

Supremacy and Curial Deference: The Supreme Court of Canada's Approach to **Statutory Interpretation by Administrative Tribunals**

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When an institution is called a Supreme Court, we expect two things of it: that it be a court, and that it be supreme.

Both the Supreme Court of the United Kingdom (“UKSC”) and the Supreme Court of Canada (“SCC”) fulfill the first expectation. Both have been established by statute¹, and both are protected by constitutional safeguards that ensure that they are independent of the legislative and executive branches of government, and operate in conformity with the Rule of Law. They are quintessential examples of courts.

Supremacy, however, is a more elusive quality.

The SCC had a long journey toward supremacy. The *British North America Act* preserved the Judicial Committee of the Privy Council as the highest appellate body for Canada. In 1888, the Canadian *Criminal Code* was amended to abolish appeals to the Privy Council in criminal cases², but some 38 years later, the amendment was held by the Privy Council to be invalid.³ This, among other things, led to a series of events culminating in the enactment of the *Statute of Westminster, 1931*⁴, which strengthened Canada's existence as an independent nation. In 1933, the Canadian Parliament re-enacted provisions abolishing criminal appeals to the Privy Council,⁵ and this time, the law was held to be valid.⁶ Appeals in civil matters continued for some time thereafter, owing to doubt as to whether the Canadian Parliament had jurisdiction to abolish appeals to the Privy Council in respect of matters that fell within provincial jurisdiction. A bill to abolish civil appeals to the Privy Council was introduced in the Canadian Parliament in 1939, and referred to the courts for a judicial opinion. The Privy Council ultimately held that the Canadian Parliament did have jurisdiction to enact such legislation⁷. The bill was then enacted, and took effect in late December 1949⁸, applying to all cases commenced after that date. The last Canadian appeal to the Privy Council was decided in 1959,⁹ almost 85 years after the establishment of the SCC.

¹ The UKSC was established by the *Constitutional Reform Act 2005*, 2005 c. 4, brought into force on October 1, 2009 by *The Constitutional Reform Act 2005 (Commencement No. 11) Order 2009*, 2009 No. 1604 (C. 83). Canada's *Constitution Act, 1867* (formerly the *British North America Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.)) provided for “a general court of appeal for Canada”. The SCC was created by an Act of the Canadian Parliament: *Supreme and Exchequer Court Act*, S.C. 1875, c. 11

² *Criminal Procedure Amendment Act*, S.C. 1888, c. 43, s. 1

³ *Nadan v. The Queen*, [1926] A.C. 482

⁴ *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.)

⁵ *Criminal Code Amendment Act*, S.C. 1932-33, c. 53, s. 17

⁶ *British Coal Corp. v. The King*, [1935] A.C. 500

⁷ *A.G. Ontario v. A.G. Canada (Privy Council Appeals)*, [1947] A.C. 127

⁸ *Supreme Court Amendment Act*, S.C. 1949 (2nd. session), c. 37, s. 3

⁹ *Ponoka-Calmar Oils v. Wakefield*, [1960] A.C. 18 1954

Today, then, the SCC, like the UKSC, sits at the apex of a judicial system. Together, ss. 35-38 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 provide the SCC with jurisdiction to hear not only appeals from the provincial and federal appeal courts, but also appeals from final decisions of lower courts which cannot, themselves, be appealed to Courts of Appeal. By most measures, then, the SCC is truly a “supreme” court; it is certainly such in formal terms.

Deference to Administrative Tribunals

There is, however, at least one sense in which the SCC falls short of being “supreme”. Over the past 25 years or so it has adopted an approach to administrative tribunals that limits the degree to which it can interfere with certain legal determinations made by administrative tribunals.

As I will explain, it has structured judicial review in such a way as to require courts to defer to some tribunal decisions, even on issues of statutory interpretation and other pure issues of law.

To be fair, this is not necessarily a radical departure from the common law. The House of Lords established, in *Anisminic v. Foreign Compensation Commission*, [1969] 2 A.C. 147 that all errors of law by made by an administrative tribunal could be characterized as errors of jurisdiction. Prior to *Anisminic*, that was not thought to be the case, with only errors of law going to jurisdiction narrowly defined (*i.e.* initial jurisdiction to embark upon a question) constituting clear jurisdictional error. A tribunal protected by a privative clause (also called a “preclusive” or “ouster” clause) was, prior to *Anisminic*, free to make determinations of law (as long as they were “within jurisdiction”) without fear of reversal on judicial review.

Even after *Anisminic*, it appears that administrative tribunals in the UK have some limited leeway in their interpretations of statutory language. As I understand it, there remains some deference to expert tribunals with respect to the proper interpretation of technical language and terms of art. As well, the courts have acknowledged that tribunals are often in as good a position as are the courts when it comes to interpreting ordinary terms that are used in common parlance.¹⁰ Finally, courts distinguish between the interpretation of a statute (an issue of law) and the application of the statute to a particular set of facts (an issue of mixed fact and law). While a tribunal is not entitled to deference in respect of its interpretation of a statute, it enjoys considerable autonomy in respect of its application of the law to the facts.

Even acknowledging that *Anisminic* did not leave tribunals completely bereft of power to interpret laws, however, its importance should not be minimized. To a very large extent, it established the courts of the United Kingdom as the exclusive guardians of legal interpretation and the ultimate authorities on issues of law.

The idea that all errors of law amount to jurisdictional error has never been part of the law of Canada. Instead, Canadian courts continued, into the 1970s, to defer to legal

¹⁰ *Brutus v. Cozens*, [1973] A.C. 854

determinations that were “within the jurisdiction” of administrative tribunals that were protected by privative clauses. This deference was tempered by the adoption of an expansive doctrine that defined what constituted an error going to jurisdiction. In particular, courts described certain issues of law as “preliminary or collateral matters”. Tribunals acted outside of their jurisdiction if they did not correctly interpret statutes in respect of such matters. Because most issues of law could be characterized as being matters that were preliminary or collateral – *i.e.* matters that were crucial to assuming jurisdiction – courts had powerful tools to deal with tribunal decisions with which they disagreed.

***C.U.P.E. v. New Brunswick Liquor Corporation* – Limiting “Jurisdictional” Error**

In 1979, the SCC pronounced its judgment in *C.U.P.E. v. New Brunswick Liquor Corporation*¹¹. The case concerned a legal strike by the union. During the strike, the employer assigned management personnel to perform some of the tasks of striking employees. The governing statute provided that an “employer shall not replace ... striking employees or fill their position with any other employee.” The employer contended that the section did not preclude managers from temporarily carrying out functions normally carried out by employees during a strike. The Public Service Labour Relations Board of New Brunswick disagreed, and found that the employer’s actions breached the statute. An application for *certiorari* was allowed, with the New Brunswick Appeal Division holding that the proper interpretation of the statutory provision was a “preliminary or collateral matter.” By misconstruing the statute, it held, the Public Service Labour Relations Board had assumed a jurisdiction that did not properly belong to it. Despite a privative clause in the statute, the court quashed the tribunal’s decision.

The Supreme Court of Canada allowed the appeal. Dickson J. (as he then was) speaking for the court, was critical of the use of the “preliminary or collateral question” doctrine to find an excess of jurisdiction. At 233, he said:

With respect, I do not think that the language of “preliminary or collateral matter” assists in the inquiry into the Board's jurisdiction. One can, I suppose, in most circumstances subdivide the matter before an administrative tribunal into a series of tasks or questions and, without too much difficulty, characterize one of those questions as a “preliminary or collateral matter”. As Wade suggests in his *Administrative Law* (4th ed., 1977) at p. 245, questions of fact will naturally be regarded as “the primary and central questions for decision”, whereas the “prescribed statutory ingredients will be more readily found to be collateral”. This is precisely what has occurred in this case, the existence of the prohibition described in the statute becoming the “collateral matter”, and the facts possibly constituting breach of the prohibition, however interpreted, the “primary matter for enquiry”. Underlying this sort of language is, however, another and, in my opinion, a preferable approach to jurisdictional problems,

¹¹ [1979] 2 S.C.R. 227

namely, that jurisdiction is typically to be determined at the outset of the inquiry.

The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

The Court went on to find that, as the tribunal had jurisdiction to embark upon the inquiry, and as it was protected by a privative clause, the tribunal's decision could only be overturned on judicial review if it constituted a "patently unreasonable" interpretation of the statute. As the court found that the interpretation was not patently unreasonable, the tribunal's decision could not be overturned.

While the Supreme Court's decision in *C.U.P.E. v. New Brunswick Liquor Corporation* signalled dissatisfaction with the "preliminary or collateral matter" doctrine, and suggested that courts be more restrained in invoking it, it did not do away with the doctrine entirely.

***U.E.S., Local 298 v. Bibeault* – the "Pragmatic and Functional" Approach**

The doctrine was, however, eliminated by the SCC's subsequent decision in *U.E.S., Local 298 v. Bibeault*,¹² a case that concerned successorship rights in a labour relations context. In that case, the SCC announced the demise of the "preliminary or collateral question doctrine", finding that the labelling of certain questions as "preliminary or collateral" to jurisdiction did not aid analysis. Instead, the court suggested that a "pragmatic and functional approach" should be adopted to deal with jurisdictional error.

The approach was to begin with an analysis of the legislative scheme, including the language of the enactment and the purposes for which the tribunal was created. The analysis was also to take into account the institutional expertise of the tribunal, and the nature of the problem involved in an individual case. By examining all of these features, a court was to determine the extent of the jurisdiction intended by the legislature to be conferred on the tribunal. Rather than focussing on specific statutory provisions, as had the "preliminary or collateral matter" doctrine, the court was to focus on the bigger picture to assess the proper role of the tribunal in the statutory scheme.

The analysis was to be "functional" in that it examined the tribunal's role in the statutory scheme. It was "pragmatic" in the sense that it left to the tribunal those matters that were within the expertise and purview of the tribunal, and reserved to the courts those matters that were not.

Under the pragmatic and functional approach, if a matter was found to be within a tribunal's jurisdiction a court could only interfere with the tribunal's decision if the decision was "patently unreasonable". Where the decision was not one found to be

¹² [1988] 2 S.C.R. 1048,

within the tribunal's jurisdiction, any error of law by the tribunal could be corrected by the court.

The pragmatic and functional approach set out in *Bibeault* made it much harder for courts to interfere with decisions by tribunals. They could no longer simply brand certain matters to be "preliminary" and critical to jurisdiction. Instead, they were required to examine all facets of the legislative scheme to try to divine what was intended to be within the tribunal's purview.

While the new approach was a commendable attempt to rationalize judicial review by reference to pragmatic criteria, it was complex. There were no clear rules or steps by which a court could analyze the scope of a tribunal's jurisdiction. Differing assessments as to the place of a tribunal in a statutory scheme could lead to very different results.

What did emerge from *Bibeault*, however, was a clear statement that judicial review involved the application of two separate standards of review. For matters that were intended by a legislature to be within the scope of a tribunal's jurisdiction, a court was required to defer to the tribunal – only a patently unreasonable interpretation by the tribunal would allow a court to quash the decision. On the other hand, where a legal question was not intended to be one within the exclusive jurisdiction of the tribunal, a court owed the tribunal no deference – a standard of "correctness" applied.

Several difficulties with the new approach soon became evident. In many ways, the "pragmatic and functional approach" may have been too great a departure from the existing law of judicial review to be adopted without difficulty.

Some of these difficulties came to the fore in *CAIMAW v. Paccar of Canada Ltd.*¹³. The rather unfortunate case concerned a protracted and bitter labour dispute, in which the employer, after termination of the collective agreement, unilaterally altered terms and conditions of employment of its workers. The British Columbia Labour Relations Board interpreted the statute as allowing this to occur. The Supreme Court of British Columbia held that the decision was patently unreasonable, and the British Columbia Court of Appeal dismissed an appeal. The SCC was deeply divided on a number of issues. Only six of the Court's judges participated in the judgment. By a majority, they reinstated the Board's decision.

Two judges found that the issues were within the exclusive jurisdiction of the Labour Board, and also that its ruling was not "patently unreasonable."

The other two judges who made up the majority eschewed the pragmatic and functional analysis altogether, finding that it was unnecessary to consider the Board's jurisdictional limits because its interpretation of the statute was correct.

The two dissenting judges found that the Board's decision was patently unreasonable, and would have upheld the decision of the British Columbia Court of Appeal.

¹³ [1989] 2 S.C.R. 983

Paccar illustrates some of the difficulties that beset the pragmatic and functional approach in its early days. Courts, including the SCC, failed to recognize that the pragmatic and functional approach entailed an entirely new way of looking at tribunal jurisdiction.

Even the two judges who found that the tribunal had acted within its jurisdiction and not unreasonably stated that “The tribunal has the right to make errors, even serious ones, provided it does not act in a manner so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review.” Looked at in hindsight, the observation is a curious one. It is difficult to understand what policy objective would be served by allowing serious errors of law to prevail.

When properly understood, the pragmatic and functional approach requires curial deference to be afforded to tribunals not because they are somehow entitled to be wrong, but because they are, in law, entitled to finally determine whether a particular interpretation is right or wrong.

The pragmatic and functional approach was founded on the premise that the courts are not always in the best position to determine issues of law – sometimes, as a result of specialization, expertise, and public policy considerations, a tribunal may have advantages over a court. To suggest in such circumstances that a tribunal is making errors that are tolerated by a court ignores the entire foundation of the pragmatic and functional approach.

The *Paccar* decision also demonstrates that the concepts of “correctness” and of “patent unreasonableness” were not adequately delineated when it was decided. It must have been embarrassing for the members of the Court to have two judges stating that an interpretation was correct, while two others stated that it was not only erroneous, but patently unreasonable!¹⁴.

***National Corn Growers Assn. v. Canada (Import Tribunal)* – An Explanation for Deference**

In some ways, what was lacking was a consideration of the philosophical underpinnings of the pragmatic and functional approach. This was provided, to a large extent, by the minority concurring judgment of Wilson J. in *National Corn Growers Assn. v. Canada (Import Tribunal)*¹⁵. *National Corn Growers*, unlike most of the earlier cases, was not a labour relations case. Instead, it concerned import controls on subsidized agricultural products. The issue considered by the Import Tribunal was whether the subsidization of U.S. corn exports to Canada had caused or was likely to cause material injury to the production of corn in Canada.

¹⁴ A subsequent decision of the Court equated “patently unreasonable” with “clearly irrational” and “evidently not in accordance with reason”: *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941

¹⁵ [1990] 2 S.C.R. 1324

All seven judges were in agreement that the decision of the tribunal was within its jurisdiction and not patently unreasonable. The difference between the majority and minority judgments turned on the level of detail that the court should examine in determining whether a tribunal's decision is patently unreasonable. The case was not particularly noteworthy in that regard.

What was noteworthy was Wilson J.'s discussion of the changes that had been brought about in Canadian administrative law by the decision in *C.U.P.E. v. New Brunswick Liquor Corporation*. She recognized that the decision signalled a change in the way that Canadian courts viewed administrative tribunals.

The traditional approach, founded on A.V. Dicey's description of the Rule of Law, saw the role of the courts as interpreters of the law as sacrosanct. Administrative tribunals, were seen as part of the executive of the state. The Rule of Law demanded that the executive, no less than the ordinary citizen, be kept from acting unlawfully. Wilson J. summarized the approach:

As guardians of the rule of law it was incumbent on the courts to ensure that any person or body relying on power delegated by the legislature abide by the terms and conditions on which that power was granted. Thus, ministers, agencies and administrative tribunals would have to be able to justify their actions by pointing to specific legislative authority in the same way that any citizen would have to be prepared to show that his or her acts were lawful.

Wilson J. was of the view that the role and nature of administrative tribunals in Canada had made the argument unconvincing:

Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state. Part of this process has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.

Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work.

Following *National Corn Growers*, the SCC's use of the "pragmatic and functional approach" became increasingly less formalistic. The absence of a privative clause in a

statute was no longer seen as precluding curial deference. Deference could be accorded whenever a tribunal was shown to have an institutional advantage over the court in determining the meaning to be given to statutory language.

Canada (Director of Investigation and Research) v. Southam – Systematization of the Approach

In *Pezim v. British Columbia (Superintendent of Brokers)*,¹⁶ the SCC held that even where a statute specifically contemplated an appeal from the decision of a tribunal, the tribunal might be entitled to deference on issues of statutory interpretation. The court found that the Superintendent of Brokers had developed expertise in assessing what developments in a company constituted “material change”. It therefore accorded deference to the superintendent’s decision, holding that it could be reviewed only for reasonableness, and not for correctness.

I do not want to leave the impression that deference to tribunals on questions of law became the norm. Few tribunals operate in fields so esoteric that the expertise of the courts in legal matters is overshadowed by the specialized knowledge of the tribunal. For example, in *Canada (Attorney General) v. Mossop*¹⁷, the SCC rejected the contention that a human rights tribunal was entitled to deference in respect of its interpretation of its constating statute.

By 1997, the SCC had had sufficient experience with the pragmatic and functional approach to summarize the criteria to be applied in assessing whether a tribunal’s decisions were entitled to deference. While the SCC has since retreated on some of the statements made in *Canada (Director of Investigation and Research) v. Southam Inc.*¹⁸, (particularly, as I will discuss, those that suggested the existence of a multitude of standards of review), the basic framework of analysis set out in the case continues to govern.

In determining whether curial deference is due to a tribunal, the court must consider:

1. whether there are specific statutory provisions dealing with the possibility of curial review of the tribunal’s decisions. (a privative clause will suggest a deferential standard, while an appeal provision will suggest a non-deferential one);
2. the institutional expertise of the tribunal, especially as it compares with the expertise of a court (the more “expert” and specialized the tribunal, the more likely it is that a deferential standard will apply);
3. the nature of the question that is in issue (it is more likely that a deferential standard will apply to mixed questions of fact and law than to pure questions of law); and

¹⁶ [1994] 2 S.C.R. 557

¹⁷ [1993] 1 S.C.R. 554

¹⁸ [1997] 1 S.C.R. 748

4. the purpose of the statute (the more a statute engages “policy interests” and balances multiple sets of interests, the more likely it is that deference will be granted. On the other hand, the more a statute is directed at resolving a purely “legal” issue, the less likely it is that deference will be granted.¹⁹

The supremacy of administrative tribunals in the interpretation of some statutes has some strange consequences. More than one tribunal (or more than one panel of the same tribunal) may have occasion to interpret a statute. A deferential standard of review means that a range of interpretations will be acceptable. Even if there are conflicting decisions from a tribunal (which there may be, since tribunals are not bound by any strict doctrine of *stare decisis* or of comity) or from two tribunals that are required to interpret the same statute, courts are not entitled to intervene to ensure a single common interpretation if a deferential standard of review applies.²⁰ Where two tribunals make orders that are in operational conflict, the courts will determine which tribunal’s order is to prevail, but will do so only by considering which tribunal is more centrally involved in the issue²¹

Degrees of Deference – *E Pluribus Duo*?

Before turning to the most recent iteration of the SCC’s theory of deference to administrative tribunals, it is appropriate to confess that I have not been entirely accurate in setting out the history of the matter. As is usual in the development of the law, there have been many false starts and abandoned theories along the way. Progress has not been anywhere near as linear as my discussion would suggest. One particular detour that must be mentioned is the SCC’s view on the degree of deference owed to a tribunal.

Up until *Southam*, the court postulated a deferential standard of “patent unreasonableness” – i.e., the court would not interfere with a tribunal decision unless it was patently unreasonable. A few cases spoke of an upholding all “reasonable” decisions, but it appeared that this was simply a slightly different way of expressing the same idea. In *Southam*, the court spoke of deference as a spectrum or continuum, with the “correctness” standard being the least deferential available to the court, and the “patent unreasonableness” standard being the most deferential.²² The court identified “reasonableness *simpliciter*” as an intermediate standard – a standard close to that of “patent unreasonableness” but not quite as deferential. The court said that where a

¹⁹ In *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, the court explained this consideration: “[a] statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court”.

²⁰ *Domtar Inc. v. Quebec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756

²¹ *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739.

²² Because the right and duty of a superior court to judicially review an inferior tribunal is a constitutionally protected one in Canada (*Crevier v. A.G. (Québec)*, [1981] 2 S.C.R. 220), no standard more deferential than “patently unreasonable” is possible.

decision is “clearly wrong” then it fails to meet the “reasonableness *simpliciter*” standard:

Even as a matter of semantics, the closeness of the “clearly wrong” test to the standard of reasonableness *simpliciter* is obvious. It is true that many things are wrong that are not unreasonable; but when “clearly” is added to “wrong”, the meaning is brought much nearer to that of “unreasonable”. Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference.

It continued:

The difference between “unreasonable” and “patently unreasonable” lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal’s reasons, then the tribunal’s decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at p. 963, “[i]n the Shorter Oxford English Dictionary ‘patently’, an adverb, is defined as ‘openly, evidently, clearly’”.

Even this initial description of the standards portended problems. The court was suggesting that it would differentiate between decisions that are “clearly wrong” and those that are “clearly clearly wrong”.

The idea that there was an unlimited number of standards of review was also troubling. In *Law Society of New Brunswick v. Ryan*²³, the SCC decided that the hunt for new standards of review should be declared over. It held that only three standards of review – correctness, reasonableness *simpliciter* and patent unreasonableness – existed. The “spectrum” of review was reduced to three colours, the rainbow to a traffic light.

In practice, it remained difficult to differentiate between a standard of “patent unreasonableness” and one of “reasonableness *simpliciter*”. One judge put it this way:

In attempting to follow the court’s distinctions between “patently unreasonable”, “reasonable” and “correct”, one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.²⁴

²³ [2003] 1 S.C.R. 247, 2003 SCC 20

²⁴ Barry J. (as he then was) in *Miller v. Workers’ Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), quoted in the dissenting judgment in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63

In *Dunsmuir v. New Brunswick*²⁵, the Supreme Court acknowledged that the system of three standards had not proved workable. It returned to a system of only two standards of review – “correctness” and “reasonableness”. The promised spectrum faded to black and white.

***Dunsmuir v. New Brunswick* – The Current Law**

The SCC revisited the whole issue of curial deference to administrative tribunals in *Dunsmuir*. Apart from a reduction in the number of standards of review, the Court tweaked the description of the standards, and provided further guidance as to their use.

The official headnote to the judgment provides a good summary of the SCC’s new description of the two standards of review:

When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is a deferential standard which 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.

With respect to the circumstances in which curial deference will apply, the same headnote summarized the decision as follows:

Deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. While deference may also be warranted where an administrative decision maker has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context, a question of law that is of central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision maker will always attract a correctness standard. So will a true question of *vires*, a question regarding the jurisdictional lines between two or more competing specialized tribunals,

²⁵ [2008] 1 S.C.R. 190, 2008 SCC 9

and a constitutional question regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*.

At the same time, the SCC reiterated the importance of the four criteria for deference considered in *Southam*, and mentioned, as well, that questions going to jurisdiction in the narrow (pre-*Anisminic*) sense would be reviewed on a standard of correctness.

Finally, of note, was a statement by the SCC that the tests to determine whether courts should defer to administrative tribunals should no longer be referred to as the “pragmatic and functional approach”:

The existing approach to determining the appropriate standard of review has commonly been referred to as “pragmatic and functional”. That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase “pragmatic and functional approach” may have misguided courts in the past, we prefer to refer simply to the “standard of review analysis in the future,

This is, perhaps, recognition that the systematization of the “pragmatic and functional approach”, particularly in *Southam*, tended to encourage lower courts to adopt a mechanistic approach to questions of deference as opposed to the “big picture” approach favoured in earlier cases such as *Bibeault*. It remains to be seen whether the new label will encourage a deeper analysis of the need for deference in future cases.

Are there Lessons to be Drawn from the Canadian Experience?

Interestingly, deference to administrative tribunals on issues of law has recently re-emerged as an issue in the UK. The establishment of a new and complex system of administrative justice has led to some question as to whether the superior courts of England and of Scotland have plenary jurisdiction to judicially review decisions of the Upper Tribunal, an appellate body that has taken over certain functions historically entrusted to the courts.²⁶ The UKSC will, ultimately, have to determine whether there are areas in which tribunals have exclusive jurisdiction to decide issues of law.

It is important to recognize that the issue faced by the courts of the UK is quite different from the one that Canadian courts have dealt with. The current issue in the UK, as I understand it, concerns only the special situation of the Upper Tribunal and does not directly touch that of other tribunals. Given that the decisions of many tribunals are appealable to the Upper Tribunal, however, the issue has significant potential to change the relationship between courts and tribunals.

I do not suggest that the Canadian experience can serve as a guide to the UK in its struggle to determine the appropriate relationship between the courts and tribunals.

²⁶ See *R (on the application of Cart) v The Upper Tribunal & Ors* [2010] EWCA Civ 859; *Eba v. Advocate General for Scotland*, [2010] CSIH 78

The law of the two jurisdictions has diverged in profound ways since *Anisminic*, and there is no reason to expect that that will be changed in the foreseeable future.

The jurisprudence that has emerged from Canada does, however, show that it is possible to construct a workable legal system in which there is deference to tribunals on issues of law. The jurisprudence also shows, however, that defining the criteria for deference is a particularly daunting task.

There are two basic difficulties. The first is to define why, and when, courts should defer to tribunals. The SCC has made significant headway in this analysis. A theory of deference must be founded on the idea that, in respect of certain types of questions, certain administrative tribunals are better situated to make legal determinations than are the courts.

In part, this is a result of the complexity of modern administration, as Wilson J. suggested in *National Corn Growers*. There is, however, in my view, another reason to wonder whether the Dicey model of Rule of Law should continue to be dominant. Dicey's model treated administrative tribunals as emanations of the executive branch of government. That certainly was an historically accurate view of administration. Today, however, it is not entirely accurate to think of administrative tribunals as simply organs of the executive. Many tribunals are quasi-judicial in character. They enjoy an independence from the rest of the executive branch of government, and are not mere organs of it. Indeed, many tribunals are called upon to adjudicate disputes in which the executive is involved – common examples are public service labour relations tribunals, human rights tribunals, information commissioners, and tax assessment tribunals. To treat them as merely instruments of executive government is to ignore a very real judicial role that they perform.

For tribunals that perform duties that are best described as “judicial” (or *quasi*-judicial) there is no need, from a Rule of Law standpoint, to ensure that full curial review of their actions is available. There is no obvious reason to require that all judicial decisions ultimately filter into a single appellate court.

Care must be taken, however, to ensure that deference is given only to bodies that merit it. One of the considerations in addressing merit will be the expertise of the administrative tribunal. Arguably, however, the independence of the tribunal – a factor that is not currently part of the regime endorsed by the SCC – has a role to play.

Apart from the difficult question of when deference ought to be given to administrative tribunals, there is the problem of defining the standards of review. The Canadian experience here is not encouraging. Given that multiple considerations will be involved in deciding whether a tribunal is worthy of deference, the SCC's position in *Southam* that a wide array of standards of review should exist appears to be tenable. In practice, however, an attempt to fashion even three such standards led to confusion and had to be abandoned.

The recognition by the SCC that some administrative tribunals are deserving of deference in respect of certain issues of law has important implications for the legal system. In a very real way, it challenges the supremacy of the courts, and introduces an interesting, if sometimes infuriating, complexity into the system. We are at the stage in Canada where deference is now part of the “received view” of the law – an entire generation of lawyers has grown up in a world in which the courts are not necessarily the ultimate arbiters of legal issues. Nonetheless, as can be seen from the shifting ground of SCC decisions, the system remains a work in progress.