the tribunal’s ability to operate effectively with respect for the limitations of its statutory mandate. By implication, however, it also invites the party dissatisfied with the tribunal’s decision to attempt to rebut that presumption. It is not impossible in my view to create a discipline for this process that makes it fundamentally different than review using a “correctness” standard. Nevertheless, it seems to me that in the absence of such a discipline, Wilson J. was justified in her concern that if courts can be persuaded to inquire too closely into a tribunal’s reasoning in reaching its decision, the temptation to engage in “correctness” review under the guise of “reasonableness” review might be too great to resist.

To the extent that the “economic management” rationale for deference is understood as simply reinforcing the “presumed expertise” rationale for tribunals that operate in certain subject matter areas, it shares the frailties of that rationale. It can be argued, however, that the “economic management” rationale depends less on the superiority of the tribunal’s specialized expertise than on the legislation’s decision to place managerial responsibility over a particular area of the economy into the hands of a tribunal. Although it is far from clear that Wilson J. saw the “economic management” rationale this way, it could be argued that this rationale is

¹⁴¹ See Philip Bryden, “Understanding the Standard of Review in Administrative Law” (2005) 54 U.N.B.L.J. 75.

better understood as a special instance of the “legislative choice” rationale rather than of the “presumed expertise” rationale. The “legislative choice” rationale does offer courts a compelling reason for preferring a tribunal’s interpretive choices to its own, because it instructs courts to respect the legislature’s decision to confer on the tribunal the basic right to make authoritative decisions, and more specifically to give authoritative meaning to a statute. As I will explain, I do not believe that this authority is unlimited, and the “legislative choice” rationale continues to offer courts a meaningful, albeit severely restricted, role in review using a reasonableness standard. It seems to me, however, that the “legislative choice” rationale for deference places courts in a qualitatively different position on judicial review than the “presumed expertise” rationale.

To explain this difference, it is helpful to explore some of the rationales that can be offered for judicial intervention in tribunal decision-making notwithstanding a general posture of deference. A non-exhaustive list that can be derived from Canadian case law includes the following reasons for intervention:¹⁴²

- (1) A tribunal has made a decision in bad faith.¹⁴³
- (2) A tribunal’s decision is grounded on a legal premise that is unquestionably incorrect (for example, the decision relies on a statutory provision that has been repealed).¹⁴⁴
- (3) There are serious flaws in the logical underpinnings of a tribunal’s decision.¹⁴⁵
- (4) A tribunal goes beyond its interpretive mandate and effectively seeks to amend its enabling legislation in the guise of interpreting it.¹⁴⁶

¹⁴² For a more detailed explanation of this list, see *id.*, at 94-99.

¹⁴³ See, for example, *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.).

¹⁴⁴ See *Vernon (City) v. Vernon Professional Fire Fighters Assn., International Assn. of Fire Fighters, Local 1517*, [1996] B.C.J. No. 1750 (B.C.S.C.), in which an arbitrator interpreting a piece of legislation that had recently been enacted relied on the text of the Bill that introduced the legislation, and the text of the relevant section had been amended on Third Reading.

¹⁴⁵ See, for example, *Toronto v. O.S.S.T.F.*, [1997] S.C.J. No. 27, [1997] 1 S.C.R. 487 (S.C.C.); *Mount Sinai Hospital*, [2001] S.C.J. No. 43, [2001] 1 S.C.R. 342 (S.C.C.), *per* Binnie J.

¹⁴⁶ See, for example, *Lester*, [1990] S.C.J. No. 127, [1990] 3 S.C.R. 644 (S.C.C.), *per* McLachlin J.

- (5) A tribunal's interpretation of its enabling legislation is inconsistent with basic and well accepted principles of statutory interpretation.¹⁴⁷
- (6) A tribunal's decision is inconsistent with basic legal norms in Canadian society.¹⁴⁸
- (7) A tribunal's decision is inconsistent with the policy objectives of its enabling legislation.¹⁴⁹

It seems to me that whatever rationale one adopts for deference to tribunal decision-making as a general proposition, the first two reasons on this list justify judicial intervention. In other words, even if we assume that the legislature intended to confer on a tribunal the power to make authoritative decisions including authoritative interpretations of its enabling legislation, it is both implausible and constitutionally offensive to suggest that the legislature intended to confer on a tribunal the authority to act in bad faith or to make decisions that are contrary to basic and uncontested rules of law. The third and fourth rationales for intervention are likely to provoke controversy in their application, since decision-makers are unlikely to agree that their decisions are fundamentally logically flawed or that they have stepped beyond the boundaries of interpretation and usurped the right to amend legislation. In principle, however, it seems to me that these rationales for intervention still respect the basic principle of legislative choice of an administrative body rather than as the final arbiter of the interpretation of a statute. This is because it is reasonable to assume that the legislature did not intend delegates of statutory authority to make decisions on a basis that is logically unsupportable or to amend rather than interpret their legislative mandates.

As we move to the next three reasons for intervention, however, it seems to me that they are easier to reconcile with the "presumed expertise" rationale for deference than with the "legislative choice" rationale. For example, it seems to me that it is not inherently implausible to suggest that one reason a legislature might prefer to have a tribunal rather than a court make authoritative decisions about the

¹⁴⁷ See *Jones v. New Brunswick (Board of Management)*, 2004 NBCA 65, [2004] N.B.J. No. 345 (N.B.C.A.), per Robertson J.A.

¹⁴⁸ I did not include this rationale in "Understanding the Standard of Review in Administrative Law", *supra*, note 141, but I believe it is consistent with Supreme Court of Canada decisions such as *Baker*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

¹⁴⁹ See *C.U.P.E. v. Ontario*, *supra*, note 132, per Binnie J.

proper interpretation of a statute is that the legislature believes that the approach judges are likely to take, embedded as it is in certain approaches to the interpretation of legislative texts, will thwart rather than serve the legislature's public policy goals. Similarly, it is plausible to suggest that legislatures may choose to use tribunals rather than judges as decision-makers because they want to avoid reliance on judicially defined legal norms. For example, it can be argued that legislatures moved collective bargaining disputes out of the courts and into the administrative tribunal arena precisely in order to avoid decision-makers who were likely to be influenced by the norms characteristic of the common law governing employment. A similar argument can be advanced for the use of workers' compensation boards rather than courts to deal with industrial accidents and illness in order to avoid decision-making that was excessively influenced by the norms embedded in the common law of torts. Finally, it seems to me that for a court to invalidate a specialized tribunal's decision on the basis that it is inconsistent with the policy goals of its enabling legislation comes perilously close to rejecting the legislative choice rationale entirely. If the legislative choice rationale is to be meaningful at all it must, in my view, include the right of the tribunal rather than the courts to define the policy objectives of its enabling statute and determine how best to balance the statute's competing policy goals.

To say that legislatures are entitled, within constitutional limits, to choose tribunals rather than courts as the final arbiters of statutory schemes for the reasons just enumerated is not the same thing as saying that the selection of decision-making by a specialized tribunal always carries with it the presumption that the legislature has made such a choice. Thus, it is not in my view inconsistent to maintain that courts can simultaneously respect the specialized expertise of tribunals and expect that the legislature both intended the tribunals to respect certain norms of statutory interpretation and intended judges to police compliance with those norms. Likewise, taking advantage of the virtues of specialized expertise need not imply the abandonment of a commitment to interpretation that is consistent with broader, judicially defined legal norms. Indeed, it is plausible to suggest that one of the roles of judicial review is to ensure that these norms are not too readily sacrificed by specialized tribunals in the pursuit of other public policy goals. Finally, it seems to me that recognizing that specialized tribunals will generally be in a better position than courts to determine whether or not a particular interpretation or decision best furthers the public policy goals

of a piece of legislation is not the same thing as saying that they will always do a better job than courts in making that determination. It is not in my view incoherent to suggest that some level of judicial scrutiny of a tribunal's choices for consistency with a statute's overall policy goals can represent a useful form of quality control over tribunal decision-making, even if one must recognize its perils as well as its possibilities.

I do not mean to suggest that explicit recognition of the differences between the rationales for judicial deference and intervention in administrative decision-making resolves all the tensions that exist at an operational level. For example, in her judgment in the *National Corn Growers* case, Wilson J. argued that the courts should not interfere with the tribunal's adoption of a particular interpretation of its enabling legislation, and if the legislature was dissatisfied with that interpretation it was open to it to amend the legislation.¹⁵⁰ These observations doubtless represented cold comfort to the disappointed litigants in those particular disputes, but they were a particularly robust expression of the logical implications of the "legislative choice" rationale for deference. It seems to me that the same reasoning was open to the Supreme Court in relation to the British Columbia Industrial Relations Council's decision in *Paccar*,¹⁵¹ and indeed was arguably embraced by La Forest J. writing for the majority. Yet in that particular instance Wilson J. would have been willing to intervene and overturn the decision, which suggests that her commitment to the "legislative choice" rationale was not sufficiently robust to overcome her reluctance to accept every public policy choice that was logically open to a specialized tribunal. No doubt any theory of judicial deference is vulnerable to the understandable desire of a reviewing court to do justice to the litigants by imposing its understanding of the best approach to the substantive questions underlying the dispute. Nevertheless, it seems to me that explicit judicial recognition of the distinctions identified above would enrich our understanding of standard of review jurisprudence, and could assist in making that jurisprudence more internally consistent.

V. CONCLUSION

Justice Wilson's decision in the *National Corn Growers*¹⁵² case was a significant contribution to the development of Canadian jurisprudence

¹⁵⁰ *Supra*, note 125, at 1352-53.

¹⁵¹ [1989] S.C.J. No. 107, [1989] 2 S.C.R. 983 (S.C.C.).

¹⁵² *Supra*, note 125.

with respect to the common law judicial review of administrative decision-making. To argue as I do that Justice Wilson's reasons do not represent a fully satisfactory account of judicial review is not in any way to underestimate the value of that contribution. Canadian thinking about judicial review has come a long way since the *National Corn Growers* case was decided in 1990, and it would be overly optimistic to believe that *Dunsmuir*¹⁵³ represents the final resting place in the evolution of our jurisprudence. The fact that Justice Wilson's reasoning in the *National Corn Growers* case still inspires debate is a testament to the power of her expression of her insights, and in this, as in many other areas of our law, Canadians owe her a profound debt of gratitude.

¹⁵³ [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.).