UNDERSTANDING THE STANDARD OF REVIEW IN ADMINISTRATIVE LAW

Philip Bryden*

INTRODUCTION

For lawyers and judges dealing with challenges to the validity of administrative decisions on a daily basis, the question of the standard of review to be employed by the court in evaluating the matter before it has become the starting point from which the rest of the case must proceed. Nowadays it is virtually impossible to contemplate a judicial review application on a matter of substance without counsel, and the court itself, attempting to come to grips with the choice and application of the appropriate standard of review.[1]

To say that the Supreme Court of Canada's standard of review jurisprudence has been the matter of some controversy among administrative law practitioners and lower court judges would be an understatement.[2] Indeed, open dissatisfaction with this jurisprudence has been expressed by members of the Court itself, most notably by Mr. Justice LeBel in *Toronto (City) v. C.U.P.E., Local 79*[3] and *Voice Construction*

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[1] Indeed, it may be an error of law for a court hearing an appeal from a decision of an administrative body or reviewing a decision of an administrative body to fail to address the standard of review at the outset of the case. See D. Jones, "Recent Developments In Administrative Law", unpublished paper presented to the Canadian Bar Association National Administrative Law and Labour and Employment Law Conference "Fixing the System: Bringing Transparency and Accountability to the Law", November 26 and 27, 2004 at pp. 4-18, and in particular the author's discussion of *Voice Construction Ltd. v. Construction & General Workers' Union*, [2004] 1 S.C.R. 609, 2004 SCC 23.

[2] To offer just four examples, see *New Brunswick (Board of Management) v. Doucet Jones*, 2004 NBCA 65, 243 D.L.R. (4th) 652 (N.B.C.A.) [*"Doucet Jones"*], at para. 17 (per Robertson, J.A); *Miller v. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), at para. 27 (per Barry, J.); F. Falzon, "Standard of Review on Judicial Review or Appeal", Background Paper for the Administrative Justice Project, Ministry of the Attorney General of British Columbia (2002), at pp. 32-33; and D. Lovett, "That Curious Curial Deference Just Gets Curiouser and Curiouser — *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), 55 Advocate (B.C.) 541.

[3] [2003] 3 S.C.R. 77, 2003 SCC 63.

Ltd. v. Construction & General Workers' Union, Local 92.[4] It is equally evident, however, that for the time being the Court as a whole is wedded to the "pragmatic and functional" standard of review analysis set out in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*[5] and elaborated on in subsequent decisions. Whether or not this line of thinking represents an ideal solution for the standard of review problems that lawyers and judges have to address, it seems to me that, at least for the short to medium term, it is the framework that our legal system is committed to using. What I would like to do in this essay is explore why the Supreme Court of Canada has found this framework attractive, and suggest some ways of understanding the framework that will, I hope, make it easier for lawyers and judges to use.

My basic thesis is that more attention needs to be paid to the implications that the outcome of the standard of review analysis holds for the types of arguments that lawyers make on judicial review applications and the reasons that judges give to support their decisions. If the "correctness", "reasonableness" and "patently unreasonable" standards are merely labels that have little real impact on the types of arguments that lawyers use to support their positions or the reasoning that judges use in accepting or rejecting these arguments, much of the value that is supposed to attach to the standard of review analysis required by *Pushpanathan* is wasted. I am not convinced that the current state of the law is quite so grim as this observation might suggest. On the other hand, I do contend that it is important for the courts to begin drawing distinctions in kind and not merely in degree concerning the types of arguments that are appropriate to use in addressing cases that involve each of the recognized standards of review. To adopt the language employed by Mr. Justice LeBel in *Toronto (City) v. C.U.P.E., Local 79*, it is essential to develop approaches to the standards of review that make them "analytically, rather than merely semantically, distinct."[6]

I will pursue this line of argument in three parts. The first is a relatively straight-forward description of the *Pushpanathan* standard of review framework itself, as it has been explained and elaborated upon in subsequent Supreme Court of Canada decisions. The second is a discussion of the considerations that in my view drove the Supreme Court of Canada to favour this framework. In the third part of the essay I will explore a number of techniques for understanding what seems to me to be the crucial element of the *Pushpanathan* framework, namely how to differentiate what lawyers and judges ought to be doing in employing the three distinct standards of review.

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[4] *Supra* note 1.

[5] [1998] 1 S.C.R. 982 ["*Pushpananthan*"].

[6] *Supra* note 3, at para. 103.

THE STANDARD OF REVIEW FRAMEWORK

The current framework for assessing the standard of review to be employed in reviewing administrative decisions was laid out by Mr. Justice Bastarache writing for the Supreme Court of Canada majority in *Pushpanathan*. The first step is for the reviewing court to go through a four-part "pragmatic and functional analysis" to determine the appropriate standard of review to be applied in relation to any particular issue in the case. This analysis is necessary whether the matter is before the court by way of an application for judicial review or by way of appeal, and for the sake of convenience I will use the term "review" to cover both types of proceedings. The reviewing court is required to weigh four different factors in order to discern the standard of review it should employ in addressing each relevant element of the administrative body's decision. These factors are: (1) the presence or absence of a privative clause or a right of appeal; (2) the relative expertise of the decision-maker and the reviewing court; (3) the general purpose of the legislation authorizing the decision, and the purpose of any particular statutory provision that is at issue; and (4) the nature of the problem being addressed by the decision-maker.[7] The factors are to be weighed in an effort to determine "the legislative intent of the statute creating the tribunal whose decision is being reviewed."[8] That having been said, the Supreme Court of Canada has also indicated recently that "the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law."[9] Thus, the fact that the legislature has enacted a privative clause restricting the scope of judicial review or, on the other hand, granted a statutory right of appeal from a tribunal's decision does not displace the necessity of conducting a pragmatic and functional analysis.[10] Likewise, the fact that the parties to the proceeding have agreed that a particular standard of review ought to be employed is not determinative, and the court must itself evaluate the four factors in order to determine the proper standard.[11]

We know from the Court's decision in *Baker v. Canada (Minister of Citizenship)*[12] that the four-part standard of review analysis must be undertaken whenever a litigant is seeking to challenge the exercise of discretion by an adminis-

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[7] *Supra* note 5, at parass. 26-38.

[8] *Ibid.*, at para. 26. See also *Keddy v. New Brunswick (Workplace Health, Safety & Compensation Commission)*; 2002 NBCA 24, 42 Admin. L.R. (3d) 161 (N.B.C.A.), at paras. 28-29.

[9] *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21 [*"Dr. Q."*].

[10] *Ibid.*, at paras. 20-25.

[11] *Monsanto Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, at para. 6.

[12] [1999] 2 S.C.R. 817.

trative decision-maker, as well as in situations where the challenge is based on an alleged misinterpretation by an administrative body of the law governing its decisions.[13] In *Chamberlain v. Surrey School District No. 36*, Mr. Justice LeBel expressed misgivings concerning the expansion of the *Pushpanathan* framework from its original home in the administrative tribunal arena into other areas such as review of the decisions of municipal councils and school boards.[14] Despite this concern the Supreme Court of Canada continues to employ the same four-part test without a great deal of critical thought concerning its appropriateness in different settings.

One of the criticisms that has been made of standard of review jurisprudence in the past is that the Supreme Court of Canada has been content to move in new directions without expressly repudiating approaches that have been taken in the past.[15] The following observation made by Chief Justice McLachlin in the *Dr. Q.* case would appear to lay to rest any lingering doubts about the primacy of the "pragmatic and functional approach" over more traditional approaches to judicial review:

> To determine standard of review on the pragmatic and functional approach, it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review. Nor is it sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor. Rather, the pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo "significant searching or testing" (*Southam*, supra, at para. 57), or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness *simpliciter*, and patent unreasonableness.

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[13] This approach has been followed in numerous other Supreme Court of Canada decisions reviewing the exercise of discretion, including *Nanaimo (City) v. Rascal Trucking Ltd.* [2000] 1 S.C.R. 342; *Trinity Western University v. British Columbia (College of Teachers)*, [2001] 1 S.C.R. 772, 2001 SCC 31; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72, 2002 SCC 2; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86 ["*Chamberlain*"]; and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 39. It is necessary when addressing alleged errors in fact-finding as well. *Dr. Q.*, *supra* note 9, at paras 33-39.

[14] *Chamberlain, ibid.*, at paras. 190-205.

[15] See, for example, J. Evans, "Jurisdictional Review in the Supreme Court: Realism, Romance and Recidivism" (1991), 48 Admin. L.R. 255; A. Roman, "The Pendulum Swings Back" (1991), 48 Admin. L.R. 255; B. Langille, "Judicial Review, Judicial Revisionism and Judicial Responsibility" (1986), 17 *Rev. Gen. De Droit* 169.

> Much as the principled approach to hearsay articulated in *R. v. Khan,* [1990] 2 S.C.R. 531, and *R. v. Smith*, [1992] 2 S.C.R. 915, eclipsed the traditional categorical exceptions to the hearsay rule (*R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40), the pragmatic and functional approach represents a principled conceptual model which the Court has used consistently in judicial review.
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> Just as the categorical exceptions to the hearsay rule may converge with the result reached by the Smith analysis, the categorical and nominate approaches to judicial review may conform to the result of a pragmatic and functional analysis. For this reason, the wisdom of past administrative law jurisprudence need not be wholly discarded. For example, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, L'Heureux-Dubé J. invoked the old *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.), categorical approach to discretionary decisions as a reflection that ministerial decisions have classically been afforded a high degree of deference (see also *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002], 1 S.C.R. 3, 2002 SCC 1, at paras. 29-30), but acknowledged that the principled approach must now prevail. Similarly, as Binnie J. recognized in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services),* [2001] 2 S.C.R. 281, 2001 SCC 41, at para. 54, that under the pragmatic and functional approach, even "the review for abuse of discretion may in principle range from correctness through unreasonableness to patent unreasonableness". The nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the journey.[16]

In Professor David Mullan's words, the *Pushpanathan* approach has become "an overarching or unifying theory for review of the substantive decisions of all manner of statutory and prerogative decision makers".[17]

A number of questions spring to mind as one contemplates the first stage of the *Pushpanathan* test, including how a reviewing court is to establish the relative weight of these factors and how the court is to address the concept of relative expertise.[18] At the end of the day, however, it seems to me that the aspect of the Pushpanathan framework that is the greatest source of concern to litigants and their lawyers is the possibility that what appear to be similar factors will be weighed differently in different cases. For example, in *Trinity Western University v. British Columbia (College of Teachers)* the fact that the College's decision had implications for the delicate balance between constitutionally protected interests in freedom of

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[16] *Dr. Q., supra* note 9, at paras. 22-24.

[17] D. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at p. 108, quoted with approval in *Dr. Q., supra* note 9, at para. 25.

religion and equality significantly influenced the majority's conclusion that the correctness standard of review was appropriate.[19] In *Moreau-Bérubé v. New Brunswick (Judicial Council)*, on the other hand, the fact that the Judicial Council was required to address the balance between the constitutional protected interest in judicial independence and judicial accountability did not prevent the Court from concluding that the Council's decision should be reviewed using the "patently unreasonable" standard.[20] The concern that emerges when one confronts decisions like these that are difficult to reconcile is that it is easy for the litigants to go away with the impression that the standard of review analysis is influenced more by the reviewing court's eagerness or reluctance to intervene in a particular case than by a principled account of the proper relationship between the courts and the administrative body whose decision is under review. No doubt as courts gain more experience with the use of the four-part *Pushpanathan* analysis these issues will be addressed more fully. For purposes of this paper, however, I want to concentrate on what happens once a court arrives at a particular standard of review. The utility of the first stage of the *Pushpanathan* analysis, determining which standard of review to apply, depends largely on what significance this determination holds for the way the reviewing court is supposed to approach the substance of the dispute the parties have brought before it. In my view this aspect of the analytical framework has received less attention than it deserves.

For some time after *Pushpanathan* was decided there existed some doubt concerning the range of possible outcomes that could flow from the "pragmatic and functional" analysis. The Supreme Court of Canada itself had always employed one of three standards of review: (1) the "correctness" standard; (2) the "patently unreasonable" standard originally described in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*,[21] or (3) the intermediate "reasonableness" standard pioneered in *Canada (Director of Investigation and Research) v. Southam Inc.*[22] Some lower courts, on the other hand, had seized on the suggestion found in decisions such as *Southam*[23] and *Pushpanathan*[24] that there existed a "spectrum" of standards of review. These courts had explored alternative possibilities, including such standards

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[18] For an extremely insightful discussion of the "relative expertise" concept, see R. Hawkins, "Reputational Review I: Expertise, Bias and Delay" (1998), 21 Dal. L.J. 5.

[19] *Supra* note 13, especially at paras. 17-19.

[20] [2002] 1 S.C.R. 249, 2002 SCC 11, especially at paras. 43-53.

[21] [1979] 2 S.C.R. 227 ["*New Brunswick Liquor*"].

[22] [1997] 1 S.C.R. 748 ["*Southam*"].

[23] *Ibid.*, at para. 30.

[24] *Supra* note 5, at para. 27.

as "correctness with appropriate deference"[25] and a standard that lay somewhere between reasonableness *simpliciter* and the "patently unreasonable" standard.[26] As a result of the Supreme Court of Canada's decisions in *Law Society of New Brunswick v. Ryan*[27] and *Dr. Q. v. College of Physicians and Surgeons of British Columbia*,[28] we now know that the "pragmatic and functional" analysis must yield a choice among one of the three standards currently recognized by the Supreme Court of Canada.

The "correctness" standard has traditionally been easy to describe and apply since it permits the reviewing court to make an independent assessment of the issue in dispute and substitute its own view for the one taken by the administrative body if that appears to the court to be appropriate. The difference between the "reasonableness" standard and the "patently unreasonable" standard was described by Mr. Justice Iacobucci in *Southam* in the following terms:

> . . . An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.
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> 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.[29]

This description of the distinction between the two tests was reinforced by Mr. Justice Iacobucci, writing for the Court, in *Ryan*[30] and he has defended this approach

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[25] See *Northwood Inc. v. British Columbia (Forest Practices Board)*, [2001] B.C.J. 365 (C.A.) at paras. 35—38 commented upon in D. Lovett, *Northwood Inc. v. British Columbia (Forest Practices Board):* Deference Within a Standard of Correctness?" (2001), 59 *The Advocate* 701.

[26] See *British Columbia (Vegetable Marketing Commission) v. Washington Potato and Onion Association* , [1997] F.C.J. 1543 (C.A.) at para. 3.

[27] [2003] 1 S.C.R. 247, 2003 SCC 20, at paras. 24-26 ["*Ryan*"].

[28] *Supra* note 9, at para. 35.

[29] *Southam, supra* note 22, at paras. 56–57.

[30] *Supra* note 27, at para. 24.

in his extra-judicial writing as well.[31] As I noted at the outset of this paper, it seems to me that a great deal hangs on the ability of lower courts to apply this distinction effectively, and I will address this issue in more detail later in the paper.

It might appear from the *Voice Construction* decision that the Supreme Court of Canada is moving indirectly towards a "two standards" approach to judicial review by curtailing the application of the "patently unreasonable" standard. In that case the decision of a labour arbitrator protected by a weak privative clause was reviewed using the "reasonableness" standard rather than the "patently unreasonable" standard, even though the general trend of the jurisprudence in the labour arbitration field suggested that the "patently unreasonable" standard should be applied. My own view is that *Voice Construction* is best understood as a sign that the Supreme Court of Canada expects reviewing courts to inquire closely into the circumstances of the case before them in carrying out the standard of review analysis, and that it is not sufficient to rely on superficial analogies with earlier decisions in selecting the appropriate standard. As the *Doucet Jones* case illustrates, the presence of a strongly worded privative clause continues to be a persuasive indicator that review using the "patently unreasonable" standard is appropriate. *Voice Construction* may be taken as a harbinger of a greater willingness of the Supreme Court of Canada to select the "reasonableness" standard over the "patently unreasonable" standard than it has exhibited in the past, but I believe that it is still too early to predict the demise of the "three standards" approach to judicial review.

B. THE REASONS FOR THE DEVELOPMENT OF THE "PRAGMATIC AND FUNCTIONAL" STANDARD OF REVIEW FRAMEWORK

On the face of it, the framework I have just described appears a bit complicated, though perhaps given the Supreme Court's ambition to set out a unifying theory of substantive judicial review it could fairly be said that a certain amount of complexity is inevitable.[32] What is less obvious is how this particular choice of a unifying the-

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[31] The Honourable Mr. Justice F. Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002), 27 Queen's L.J. 860.

[32] As Mr. Justice Iacobucci puts it, *ibid.* at pp. 872-873: ". . . the spectrum [of standards of review] was an inevitable consequence of the adoption of the pragmatic and functional approach. It is questionable whether we need to sacrifice this more nuanced legal framework, which generates superior administrative law results merely for the sake of an often misguided search for simplicity. While simplicity is a virtue in the modern regulatory state, Parliament and the legislatures have delegated numerous powers in myriad ways, and have made various choices about how this delegated power should be supervised. There is no reason why the courts should willfully disregard these complexities in order to make their supervisory role easier. Having access to multiple standards of review across the full range of the deference spectrum allows courts to deal with these complexities in a sophisticated and, arguably, a more effective and practical way."

ory emerged,[33] and what purposes it is designed to serve.

In my view it is helpful to begin by recognizing that any system of judicial oversight, whether it is appellate review of the decisions of trial judges or judicial review of the decisions of administrative bodies, is concerned with two things. The first is establishing an appropriate relationship between the initial decision-maker and the court that is carrying out at supervisory function.[34] It is, of course, theoretically possible for a reviewing court to engage in a *de novo* consideration of all the evidence and issues that were before the initial decision-maker. Our legal system generally takes the view that this is wasteful of time and resources, however, so we normally want a reviewing or appellate court to play a more limited supervisory role.

The second thing we want a review system to do is advance the cause of justice between or among the parties to the dispute that is before the court. If oversight is a mere *pro forma* exercise, the time and money of the litigants are being wasted and the administration of justice is brought into disrepute. In an ideal world, all the parties to a judicial review or appeal proceeding would be reinforced in their belief that the court's intervention led to a just result regardless of whether the outcome was favourable to them. More realistically, we expect the court to be able to convince the losers that their arguments were heard and given serious consideration, even if they were found wanting.

It should be evident immediately that the goal of adopting an appropriate institutional relationship can conflict with the goal of doing justice in the case before the court. This can happen if litigants find themselves in a position where the reviewing judge believes that justice is on their side but it would be institutionally inappropriate for the judge to interfere with a key aspect of the initial decision-maker's ruling. All systems of oversight confront this possibility, and they all struggle to achieve an appropriate resolution of it.

At the risk of over-simplification, it seems to me that if one looks back to the era prior to the *New Brunswick Liquor* case, the law of judicial review in Canada was preoccupied with the division of spheres of authority between administrative decision-makers and courts. The courts assumed that administrative bodies had a "right to be wrong" as long as they were operating within the scope of their authority, espe-

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[33] For a discussion of the historical development of the "pragmatic and functional" framework and an analysis of the framework that is much more detailed and sophisticated than it is possible for me to offer in this brief paper, I can recommend S. Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle, Précis du contrôle judiciaire des decisions de fond rendues par les organisms administratifs* (Cowansville, Quebec: Editions Yvon Blais, 2003) and D. Jones and A. de Villars, *Principles of Administrative Law* (4th ed. Scarborough, Ontario: Thompson Canada Ltd., 2004) at pp. 456-482.

[34] For a very useful discussion of this aspect of judicial review, see F. Falzon, *supra.* note 2.

cially if their decisions were protected by a privative clause.[35] The courts also assumed that they were in the best position to supply "correct" answers to the legal questions that confronted administrative bodies. The challenge for counsel seeking to overturn an administrative decision on judicial review, therefore, was to convince the court that the administrative body had overstepped the bounds of its jurisdiction or made some other type of legal error that the court had the authority to correct.

This is not to say that review using a "reasonableness" standard had no place in Canadian administrative law prior to the *New Brunswick Liquor* decision. For example, in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* Lord Greene, M.R. observed that the courts would intervene where an administrative body did "something so absurd that no sensible person could ever dream that it lay within the powers of the authority" [36] or came to "a conclusion so unreasonable that no reasonable authority could ever have come to it."[37] It is apparent, however, that the *Wednesbury* unreasonableness standard was more a means of demonstrating to a court that a public body had exceeded its authority than a basis for persuading the court to overturn unreasonable decisions. Moreover, the application of the standard was sufficiently stringent that reliance on the *Wednesbury* case came to be seen as something akin to an argument borne of desperation.[38] As a result, counsel tended to prefer to frame legal challenges to the exercise of discretion in terms of other doctrines such as the *ultra vires* principle,[39] unauthorized sub-delegation,[40] fettering of discretion,[41] acting for improper purposes,[42] taking into account irrelevant consider-

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[35] See, for example, *Walker v. Manitoba (Labour Relations Board)*, [1976] 2 S.C.R. 78; *Service Employees' International Union, Local 333 v. Nipawin Union Hospital*, [1975] 1 S.C.R. 382; *F.A. Sawatsky Ltd. v. Manitoba (Labour Board)* (1972), 24 D.L.R. (3d) 220 (Man. C.A.); *Parkhill Furniture & Bedding Ltd. v. I.M.A.W. Local 714* (1961), 26 D.L.R. (2d) 589 (Man. C.A.).

[36] [1948] 1 K.B. 223 (Eng. C.A.) at p. 229.

[37] *Ibid.* at p. 234.

[38] It is, of course, possible to find decisions in which Canadian courts have accepted an argument that administrative action was unreasonable in the *Wednesbury* sense. See, for example, *Canadian National Railway Co. v. Fraser-Fort George (Regional District)* (1996) 26 B.C.L.R. (3d) 81, 140 D.L.R. (4th) 23 (B.C.C.A.); *Re Stora Kopparbergs Bergslags Antiebolag and Nova Scotia Woodlot Owners' Association* (1975), 12 N.S.R. (2d) 91, 61 D.L.R. (3d) 97 (N.S.C.A.). In my view, however, such cases are sufficiently unusual that they can be treated fairly as the exceptions that prove the rule.

[39] See *Mia v. British Columbia (Medical Services Commission)* (1985), 61 B.C.L.R. 273, 17 D.L.R. (4th) 385 (B.C.S.C.).

[40] See *Vic Restaurant Inc. v. Montreal*, [1959] 1 S.C.R. 58.

[41] See *Maple Lodge Farms v. Canada*, [1982] 2 S.C.R. 2; *Ainsley Finance Corp. v. Ontario (Securities Commission)* (1994), 21 O.R. (3d) 104, 121 D.L.R. (4th) 79 (Ont. C.A.).

[42] See *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

ations [43] or failure to take into account relevant considerations.[44]

Wherever possible, however, counsel who sought to overturn an administrative body's decision devoted their ingenuity to the transformation of issues that might have been characterized as questions of fact or law or the exercise of discretion into questions that went to the administrative body's jurisdiction. Questions going to jurisdiction were clearly on the judicial side of the authority boundary and there was little doubt that courts would require administrative bodies to answer questions that went to their jurisdiction "correctly".[45] This approach was capable of producing a highly interventionist approach to judicial review, as the House of Lords demonstrated when it developed the "wrong question" doctrine in the *Anisminic* case[46] in 1969, a development that the Supreme Court of Canada enthusiastically embraced in the *Metropolitan Life* case[47] the following year. The way the "wrong question" doctrine worked is that the court would split the issue before the tribunal into two parts, a preliminary legal question typically involving some aspect of the administrative body's statutory mandate and the application of the governing law to the facts of the case itself. If the court disagreed with the tribunal's approach to the legal question, it could say that the tribunal had "embark[ed] on an inquiry or answer a question not remitted to it"[48] and therefore exceeded its jurisdiction. Thus, any dispute concern-

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[43] See *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1976), 14 O.R. (2d) 49, 73 D.L.R. (3d) 18 (Ont. C.A.); *Doctors Hospital v. Ontario (Minister of Health)* (1976), 12 O.R. (2d) 164 (Ont. Div. Ct.).

[44] See *Oakwood Development Ltd. v. St. Francois Xavier (Rural Minicipality)*, [1985] 2 S.C.R. 164; *Bareham v. London (City) Board of Education* (1984), 46 O.R. (2d) 795, 10 D.L.R. (4th) 406 (Ont. C.A.).

[45] Indeed, the Supreme Court of Canada in *Pushpanathan* did not challenge the proposition that jurisdictional questions must be answered "correctly". Instead, it challenges the way in which we identify questions as jurisdictional. Thus, at para. 28, Mr. Justice Bastarache observed: ". . . it is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be acting *intra vires*. But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown."

[46] *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.E.). Indeed, in *Re Racal Communications Ltd.*, [1981] A.C. 374 (H.L.E.) and *O'Reilly v. Mackman*, [1983] 2 A.C. 237 (H.L.E.), Lord Diplock appeared to take the view that the *Anisminic* decision had effectively transformed all questions of law into questions of jurisdiction. See the discussion of these cases by Cory, J., dissenting, in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, at pp. 644-647.

[47] *Metropolitan Life Insurance Co. v. I.U.O.E., Local 796*, [1970] 2 S.C.R. 425.

[48] *New Brunswick Liquor, supra* note 21, at [1979] 2 S.C.R. p. 237, quoting *S.E.I.U. v. Nipawin Union Hospital, supra* note 35, at [1975] 1 S.C.R. p. 389.

ing the interpretation of a statute could, with sufficient ingenuity, be transformed into a question going to the tribunal's jurisdiction.

In my view, the *New Brunswick Liquor* decision had three effects on this line of thinking. The first was to dampen judicial enthusiasm for the characterization of questions of statutory interpretation as jurisdictional and therefore subject to review using a "correctness" test. While the Supreme Court of Canada did not immediately abandon the idea that some interpretive questions went to a tribunal's jurisdiction, there is little doubt that the range of statutory interpretation questions that would be subjected to judicial scrutiny using the "correctness" standard was significantly curtailed.[49]

The second effect of Mr. Justice Dickson's judgment was to introduce the "patently unreasonable" standard of review as a comprehensive basis for judicial intervention regardless of whether the statutory provision whose interpretation was in dispute would be properly characterized as jurisdictional. As a result, the Court was able to embrace the view, implicit in *Anisminic*, that administrative bodies should not receive absolutely immunity from judicial review in relation to any element of their decisions. At the same time, however, the Court was able to avoid a commitment to review all aspects of administrative decisions using a correctness standard.

The third important part of the *New Brunswick Liquor* decision was Mr. Justice Dickson's suggestion that many statutory provisions were inherently ambiguous and that an administrative tribunal's interpretation of those provisions might actually be superior to the interpretations that might appeal to judges. It seems to me that the effect of this point was to pave the way for an alternative reason for deference to administrative decision-making, namely a rationale based on expertise rather than authority. This shift in thinking did not happen overnight. During the 1980s and into the early 1990s a number of Supreme Court of Canada decisions reinforced the idea that the *New Brunswick Liquor* case did not abolish the category of issues that went

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[49] For example, in *S.E.P.Q.A. v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412, [*"S.E.P.Q.A."*] Mr. Justice Beetz, at p. 420, generally limited jurisdictional errors to those that relate: "to a provision which confers jurisdiction, that is, one which describes, lists and limits the powers of an administrative tribunal, or which is [TRANSLATION] "intended to circumscribe the authority" of that tribunal, as Pigeon J. said in *Komo Const. v. Comm. des relations du travail du Québec*, [1968] S.C.R. 172 at 175, 68 C.L.L.C. 14,108 (*sub nom. Komo Const. v. Que. L.R.B*), 1 D.L.R. (3d) 125 (S.C.C.)." At p. 421 he criticized the use of the "preliminary or collateral" questions doctrine as "a fleeting and vague concept against which the Courts were warned by this *Court in N.B. Liquor Corp., supra* at p. 233, once the initial jurisdiction of the administrative body holding the hearing has been established at the outset." The restrictions on the use of the "correctness" standard have expanded in recent years, to the point where questions that were once considered jurisdictional in nature are no longer characterized in that manner. See *Ivanhoe Inc. v. U.F.C.W., Local 500*, [2001] 2 S.C.R. 566, 2001 SCC 47; *Sept-Îles (City) v. Quebec (Labour Court)*, [2001] 2 S.C.R. 670, 2001 SCC 48.

to a tribunal's jurisdiction and had to be decided "correctly".[50] More recently, however, the Court has been much less willing to take a categorical approach to questions that once were categorized as jurisdictional, and lower courts have begun to take note of this alteration in the Court's thinking. In *Neighbouring Rights Collective of Canada (NRCC) v. Society of Composers, Authors and Music Publishers of Canada (SOCAN)*[51] the Federal Court of Appeal rejected an argument that the Copyright Board's interpretation of its remedial powers went to the Board's jurisdiction and the Board therefore had to interpret those provisions "correctly". Mr. Justice Evans observed:

> . . . [A] lot of water has gone under the judicial review bridge since Beetz J. formulated the test in [*S.E.P.Q.A.*] for determining which provisions of an enabling statute an administrative agency must interpret correctly if its decision is to withstand judicial review for jurisdictional error when protected by a strong preclusive clause. See, for example, *Professional Assn. of Foreign Service Officers v. Canada (Attorney General),* 2003 FCA 162 (Fed. C.A.) at para. 11 (per Strayer J.A.).
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> That a statutory provision comfortably seems to fit the description of one that "describes, lists and limits the powers of an administrative tribunal" is no longer conclusive of the standard of review, even when the scope of a tribunal's remedial powers is at issue. For the following reasons, resort to the language of jurisdiction as used in [*S.E.P.Q.A.*] no longer enables a reviewing court to avoid a pragmatic and functional analysis in order to determine the standard of review.
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> . . . In my view, there is a logical incompatibility between a pragmatic and functional analysis for determining the appropriate standard of review, and a formalistic approach that purports to identify certain statutory provisions as attracting correctness review because they describe, define or limit the powers of an administrative agency. The fact of the matter is that every statutory provision that prescribes the circumstances that must exist, or be taken into account, before an agency decides a matter or takes some action can be said to describe, define or limit its powers.
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> . . . [T]o the extent that the Supreme Court of Canada continues to have regard to a statutory provision's "jurisdictional" nature in the [*S.E.P.Q.A.*] sense when

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[50] See, for example, *S.E.P.Q.A., ibid.; U.E.S., Local 298 v. Bibeault,* [1988] 2 S.C.R. 1048; *Canada (A.G.) v. P.S.A.C., supra* note 46; *Canadian Pacific Airlines v. Canadian Air Line Pilots Ass'n,* [1993] 3 S.C.R. 724; and *Canadian Broadcasting Corp. v. Canada (Labour Relations Board),* [1995] 1 S.C.R. 157.

[51] 2003 FC 302, 2003 CarswellNat 2137, 229 D.L.R. (4th) 205 (F.C.A.).

> determining the standard of review, it is only as one part of one factor of the pragmatic and functional analysis, namely the nature of the problem before the agency: *Chieu v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 84 (S.C.C.) at paras. 22 and 24.
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> Taking into account both the relative expertise of the Board and the Court, and the nature of the problem before it, I have concluded that the Board is better placed than the Court to determine if its powers include the certification of a single tariff when the parties have neither submitted, nor consented to one.
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> Accordingly, the relative expertise of the agency and the reviewing court on the issue in dispute, often described as the most important factor in the pragmatic and functional analysis (see, for example, *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) at paras. 32-33), indicates a legislative intention that the Court should exercise considerable restraint in reviewing the Board's decision to certify a single tariff.

Mr. Justice Evans' reasons do not suggest that courts will never use the "correctness" standard of review in addressing questions that were once characterized as jurisdictional. What they do indicate is that courts are required to undertake a more careful analysis of when a particular issue ought to be regarded as going to the jurisdiction of an administrative body.[52]

As the *SOCAN* decision suggests, the trend in the Supreme Court of Canada's more recent administrative law decisions has been to concentrate less on the division of authority between administrative bodies and courts and more on the issue of which institution ought to have the final say with respect to the different aspects of the problem the administrative body was confronting.[53] According to this line of thinking, judicial intervention in administrative decision-making ought to vary depending on the likelihood that the courts will actually improve the overall quality of decisions by taking a more interventionist stance.[54] This commitment to judicial deference does not mean that courts should abandon their supervisory role. They should, however, intervene only if the nature of the administrative body or the types of decisions it

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[52] For instance, in my view there are still compelling reasons for a court to use the correctness standard in reviewing decisions that require a tribunal to interpret the relationship between its own enabling legislation and that of another tribunal. See, for example, *Canada (A.G.) v. P.S.A.C.*, *supra* note 46 and *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, *supra* note 50.

[53] Among the decisions that are the most significant in the development of this trend I would include *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; and *Southam*, *supra* note 22.

[54] See H.W. MacLauchlan, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986), 36 *U.T.L.J.* 313.

made suggested that close judicial supervision was appropriate,[55] or where the administrative body's decision was sufficiently erroneous that it warranted judicial intervention regardless of a general posture of deference.[56]

The *New Brunswick Liquor* case itself involved judicial review of a tribunal whose decisions were protected by a strong privative clause. Accordingly it was possible to explain the Court's approach to deference in terms of traditional legislatively imposed limits on the scope of judicial authority to review the tribunal's decisions. Indeed, one of the early criticisms of Mr. Justice Dickson's reasons for judgment in the *New Brunswick Liquor* case was that he offered two quite distinct rationales for the Court's unwillingness to intervene in the tribunal's decision without commenting on the possibility that these rationales might be in conflict.[57] One obvious source of conflict was that deference based on authority tended to produce binary solutions (either the courts had authority to intervene or they did not) whereas deference based on relative expertise admitted of the possibility of different gradations or degrees of deference.

Once deference based on relative expertise took hold, however, it was obvious that it would not be restricted to situations where the administrative body's decisions were protected by a privative clause. It was hardly surprising, therefore, to find the Supreme Court of Canada searching for an intermediate approach that would allow it to offer some deference based on the expertise of a tribunal and at the same time recognize that some tribunals were not entitled to the same degree of deference as others whose decisions were protected by privative clauses. As Mr. Justice Iacobucci pointed out in *Southam*, the logic of the jurisprudence required an intermediate standard of review. He observed:

> I wish to emphasize that the need to find a middle ground in cases like this one is almost a necessary consequence of our standard-of-review jurisprudence. Because appeal lies by statutory right from the Tribunal's decisions on questions of mixed law and fact, the reviewing court need not confine itself to the search for errors that are patently unreasonable. The standard of patent unreasonableness is principally a jurisdictional test and, as I have said, the statutory right of appeal puts the jurisdictional question to rest. See *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at

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[55] See, for example, *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Gould v. Yukon Order of Pioneers*, 1996] 1 S.C.R. 571.

[56] See, for example, *Toronto (City) Board of Education v. O.S.S.T.F. District 15*, [1997] 1 S.C.R. 487; *United Association of Journeymen and Apprentices of the Pipefitting Industry v. W.W. Lester* (1978) Ltd., [1990] 3 S.C.R. 644 [*"Lester"*].

[57] N. Lyon, "Case Comment" (1980), 58 *Can. Bar Rev.* 646.

> p. 237. But on the other hand, appeal from a decision of an expert tribunal is not exactly like [an] appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage that judges do not. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. Accordingly, a third standard is needed.[58]

While an intermediate standard of review is attractive from the standpoint of developing a relatively sophisticated framework for organizing the relationship between courts and administrative decision-makers, it is less clear how the thought process of a judge employing the reasonableness standard can be differentiated from the thought process of the same judge employing the "patently unreasonable" standard. As noted above, in the *Southam* case Mr. Justice Iacobucci tried to address this question by concentrating on the "immediacy or obviousness of the defect".[59] This approach tends to overlook the Supreme Court of Canada's earlier efforts to give content to the "patently unreasonable" standard of review, and the inconsistencies that can be identified in these efforts.

The Supreme Court of Canada originally sought to define the "patently unreasonable" standard as something that was distinct from the "correctness" standard used to review "jurisdictional" questions. Mr. Justice Dickson, as he then was, can be credited with the first definition in the *New Brunswick Liquor* decision itself. He asked: "was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?"[60] This test, which was concerned principally with alleged errors by tribunals in the interpretation of their governing statutes, asked reviewing courts to consider whether or not the interpretation chosen by the tribunal was one that the legislation could reasonably bear.[61] If so, the court was to refrain from interfering with the tribunal's decision.

In *S.E.P.Q.A. v. Canada (Labour Relations Board)*,[62] however, Mr. Justice Beetz put a quite different gloss on the "patently unreasonable" standard of review. He observed that "a mere error of law is to be distinguished from one resulting from a patently unreasonable interpretation of a provision which an administrative tribunal is required to apply within the limits of its jurisdiction. This kind of error amounts

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[58] *Southam, supra* note 22, at para. 55.

[59] *Supra* note 29.

[60] *New Brunswick Liquor, supra* note 21, at [1979] 2 S.C.R. p. 237.

[61] See MacLauchlan, *supra* note 54.

[62] *Supra* note 49.

to a fraud on the law or a deliberate refusal to comply with it."[63] The Dickson formulation appears to contemplate judicial correction of serious errors of interpretation that are made in good faith whereas the Beetz formulation appears to imply that "patently unreasonable" interpretations will only surface where the tribunal is acting in bad faith.

While the "fraud on the law" approach never took hold, later definitions continued to emphasize the judicial obligation not to be excessively interventionist. In the *Paccar* case, for example, Mr. Justice La Forest wrote: "The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should not be so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result."[64] This emphasis on rationality was later reinforced by Cory, J., writing for the majority of the Supreme Court of Canada in *Canada (Attorney General) v. Public Service Alliance of Canada*, who observed:

> It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational. . . . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.[65]

These formulations of the "patently unreasonable" test were undoubtedly quite effective in discouraging excessive judicial intervention in administrative decision-making. They were not, however, particularly useful as indicators of when courts ought to intervene. Moreover, when judges do decide that an administrative decision is sufficiently seriously wrong that it requires intervention, this approach forces them into the unfortunate rhetorical position of having to characterize the decision as "clearly irrational" when it would be more accurate to say that the judges believe there are

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[63] *Ibid.*, at [1984] 2 S.C.R. p. 420.

[64] *C.A.I.M.A.W. v. Paccar of Can. Ltd.*, [1989] 2 S.C.R. 983, at para. 32 ["*Paccar*"].

[65] [1993] 1 S.C.R. 941, at p. 963-964.

compelling reasons for refusing to allow the decision to stand. As Mr. Justice Robertson observed in *New Brunswick (Board of Management) v. Doucet Jones*:[66]

> . . . [F]formulating a review standard in terms of a decision being absurd or clearly irrational does little to advance the interests of justice. In truth, such standards unnecessarily demean the individual whose personal judgment is called into question by the unsuccessful party. No decision-maker wants to be labeled "clearly irrational" or the author of a "silly" decision."

In the next part of this essay I will argue that if one examines judgments in which courts have determined that administrative decisions are "patently unreasonable" it is possible to construct a series of rationales for judicial intervention that are both more useful and more convincing than the alternatives described above. This is, I would argue, precisely what the New Brunswick Court of Appeal did in *Doucet Jones* and the elaboration of this approach holds out the potential for more satisfactory use of the current three-standard approach to judicial review.

C. REFINING OUR UNDERSTANDING OF "CORRECTNESS" "REASONABLENESS" AND "PATENTLY UNREASONABLE" REVIEW

Before turning to the question of how we ought to understand the "patently unreasonable" standard of review, it is worth spending a moment to explore the distinction between the "correctness" and the "reasonableness" standards. Former Alberta Court of Appeal Justice Roger Kerans, in his book *Standards of Review Employed by Appellate Courts,* expressed the following view on the subject:

> There are only two true standards of review. The first asks whether the appellate court agrees with the first tribunal, and requires it to make its own decision. It is *de novo* except in the sense that it begins by study of the decision of the first judge, and therefore might be called the standard of "concurrence". The second presumes that the decision of the first judge was correct, and demands of the appellant that it persuade the reviewing court that the decision was wrong in the sense of not being one that a sensible and responsible person could have made in the circumstances of the case. The court can and should dismiss the appeal without making or offering its own decision on the case if the appellant fails in that burden. If the court does interfere, it must be able to articulate cogent reasons for labeling the first decision as unreasonable.[67]

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[66] *Supra* note 2, at para. 23.

[67] The Honourable Mr. Justice R. Kerans, *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber Ltd., 1994), at p. 51. It is noteworthy that Mr. Justice Kerans, who was writing before the Southam case had been decided, does not find it useful to distinguish between "reasonableness" review and the "patently unreasonable" standard identified in the *New Brunswick Liquor* case. While I have some sympathy with this approach, current Canadian jurisprudence forces us to attempt to give meaning to the distinction between these two standards.

Whether or not one agrees with the initial observation that there are only two "true" standards of review, it seems to me that two aspects of this line of reasoning are particularly noteworthy. The first is that both approaches to the standard of review question are consistent with what Professor David Dyzenhaus has described as "deference as respect", which he defines as "[requiring] not submission but a respectful attention to the reasons offered or which could be offered in support of a decision. . . ".[68] The "correctness" approach advocated by Mr. Justice Kerans still requires a reviewing court to begin by giving careful study to the decision under review. No doubt it is easy to find examples of judicial failure to give respectful consideration to the reasons for which administrative bodies reach the decisions they do. In my view, however, it should not automatically be taken as a sign of disrespect when a judge comes to a different conclusion than an administrative body. In essence, what the "correctness" standard means is that the courts are entitled to the final say on particular questions, whether it be the interpretation of the constitution or the interpretation of a particular statute. It is easy to find disagreement about how broad or narrow the ambit of this particular aspect of the judicial role ought to be. Nevertheless, I believe it is a mistake to conclude that the choice of the "correctness" standard of review somehow undermines or belittles the significance of the role played administrative bodies whose decisions are subject to review using this standard.

The second important aspect of Mr. Justice Kerans' description of the difference between the "correctness" and the "reasonableness" standard of review is that he offers a distinction in kind rather than merely one of degree. In other words, he is describing two distinctly different thought processes and, I would submit, distinctly different lines of argument need to be advanced in order to persuade a court to intervene using these two standards. As a result it seems to me that, with the greatest of respect, Mr. Justice Sopinka was wrong to insist in his concurring judgment in the *Paccar* case that "Anyany adjudication upon the reasonableness of a decision must involve an evaluation of the merits.[69] In Mr. Justice Sopinka's view:

> Reasonableness is not a quality that exists in isolation. When a court says that a decision under review is "reasonable" or "patently unreasonable" it is making a statement about the logical relationship between the grounds of the decision and premises thought by the court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made.[70]

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[68] D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279, at p. 286, quoted with approval in *Baker, supra* note 12, at para. 65.

[69] *Paccar, supra* note 64, at p. 1018.

[70] *Ibid.*

In my opinion, Mr. Justice Kerans (in the passage quoted above) and Mr. Justice La Forest in the *Paccar* case correctly concluded that a court using a "reasonableness" standard should not be attempting to draw a comparison between what it thinks is right and the decision under review. I say this for two reasons. The first is that it runs counter to the proposition that, as long as the administrative body has not behaved unreasonably its decision is authoritative. In the eyes of the law, therefore, no meaningful distinction can be drawn between a reasonable decision and one that is correct since they are both treated in the same way. The second, and more important, reason is that one of the central purposes of law is to reconcile the unsuccessful litigant to the justice of defeat. It seems to me that for a reviewing court to tell the unsuccessful litigant that its argument was correct but that for institutional reasons the court is not going to intervene is likely to inflame rather than diminish that litigant's sense of injustice.

Although it is possible to draw a relatively distinct line between "reasonableness" review and "correctness" review, how can we create a similarly sharp boundary between "reasonableness" review and review using the "patently unreasonable" standard? I suspect that we can never draw quite as clear a distinction between these two standards because "patently unreasonable" decisions will always be a subset of "unreasonable" decisions. That said, it seems to me that we can identify types of flaws that are characteristic of "patently unreasonable" decisions and require litigants to use arguments based on these flaws in cases where the "patently unreasonable" standard is being employed rather than simply advancing the proposition that the decision is seriously wrong or obviously incorrect.

First of all, in those rare cases where counsel is able to argue successfully that a decision was made in bad faith, it seems to me that this automatically makes the decision itself not merely wrong or unreasonable but "patently unreasonable". If the commitment to judicial review has any meaning at all, it has to embrace the goal of correcting abuses of authority notwithstanding a general commitment to deference to administrative decisions.

In addition, I believe that when counsel can convince the reviewing court that the decision under review is based on a premise that is unquestionably incorrect, this also ought to render the decision "patently unreasonable". This type of mistake does not imply bad faith on the part of the decision-maker, but the type of mistake I have in mind is one that cannot seriously be defended. For example, if a decision is based on the authority of a statute that has not been proclaimed into law or has been repealed, or on the authority of a judgment that has been overturned on appeal, it seems to me that the decision should not be allowed to stand regardless of the high degree of deference that would normally be accorded to the administrative body that made the decision. Let me offer the example of the case of *Vernon (City) v. Vernon*

Professional Fire Fighters Assn.[71] which involved an arbitration in a dispute under what was at the time new legislation, the British Columbia *Fire and Police Services Collective Bargaining Act.*[72] Unfortunately, the arbitrator based part of his decision on the wording of a section of the Bill introducing the Act, and this wording had been amended on Third Reading. Although Mr. Justice Brenner, as he then was, found that this mistake was not the arbitrator's fault, he nevertheless concluded that although the decision would normally be entitled to a high degree of deference, the mistake rendered the decision "patently unreasonable" and it had to be overturned.

A third type of situation in which the Supreme Court of Canada has been prepared to intervene using the "patently unreasonable" standard is when there are serious flaws in the logical underpinnings of the administrative body's decisions. For example, it seems to me it is "patently unreasonable" for a tribunal to make factual findings where there is no evidence to support these findings, in the same way that it was traditionally considered to be a jurisdictional error for a tribunal to do so.[73] In *Toronto (City) Board of Education v. O.S.S.T.F. District 15*,[74] the Supreme Court of Canada took this reasoning one step further and held that it was "patently unreasonable" for a labour arbitration board to make factual findings that could not be reasonably supported on the evidence before it. It is, of course, possible that this approach to the "patently unreasonable" standard could open the door to excessive judicial interference based on simple disagreement with the inferences drawn by the administrative body from the evidence before it. It seems to me, however, that it is better for judges to recognize this possibility and guard against it than it is to use the deference principle to immunize decisions that are not logically supportable from judicial review.

Another example of this type of reasoning can be found in Mr. Justice Binnie's concurring judgment in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services).*[75] He found that the Minister's decision to refuse to grant the hospital permit requested in the case "was "patently unreasonable" in terms of the public interest as [the Minister] and his predecessors had defined it over a period of seven years of consultation, encouragement and assurances to the respondents, and in his total lack of regard for the implications for the respondents of the Minister's

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[71] 1996 CarswellBC 1459 (B.C.S.C.)

[72] S.B.C. 1995, c. 40.

[73] See *Skogman v. R.*, [1984] 2 S.C.R. 93, 11 D.L.R. (4th) 161; *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245, at p. 277 (per Estey, J. dissenting in part); *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.).

[74] *Supra* note 56. See also *Canadian Union of Public Employees v. Montreal (City)*, [1997] 1 S.C.R. 793 at para. 85 and, more generally, Comtois, *supra* note 33, at pp. 133 - 135.

[75] *Supra* note 13.

broken promises."[76] While Mr. Justice Binnie was not willing to give direct legal effect to the hospital's reliance on those promises, the Minister's failure to provide an adequate reason for his unwillingness to give effect to the assurances he and his predecessors had made to the hospital rendered his discretionary decision to refuse the permit "patently unreasonable".

A fourth type of situation in which the Supreme Court of Canada has found that an administrative body's decision was "patently unreasonable" is illustrated by the majority decision in the *Lester* case.[77] Madam Justice McLachlin, as she then was, offered a number of reasons for concluding that the Newfoundland Labour Relations Board was acting in a "patently unreasonable" manner when it declared that a "double-breasting" construction company was a successor employer for purposes of the *Newfoundland Labour Relations Act*.[78] The most compelling of these reasons, in my own view,[79] was that the Newfoundland Legislature had made a conscious decision not to introduce "common employer" legislation that would allow the Board to treat "double-breasting" construction companies as a single entity, and the Board's interpretation of the Act's successorship provisions effectively created a "common employer" rule.[80] To put it another way, the majority concluded that the Board was not merely interpreting the legislation in question but was effectively seeking to amend it, something that only the Newfoundland Legislature could do. Thus an administrative body's failure in a decision to observe the limits of its institutional role can be said to render that decision "patently unreasonable".

A fifth, and somewhat more controversial, example of a type of decision that can be said to be "patently unreasonable" is one that is "inconsistent with the policy objectives of the statute"[81] that is being administered. It seems to me that this approach to the "patently unreasonable" standard is the one that was, in effect, employed by the majority of the Supreme Court of Canada in *C.U.P.E. v. Ontario (Minister of Labour)*.[82] The majority decided that the Minister's decision to appoint retired judges who were not experienced labour arbitrators as interest arbitrators

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[76] *Ibid.*, at para. 64.

[77] *Supra* note 56.

[78] S.N. 1977, c. 64.

[79] See P. Bryden, Case Comment (1992), 71 *Can. Bar Rev.* 580, at pp. 586-587.

[80] See *Lester, supra* note 56, at [1990] 3 S.C.R. pp. 686-687.

[81] *Canada Safeway Ltd. v. R.W.D.S.U. Local 454*, [1998] 1 S.C.R. 1079, at para. 65 (per Cory and McLachlin, JJ. writing for the majority) quoting *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, at p. 403 (per Cory, J.). See also, *Paccar, supra* note 64, per Wilson and L'Heureux-Dubé, JJ. dissenting).

[82] *Supra* note 13.

under the Ontario *Hospital Labour Disputes Arbitration Act*[83] was "patently unreasonable". The key passage in the Mr. Justice Binnie's reasons explaining the majority's conclusion is the following:

> Speaking broadly, "the perspective" within which *HLDAA* was intended by the legislature to operate . . . is to secure industrial peace in hospitals and nursing homes. *HLDAA* imposes a compulsory yet mutually tolerable procedure (if properly administered) to resolve the differences between employers and employees without disrupting patient care. In that context, appointment of an inexpert and inexperienced chairperson who is not seen as broadly acceptable in the labour relations community is a defect in approach that is both immediate and obvious. In my view, with respect, having regard to what I believe to be the legislative intent manifested in *HLDAA*, the Minister's approach to the s. 6(5) appointments was patently unreasonable.[84]

It is immediately noticeable, however, that Mr. Justice Binnie describes the defect in the Minister's reasoning as "immediate and obvious", in order to reconcile his conclusions with the description Mr. Justice Iacobucci in *Southam* offered of the characteristic of a "patently unreasonable" decision.

Mr. Justice Bastarache, writing in dissent, made what strikes me as a telling criticism of this approach:

> Given how much work it takes even to identify the factors at issue in this appeal (labour relations experience and broad acceptability) and to imply them into s. 6(5) [of the *HLRAA*], I am reluctant to conclude that weighing them less heavily than another factor, also unwritten (judicial experience), vitiated the appointments as patently unreasonable. Using the language of Iacobucci J. in *Southam*, at para. 57, cited above, I would say that the Minister's appointments were not patently unreasonable because "it takes some significant searching or testing to find the defect", if there is one. More problematic for Binnie J.'s approach, in my view, is the fact that it takes "some significant searching" even to find the factors said to constrain the Minister. It is difficult to characterize the Minister's appointments as immediately or obviously defective, particularly when the factors are not themselves immediately or obviously ascertainable. The flaw cannot be explained simply and easily. Or to draw on Cory J.'s approach in *PSAC, supra*, at pp. 963-64, it is difficult to argue that the appointments were "evidently not in accordance with reason," or "clearly irrational". Turning to *Ryan*, when the compelling rationale for curial deference is borne in mind — in particular the

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[83] R.S.O. 1990, c. H.14 ["*HLDAA*"].

[84] *C.U.P.E. v. Ontario (Minister of Labour), supra* note 13, at para. 184.

> Minister's superior expertise at labour relations — it becomes difficult to say that the appointments are "so flawed that no amount of curial deference" could justify letting them stand. Returning, finally, to *Suresh*, a failure to consider the proper factors, even if I were to accept them as determinative, fails to vitiate the Minister's decision because the factors themselves were not obvious and uncontroversial. These are all different ways of expressing the conclusion that the appointments were not patently unreasonable.[85]

The difficulty I experience with Mr. Justice Bastarache's observations is that, with the possible exception of the second type of example I set out above, it is a criticism that could fairly be leveled at all the other instances in which the Supreme Court of Canada has concluded that an administrative decision was "patently unreasonable". It seems to me that, as illustrated by these decisions, there are many situations where the Supreme Court of Canada actually wants to encourage courts to use their judicial review powers to protect the interests of persons who are affected by administrative decisions notwithstanding a general commitment to deference. To limit intervention using the "patently unreasonable" standard to situations where a decision is "clearly irrational" or "immediately and obviously defective" is to offer an impoverished approach to judicial review that is, in my respectful opinion, inconsistent with the results of many of the Supreme Court of Canada's actual decisions. As a matter of substantive labour relations law I happen to believe that the result reached by the majority of the Court in *C.U.P.E. v. Ontario (Minister of Labour)* is misguided, but I believe that it is more productive to address the underlying issues directly than it is to suggest that the Minister's decision should stand because the defects in his reasoning are not sufficiently obvious.

The sixth and final example I will offer in my catalogue of judicial approaches to the question of what makes a decision "patently unreasonable" is the one provided by Mr. Justice Robertson in *Doucet Jones*. He observed that "if a decision-maker arrives at an interpretation in a manner that is inconsistent with accepted principles of interpretation, the interpretative decision is not rationally supported. The defect should be obvious and the decision must be declared patently unreasonable."[86] Once again, this passage nods in the direction of the "lack of rational support" for the decision and the "obviousness of the defect" in order to bring the reasoning into line with the dominant stand of Supreme Court of Canada jurisprudence on what makes a decision "patently unreasonable". Nevertheless, it seems to me that the concept that underpins Mr. Justice Robertson's reasoning is not the thought that the court is reviewing the soundness of the decision-maker's reasoning process, but the idea that the court has an obligation to ensure that the decision-maker is carrying out his or her

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[85] *Ibid.*, at para. 36.

[86] *Doucet Jones, supra* note 2, at para. 27.

duties in a manner that respects the limits of the mandate afforded to legal decision-makers. Reasonable people may disagree about the result of an application of accepted principles of interpretation. Nevertheless, failure on the part of a decision-maker to accept the discipline that accepted principles of interpretation impose on legal decision-making represents a threat to the rule of law. Decisions that have this character are "patently unreasonable" and courts will intervene to ensure that decision-makers respect this aspect of the limited nature of their mandate.

Mr. Justice Robertson recognized that this approach could be misused. In the next paragraph of his reasons he noted that it would be overly simplistic to suggest "that all interpretative issues can be resolved easily through the uniform application of established principles and rules of construction."[87] If a reviewing court were to take this view, it would be "all too easy to declare that an administrative decision is or is not patently unreasonable and to explain why this is so in a manner that is no different had the proper review standard been correctness."[88] The solution to this dilemma is to recognize that there is a large body of interpretative jurisprudence that eliminates much of the subjectivity associated with the interpretation of a statute or contract. If we view a patently unreasonable interpretation as one in which there is a patent defect in the application of interpretative principles or rules of construction, it is not as difficult for the parties to predict whether a reviewing court will intervene."[89]

I have attempted in this part of the essay to sketch out a set of distinctions among the "correctness", "reasonableness" and "patently unreasonable" standards of review that I believe to be workable in practice and that are consistent with at least some strands of the Supreme Court of Canada's jurisprudence. I do not pretend that this discussion is by any means comprehensive, and my goal in this endeavour is to spur further discussion in this area rather than to attempt to have the last word. It seems to me, however, that this effort is more promising than continued reliance on a set of distinctions that, however admirable they may be in terms of flexibility, offer too little in the way of useful guidance.

CONCLUSION

In conclusion, I believe it is useful to return to the initial insights that led to the more sophisticated "pragmatic and functional" approach to substantive judicial review that is reflected in the *Pushpanathan* decision and its progeny. They are that administrative bodies should not be entitled to be immune from judicial oversight in respect of

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[87] *Ibid.*, at para. 28.

[88] *Ibid.*

[89] *Ibid.*

any aspect of their decisions, and that at the same time there are many situations in which the people who are affected by those decisions would be better served if judicial scrutiny is not excessively intense. For those insights to serve the interests of the Canadian public however, it is not enough for the courts to offer a principled account of the rationale for judicial deference. We need a workable description of the types of situations in which judicial intervention is appropriate as well.

I appreciate the fact that administrative law has to cover an enormous range of institutions and types of decisions and this puts a premium on flexibility.[90] I also recognize that our ability to draw distinctions ultimately rests on our choice of appropriate language and that we may be unable to capture all of the shades of meaning we would like to be able to using this tool.[91] On the other hand, it seems to me that there are opportunities to refine our thinking on how to approach the different standards of review, and that further efforts along the lines I have suggested above would be productive not only for the courts but for administrative bodies and the persons who are affected by their decisions as well.

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[90] See Iacobucci, supra note 31.

[91] See Mr. Justice Cory's observations in *Canada (Attorney General) v. Public Service Alliance of Canada* quoted in the text, *supra* note 65.