Economic Actors in the Work of Madame Justice Wilson

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Recommended Citation
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When I was asked to present a paper at this conference, I agreed with some trepidation. I have noticed that tax and corporate papers are rarely a hit at legal conferences which offer a smorgasbord of legal topics....I first noticed this when at a large conference I was once attending, half the audience fell asleep as the topic of my paper was announced and the other half made a dash for the exit.

Accordingly I tried to come up with something interesting around which to develop my discussion of Madame Justice Bertha Wilson's economic decisions. And reading again through Justice Wilson's wonderful speech, "Will Women Judges Make a Difference?", I found my answer in one of her more provocative statements, which seemed to have passed unnoticed in the press. Given that the rest of the text was, in some form or other, quoted verbatim, this surprised me.

Justice Wilson's quote read as follows:

Taking from my own experience as a judge of fourteen years' standing, working closely with my male colleagues on the bench, there are probably whole areas of the law on which there is no uniquely feminine perspective....the principles and the underlying premises are so firmly entrenched and so fundamentally sound that no good would be achieved by attempting to re-invent the wheel, even if the revised version did have a few more spokes in it. I have in mind areas such as the law of contract, the law of real property and the law applicable to corporations.¹

This seemed to me to be a challenge that I could not refuse, having taught tax and corporate courses from a feminist perspective for several years. Accordingly I was delighted to be asked to be a speaker at this conference, primarily of course, because like many others in the legal profession, I have been an admirer of Justice Wilson's work for many years. Accordingly it is a pleasure to have been invited to participate with all sectors of the legal community in honouring her. However I must also admit that as an academic I relish the opportunity to show Justice Wilson that she has occasionally applied a feminist

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view of the corporate world and perhaps, for the times that she has not, to foster in her a wistful regret...for the lost opportunity.

One cannot discuss corporate or tax law, or indeed any law for that matter, in a value vacuum. How we interpret, analyse and assess factual situations and the legal analysis of them will differ depending upon our individual, and occasionally, collective or societal perspectives. In the economic sphere, a great deal depends upon one's world view of the primary economic actors in our society - corporations; and the main economic laws - the tax laws. At the outset I should state that a major reason for my disagreement with some of Justice Wilson's decisions is due to the fact that, on some occasions, Madame Justice Wilson and I hold different views of the role of corporate entities in our society and even conceptual differences as to what a corporation is legally. At the risk of being overly simplistic, I believe that the differences for the most part can be traced to the conflict between the feminist view of the role of corporations as part of a system of social and economic cooperation and the conflicting view of the corporation as the objective icon fueling a patriarchal driven free market economy as espoused by one of the leaders of the scottish enlightenment - Adam Smith. Such different world views also results in differing methodologies for solving problems, legal and otherwise.

Lest that seem too rhetorical, let me place this more in perspective and with less jargon. Accordingly I will have to use a non-lawyers example....

Carol Gilligan, a psychologist, in her renowned book *In A Different Voice* 2, introduces us to Jake and Amy and demonstrates how their world views differ. (I would note parenthetically that Gilligan remains silent on the nature-nurture debate). Gilligan illustrates this by an experiment carried out on small children of differing genders immortalised in the form of Jake and Amy. The contrast of their differing world views is most starkly pronounced and located in differing intellectual methodologies of dealing with difficult issues: the ethic of caring in the case of Amy and the ethic of rights and rules in the case of Jake. Both children were asked whether it was legitimate for a man, Heinz, to rob a pharmacy in order to obtain vitally needed drugs for his dying wife that the family could not afford. Jake sympathised with the dilemma and thought that Heinz should rob the pharmacy although it might be illegal. A rights analysis dictated that the need to protect the dying women was greater than the

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need to uphold the law. Amy however thought more about the consequences to all the individuals involved rather than applying a strict rules and rights interest analysis. Accordingly, she was both more caring and pragmatic: could Heinz not explain his predicament more clearly to the pharmacist, perhaps he could pay for the drugs over a longer period of time, perhaps he could borrow the money from elsewhere. Amy was concerned about the effect of the theft on Heinz, on the pharmacist and on Heinz’s wife (she might be left alone if Heinz was jailed). I believe this same ethic of caring triumphing over rights-oriented logic can (and should) be applied in corporate cases as much as Madame Justice Wilson has done in other important cases, such as the Guerin\(^3\) and Lavallee\(^4\) cases, although the interest base may not be as clear and may require deeper investigation. Blind faith in linear logic is no substitute for taking a more expansive view which would result in greater fairness. Madame Justice Wilson has shown this can be done very clearly in some cases even in the corporate arena. A good illustration of this, is Justice Wilson’s dissent in the case of *Hunter Engineering Co. v. Syncrude*.\(^5\)

*Hunter v. Syncrude Inc.* is the case, as contract lawyers will recollect, where *Syncrude Canada Ltd.*, sued Hunter Engineering Co., Inc. and Allis-Chalmers Canada Ltd., for defective gear boxes. Both defendants raised the fact that there was an express warranty, with a time-limit which had now passed.

The final question before the court was whether a fundamental breach could be covered under an exclusion clause in the contract or, did the whole contract, exclusion clause and all, like the king’s men, come tumbling down. The majority of the court held that an exclusion clause remained effective even in the event of a fundamental breach. An exclusion clause would only be set aside if the doctrine of unconscionability could be invoked. Justice Wilson wrote a separate judgement (with which Justice L’Heureux-Dube concurred), expanding the circumstances under which an exclusion clause would be set aside. Justice Wilson recognised that unconscionability depends and is focussed on whether, looking at all the circumstances, there is an imbalance of bargaining power at the time the contract is made. Such an approach might achieve certainty in commercial transactions but only at the risk of injustice. The commercial world is a complex one in which simple rules may wreak inequity. Justice Wilson proposed a

\[\text{References:}\]

better solution which would force the courts to recognise that "the results of enforcing such exclusions clauses could be harsh if the parties had not adequately anticipated or considered the possibility of the contract's disintegration through fundamental breach." Justice Wilson recognised the need to explore the consequences of the breach for the parties and not simply their actions. Accordingly for her, the test had to be one which encompassed the fate of the parties:

It is preferable...to determine whether or not the impugned clause should be enforced in all the circumstances of the case and avoid reliance on awkward and artificial labels.

The end result is that Justice Wilson refuses to be bound by narrow legalism. Instead she proposes a more caring, purposive approach to exclusion clauses requiring their enforcement to be dependent on the circumstances and effects of the breach in addition to unequal bargaining power at the time the contract is entered. Amy would be proud.

However this was a case involving two corporate entities. For Justice Wilson different factors come into play when one of the actors is the government. In cases involving the government, it is obvious that for Justice Wilson there is a real tension between communitarian interests and the liberties of specific individuals. For the most part, Justice Wilson demonstrates a clear preference for individual liberties over state or communitarian interests; reflective perhaps of her Scottish enlightenment roots firmly embedded in the spirit of individualism. Sometimes these liberal notions have helped disadvantaged groups as one of Justice Wilson's more celebrated judgements The Queen v. Morgentaler illustrates. Nonetheless there is still considerable cause for concern with some of the sweeping individualistic statements made in that case by Justice Wilson. For example, at one point in the judgement she comments:

"The Charter is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The Charter reflects this reality by leaving a wide range of activities and decisions open to

6. Ibid., at 508 (S.C.R.); 375 (D.L.R.).
7. Ibid., at 518 (S.C.R.); 382 (D.L.R.).
legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.9

While this is undoubtedly a laudable objective, it is not without its downsides. Exclusion from others may not be the best for us as individuals or for society. And the court has had obvious difficulty in drawing the appropriate lines. Justice Wilson herself has drawn the line in different places. In my opinion, especially in the case of corporations, the line has been drawn in a manner that is too restrictive of the role which government must of necessity play in our sophisticated society. And this has resulted in part from Justice Wilson's belief enunciated later in the Morgentaler case that:

[The] basic theory underlying the Charter, [is] that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.10

Such individualistic notions of autonomy whilst attractive can result in dangerous outcomes for democratic societies. These dangers are probably most apparent when notions of autonomy and individuality are applied to corporations. In this arena more than most, the individual-communitarian conflict is most obvious. With changing notions of democracy this will become an increasing site of struggle. Democracy can only be effectively maintained by limiting the power and influence of corporations.11 Such control over the corporate sphere can only be exercised by the legislatures and courts through legislation and other legal regulation. In most economic cases, Justice Wilson has shown a remarkable reluctance to allow this type of control or regulation to be exercised by the legislature or to impose any such regulation by the courts. In most cases, Justice Wilson has followed Adam Smith's view of the corporate world and how it should, or more accurately should not, be regulated by governments.

Adam Smith, one of the forefathers of the modern male economy, sees corporate entities as a good in themselves which should be free

9. Ibid., at 485.
10. Ibid., at 486.
from state interference to create wealth. Amy however would hypothesize instead that corporations are nothing more or less than economic machines created by legislation to produce a form of organization that will benefit society both in its business dealings and by any gains and productive benefits arising from them. Accordingly, as state creatures, they should be given few powers beyond those bestowed by the state and should always be subjected in the strictest fashion to safeguards or other restrictions placed on them by the state. Corporations exist, in the eyes of feminists, for the good of society, the state does not exist to enhance the powers and potential of corporations. One’s vision of which of these categories the corporation falls within will profoundly affect how we both make and interpret laws which affect these economic actors. Justice Wilson has vacillated between both visions which leaves her at times in an uneasy position. However as I mentioned before, Justice Wilson has usually veered towards the Smithian version which often translates into a vision of unrestricted corporate activity achieved through a \textit{laissez-faire} legal approach as exemplified in the examples given later of \textit{Thomson Newspapers Ltd. v. Canada},\textsuperscript{12} and \textit{Stubart Investments Ltd v. The Queen}\textsuperscript{13}.

However to characterise Justice Wilson as the champion of the law and economics movement on the Supreme Court is overly simplistic and unduly pessimistic. Far from seeing the law solely as a means to enhance economic efficiency in our society, Justice Wilson has also been concerned that the morality of law should guide economic behaviour. Again this is reminiscent of Adam Smith who, although himself the progenitor or foreparent of the law and economics movement, had as the grounding for his ideas “a moral ideal which provides grounds independent of economic considerations for the regulation of social interactions.”\textsuperscript{14} Accordingly Justice Wilson’s economic decisions portray those of a lawyer, like Adam Smith himself, “whose economic theory is bounded by moral constraints other than those for economic efficiency.”\textsuperscript{15} For example, I believe that the dissent in \textit{Molchan v. Omega Oil and Gas Ltd.}\textsuperscript{16} springs from these moral roots though couched in different terms.

\textsuperscript{13} \textit{Stubart Investments Ltd. v. The Queen} [1984] 1 S.C.R. 536.
\textsuperscript{15} \textit{Ibid.}, at 134.
\textsuperscript{16} \textit{Molchan v. Omega Oil and Gas Ltd.}, [1988] 1 S.C.R. 348.
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Justice Wilson’s View of the Corporation

Nonetheless, the tension between the community and the individual and the state and the individual is apparent in many judgements. I will explore three different areas to demonstrate this thesis: cases involving government intervention by statute into corporate affairs; tax avoidance by corporations; and the internal workings of the corporation.

Government Intervention in Corporate Affairs

There is an interesting contrast in the cases of Thomson Newspapers Ltd. v. Canada\(^{17}\) (where Justice Wilson wrote a dissenting judgement) and McKinlay Transport where she wrote the majority decision. These decisions have conflicting views of the role of the state in corporate affairs.

In Thomson Newspapers Ltd. v. Canada the issue before the court was whether two individuals could be served with orders under section 17 of the Combines Investigation Act\(^{18}\) to appear before the Restrictive Trade Practices Commission to be examined under oath and to produce specified documents. Section 20 of the same Act prohibited the use of information so obtained in future criminal proceedings that might be brought against the individual. The issue was whether section 17 offended either section 7 (the right to life, liberty and security of person) or section 8 (unreasonable search and seizure) of the Canadian Charter of Rights and Freedoms.\(^{19}\)

The section has been widely used over the years by the Bureau of Competition Policy primarily as a means to obtain documentary evidence by means of a subpoena. In addition it has also been used to obtain oral testimony from individuals. These sections have been considered as important means of enforcing Canadian anti-monopoly laws. The majority of the court speaking through Mr. Justice La Forest thought section 17 did not infringe upon either section 7 or 8. In part, this was due to the fact that “there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course.”\(^{20}\) Moreover “In

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so far as section 17 is concerned...it will be typically, if not exclu-
sively, used to order the production of business records...it is fair to
say that they raise much weaker privacy concerns than personal pa-
pers.”

However Justice Wilson took a very different view. Why did
Justice Wilson feel so strongly that she wrote a sole dissent? In her
mind, the evil of section 17 was that it constituted, in the words of the
appellants: “a state-imposed trauma [for individuals] which adversely
affects their liberty and security of the person.”

There is no doubt that the section could be construed as infringing
on individual liberties (although primarily corporate interests given
the existence of section 20). The larger and more pressing question,
which is largely left unanswered in Justice Wilson’s dissent, is to what
extent and in what circumstances does the government have a right to
invade corporate privacy in order to protect the public interest against
the undesirable monopolistic tendencies of large corporations?

Even Adam Smith recognised the validity of laws protecting against
the consequences of monopolistic behaviour which he considered
disadvantageous to both the state and corporations:

All monopolies in particular are extremely detrimental....Now all mo-
nopolies evidently tend to promote the poverty or, which comes to
the same thing, the uncomeatibleness of the thing so monopolized.

Justice Wilson was unwilling to face this issue simply remarking
that (at 186):

There is, however, in my view a vast difference between a general
regulatory scheme (such as the rules of the road for motorists) designed
to give some order to human behaviour and a state-imposed compul-
sion on an individual to appear at proceedings against his will and
testify on pain of punishment if he refuses.

However the issue need not have been framed in this way. It could
have been reframed to inquire as to whether and in what manner the
activities of corporations should be regulated and what measures
would be needed to enforce the desired amount of regulation. In any
society the rights of the individual must always be balanced against

21. Ibid., at 227-228 (D.L.R.).
22. Ibid., at 185 (D.L.R.).
24. Thomson, Supra n. 12 at 186.
the collective right of the people. Indeed this was the very reason for the enactment of section one. Having decided that section 17 did infringe on section 7 and 8, the question was therefore whether they could be saved under section one as necessary in a free and democratic society.

And this question could have been answered quite easily in the affirmative. Justice Wilson herself comments that the provisions were introduced for the public good to stop the emergence of monolithic corporate entities. Even so, she did not believe that these important enforcement provisions could be saved under section one as justifiable in a free and democratic society.

In balancing the interests of the State against those of the corporation, Justice Wilson comes out clearly on the side of the corporation. Her dissent is "prompted by a concern that the privacy and personal autonomy and dignity of the individual be respected by the state."25

Justice Wilson clearly expounds on her views of what constitutes a moral state - one which adopts a Kantian view of the sanctity of the individual and the concommitant inviability of privacy rights. This view has many attractions but it is not without its dark side. Justice Wilson appears to be in favour of the most limited access by police and investigative bodies to corporate records and information, achieved by very expansive notions of privacy. Whilst these are laudable objectives they are misplaced in the corporate arena.

In this context, it is particularly troubling that Justice Wilson found that as the section infringed the Charter that it was of no effect whatsoever even in the case of corporations. The mere fact that a section offends against persons and therefore becomes invalid against them does not mean that it has to be, and is therefore, ineffective against corporations (which were specifically not constitutionally protected) the main players at which the Act and sections were aimed. Justice Wilson could have ruled the section inoperable against people (who are constitutionally protected by the Charter) but still valid for juristic individuals. Aware that she might be criticised for having made it impossible for the State to enforce anti-combines legislation, Justice Wilson defends her decision on the ground that her strict rule against state intervention of this type only applies in the case of proceedings of a criminal or quasi-criminal nature. However such a defence should not be allowed to obfuscate the fact that she has effectively given charter privileges to corporations and in a case in which this can only result in detriment to the public interest.

25. Thomson, Supra n. 12 at 200.
Not everyone shares my despondence over this stance. Justice Wilson's views are very attractive and shared by many liberals in the belief, as Richard Bauman has neatly categorised these viewpoints, that:

The legal regulation of corporate conduct is best achieved through treating the enterprise as a juridic person... The corporation, therefore, should be accorded the usual rights and protections that are enjoyed by any other citizen, including... freedom from unreasonable search and seizure.26

But, as Bauman points out, such views are distinctly value-laden and ignore the dangers which powerful economic interests pose to our democratic institutions and to governments attempting to act in the public interest.27 In short, these are fundamental questions which must be answered in any democratic society. And the answers must be based on a full social, political and economic evaluation of the actors and interests at stake. The problem of bringing in constitutional privileges for corporations is summed up very succinctly by Richard Bauman:

Kantian notions of human dignity and inviability of the person cannot simply be attached to the corporate form, whose only raison d'être for existence is that it is a convenient vehicle for the pursuit of short-term economic goals. These aims are premised on considerations of utilitarian rationality and self-interest that cannot simply be assimilated to the whole range of interests harboured by a natural person. In addition, the types of harms that may be caused to a human person through objectionable measures taken by governments - for example, the distress caused by loss of one's bodily or psychological security, or the loss of one's native language or culture - are hardly analogous to the harms that may conceivably result to business corporations, which themselves pursue a very limited range of satisfactions that motivate humans.

With this background firmly in mind, I believe that a better approach would have been to assess the evidence of the advantages and disadvantages of monopolies from an economic, social and political perspective. This evidence could then be utilised to assess whether the

legislation under review was the appropriate and best method for the state to achieve its objectives vis a vis monopolistic corporations. Indeed even Adam Smith would have been perplexed at this encouragement of monopolies.

Part of the difficulty with Justice Wilson's reasoning is that in the corporate sphere she relies almost exclusively on legal knowledge and doctrine to solve social and economic problems and challenges believing that the law is somehow objective or neutral with respect to corporations. This approach is typically classicist wherein as Kathleen Lahey says (of someone else but with equal application here):

This analysis is typically classicist not only because it relies only on "legal" knowledge to resolve social and economic problems, but also because bits of that "knowledge" are taken out of their original context and used in an ahistorical, noncontextual manner to produce new "knowledge".28

What is needed is a new methodology which a feminist analysis would help. A new formulation of fair outcomes and analysis rests on and is achieved by an ethic of responsibility and is not one founded on an ethic of rules, rights and entitlements.29

There is, at the very least, a need to contextualise the decisions more using interdisciplinary work from legal historians, sociologists, and economists among others. I feel that this deficiency has in part resulted in Justice Wilson's assertion or belief that there is no feminist perspective on corporate and tax law.

It is interesting to contrast the Thomson decision with the very different view taken in R. v. McKinlay Transport Ltd30 where Justice Wilson wrote the majority decision. In this case Justice Wilson found that the demand to produce documents by Revenue Canada was legitimate because the provisions were necessary to enforce the Income Tax Act. She distinguishes this decision from Thomson on the grounds that in McKinlay the demands were not intrusive nor were they required in connection with criminal or quasi-criminal proceedings. Moreover Justice Wilson recognises that:

Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and docu-

29. Ibid., at 556.
ments, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful.\(^{31}\)

And so in the \textit{McKinlay} case, Justice Wilson takes a more expansive view of the need of the government to require the production of information - a view, to my mind, more consistent with the realities of modern fiscal arrangements. Certainly it is a view which places more emphasis on the public interest as defined by legisllation.

Even so, this is one of the few victories that Revenue Canada has had at the pen of Justice Wilson. Justice Wilson has not always taken such an expansive and sympathetic view of provisions in the \textit{Income Tax Act} nor of the taxing authorities. This has been particularly so in tax avoidance decisions.

\textbf{Tax Avoidance}

Justice Wilson has always rightly insisted on fair dealing by the taxing authorities. So much so that in \textit{Canadian Pacific Airlines}\(^{32}\), Justice Wilson wrote a minority decision requiring the government to return unconstitutional taxes which had been collected from the airlines despite the fact that the airlines had already passed them onto the passengers and thus would be unjustly enriched.

Justice Wilson has not demanded the same high standards from corporate tax avoiders. Indeed, Justice Wilson has been remarkably lenient with corporate tax avoiders. In the Supreme Court of Canada's most famous tax avoidance decision in 1984, \textit{Stubart Investments Ltd. v. The Queen}\(^{33}\), Justice Wilson agreed with what was, to my mind, a very disappointing decision. I am of the view that tax avoidance must be controlled by both the courts and legislatures for the reasons identified by the Royal Commission on Taxation (the Carter Commission) which include:

1. the loss of revenue to the government;
2. the fruitless expenditure of intellectual efforts wasted in the economically unproductive tax avoidance battle;
3. the deterioration of tax morality since widespread tax avoidance may foster tax evasion by taxpayers who cannot benefit from tax avoidance; and
4. the unfair shifting of the tax avoider's tax burden to other taxpayers.\(^{34}\)

\(^{31}\) \textit{Ibid.}, at 580-581 (D.LR.).
\(^{33}\) \textit{Stubart Investments}, \textit{Supra} n. 13.
\(^{34}\) Canada, Report of the Royal Commission on Taxation, vol.3 (Ottawa: Queen's Printer, 1966), 541-542 (the "Carter Commission").
This, then, is the backdrop against which the Supreme Court of Canada was asked to decide whether it would uphold a judicial tax anti-avoidance rule: the business purpose rule. In *Stubart* the SCC unanimously rejected the business purpose test. This was despite the fact that such a test has worked successfully in the United States for decades and that the House of Lords in England has in the last decade similarly recognised the need to combat the increasing use of artificial tax avoidance schemes with judicial anti-avoidance rules. Justice Wilson seemed particularly uncomfortable with such a test remarking: "the business purpose test is a complete rejection of Lord Tomlin's principle."  

Lord Tomlin's principle is that a person is entitled to arrange her or his affairs in any artificial way in order to pay the least amount of taxation providing it is strictly legal. Again this reveals Justice Wilson's very atomistic and individualistic view of a citizen's relationship with and responsibility to the State. It is also a very narrow view of the role of the government in society which seems unrealistic especially for corporate citizens who owe their very existence to the state.

Justice Wilson has been similarly disinclined to agree with Revenue Canada on several occasions often outvoted by the rest of the court. Her decisions in this sphere speak more about her view of the role of the state in the economic sphere and especially in regulating corporate activity than they do about strict legal technical reasoning. So much so that she became, in some ways, the champion of the corporate taxpayer on the court.

For example, in her dissent in *The Queen v. Imperial General Properties Ltd.* Justice Wilson protects a corporation from the associated corporation rules. She is unwilling to expand the notion of control, which the rest of the court are prepared to do, in order to prevent corporate taxpayers from taking unfair and unforeseen advantage of corporate write-offs by double dipping. Her stated reason for the decision was that the state should intervene specifically via legislation to avoid this situation if that is the desired effect.

Similarly in *Canadian Marconi Co. v. The Queen*, Justice Wilson wrote the majority decision. The issue was whether the income in question could be considered to be from an active business or whether it was investment income which is treated in these circumstances less favourably by the income tax system. The income in question was

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obtained from investment monies arising from the profits of the sale of an active business. The appellant was investing the money with the intention of using it later to purchase another active business.

Justice Wilson allowed the appeal based on the criteria of what constituted trading activity. Moreover she placed real emphasis on the fact that there is a rebuttable presumption that corporations are *prima facie* engaged in active business especially if their objects of incorporation specifically permit the activity in question. Accordingly, in the case of a corporate taxpayer there is a presumption in favour of its income being characterised as income from a business. This is a presumption which can only benefit corporations rather than people who carry on a business. Moreover, it is a presumption that was quite unnecessary for deciding the case. As Vein Krishna points out:

The presumption, albeit rebuttable, that all corporate income is business income offends the statutory scheme in respect of the taxation of corporate income. ...The hallmark of the scheme is its insistence that business income is taxed on principles that are quite distinct from those that apply to investment income. The presumption ignores the statutory framework and was quite unnecessary in the circumstances of the decision.38

This decision may make it increasingly difficult for Revenue Canada to administer the Act in other areas as well. For example, it has added considerable uncertainty to establishing when the attribution rules and foreign accrual property rules apply. This new presumption will make artificial avoidance schemes very much in vogue once again. Indeed as Krishna points out "the Supreme Court may inadvertently have become the white knight for high income taxpayers seeking innovative methods of avoiding income tax."39

The *Marconi* decision was particularly ironic in light of a decision that was brought down in the same year by the Supreme Court, *Bronfman Trust*40, where former Chief Justice Dickson said that a more flexible, purposive approach in interpreting tax legislation was he believed:

a laudable trend provided it is consistent with the text and purposes of the taxation statute. Assessment of taxpayers' transactions with an eye to commercial and economic realities, rather than juristic classification

of form, may help to avoid the inequity of tax liability being dependent upon the taxpayer’s sophistication at manipulating a sequence of events to achieve a patina of compliance with the apparent prerequisites for a tax deduction.  

In the *Marconi* decision Justice Wilson demonstrated an uncharacteristic unwillingness to look at the purpose of the section under consideration which was to reduce the tax payable only on manufacturing and processing profits. Clearly the investment activity in the *Marconi* case fell nowhere within that ambit. Although Justice Wilson recognised this, she considered it irrelevant - if it falls within the section then it doesn’t matter what the intention of parliament is in the section because in Justice Wilson’s view: “[i]f Parliament intended such a restriction, it must express itself clearly to that effect.”

This reasoning which reverts to strict statutory interpretation shows a marked move away from previous decisions, for example even in *Stubart*, the court was firmly of the opinion that the *Income Tax Act* should be construed liberally consonant with the “object and spirit” of that provision.

Moreover the decision shows a surprising, for Justice Wilson, lack of recognition of the need for judicial creativity as the logical, moral and efficient response to an increasingly complex economic order. To lay the responsibility at the door of the legislature is to refuse to look at the reality. It is now nearly impossible for the legislature to draft watertight rules which will encompass every, or indeed the majority, of tax avoidance schemes or activities. The only hope to reduce tax avoidance, as Vivien Morgan has pointed out, is to create an environment in which the courts give liberal interpretations of tax laws which give effect to their purpose and broad policy objectives. Obviously this is not a view shared by Justice Wilson.

The problem with Justice Wilson’s hands-off approach, not applied in many other areas, is of course in a highly complex world it is impossible for tax legislators to catch the sophisticated tax avoidance schemes that exist without this exact type of intervention by the courts.

However Justice Wilson has not always followed the strict interpretation doctrine in all spheres of corporate law. When dealing with the relationship between employer corporation and employee she has

42. *Canadian Marconi v. The Queen*, Supra n. 37 at 535.
employed a much more feminist and interconnected view of the corporate world. In many of these decisions Justice Wilson has shown that she can take legal knowledge out of its box and with the benefit of economic and social analysis recognise the fundamental issues in a case in a way that most of us miss. For although Justice Wilson has often been the champion of the corporation vis a vis the government, she has shown a remarkable and thought-provoking understanding of the dynamics inside the corporate bureaucracy.

The Internal Relations within the Corporation
The internal corporate culture is as important as its more public presence and in some ways its effects are more invidious and far-reaching. As Kathleen Lahey points out:

[The] impacts of corporate cultures are not in fact marginal to the experiences of women. One central organising principle in complex capitalist interaction is the isolation and separation of people from property and from the impact that their actions have on other people. Another theme is abstraction - human interactions that are focused on single, limited transactions, instead of taking place in full context, over time. Women can therefore begin to speculate on the development of a feminist critical mode that is organized around the values of contextuality, continuity, and holistic participation.44

I believe that Justice Wilson has contributed to this project in attempting to create a more relational and contextual, caring environment within the corporate sphere. For example, Justice Wilson’s views on the role of unions within the economic and corporate sphere offer some insights into a more collective view of internal corporate relations and a recognition of the power imbalance which exists between employer and employee. In Public Service Employee Relations Act45 Justice Wilson concurred with the dissenting judgement of former Chief Justice Dickson. Importantly, in arriving at that judgement great emphasis was placed on the fact the “purpose of section 2(d) [the guarantee of freedom of association] is to recognize the profoundly social nature of human endeavours and to protect the individual from State enforced isolation in the pursuit of his or her own ends.46

In addition Justice Dickson stated:

44. Lahey and Salter, supra, note 28 at 570.
46. Ibid., at 186-197. (Dickson dissent).
Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer....it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.47

This is a recognition of the interconnectedness with which feminist literature abounds.48

Justice Wilson’s almost libertarian distaste for state intervention vis a vis the external economic activity of corporations - either through contracts or tax usage - evaporates when she is dealing with the internal environment of corporations. Justice Wilson resorts to Amy’s ethic of caring when exploring and regulating the internal social and economic interactions between the corporation qua employer with its employees. This is amply illustrated in two of Justice Wilson’s finest decisions: Brossard (Ville) v. Quebec (Commission des droits de la personne)49 and Alberta Human Rights Commission v. Central Alberta Dairy.50 In Brossard, Line Laurin was appealing the fact that due to a municipal anti-nepotism policy, she had not been hired because her mother was a full-time secretary for the police. The court unanimously agreed that this was civil status discrimination prohibited by the Quebec Human Rights Code. Justice Wilson felt compelled to go further - exploring the conditions under which the bona fide clause, which allowed discrimination for good reasons, could be invoked. Normally the bona fide clause is used in cases where weight, height, or decency require that the job be done by a particular sex. Unwilling to set out rigid rules which will apply in all circumstances, Justice Wilson recognises that law must be placed in its specific social and economic context. The rule should, therefore, only be situation specific. Indeed she very skillfully turns the essentially negative bona fide requirement into a potentially positive action clause commenting:

...coming closer to home, could a municipality which felt under an obligation as a public body to hire members of minorities as opposed to having a totally white Anglo-Saxon or French-Canadian police force

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47. Ibid., at 197.
make the applicant's race or national origin a "qualification" within the meaning of section 20? I believe that it could if it bona fide believed that the adoption of such a policy was required in order to satisfy its obligation to properly police its particular constituency.51

In this case Justice Wilson recognises the need to encourage corporate bodies to develop a moral understanding of their social and economic functioning within the bureaucracy.

Justice Wilson was even more forthright in developing this thesis encompassing the ethics of responsibility and of caring within corporations in the case of Alberta Dairy Pool.52 Justice Wilson skilfully reverses the Adam Smith turn which the court, including herself, had taken in Bhinder53 (where a male Sikh who refused to wear a hard hat had lost his human rights action). In Alberta Dairy Pool, Justice Wilson specifically rectifies some of the obvious dangers that the Bhinder decision gave rise to which were graphically depicted by the Canadian Human Rights Commission. These were:

...that workplaces may not have to be modified to enable disabled individuals to earn a livelihood; women who become pregnant and who require temporary modification of their duties may be forced from their job: person's who for religious reasons cannot work regular business hours may have difficulty finding employment....54

Mindful of these harmful effects which Bhinder had given rise to, Justice Wilson circumvents them by placing a specific positive duty on employers to accommodate these disadvantaged groups except to the extent that such accommodation would result in "undue hardship" to the employer. Hence employers will need to take on the ethic of responsibility wherever possible. Perhaps for Justice Wilson there is an increasing sense that there may indeed be a conception of the good. Feminists are increasingly recognising that social and productive organisations should be structured differently. In this judgement, I believe Justice Wilson makes an important contribution towards formulating a vision of what this structure might look like and how such change might be brought about. The importance of doing this cannot be over-estimated. Corporations are the dominant form of economic organisation in our society which has crucial and omnipresent consequences for the nature of social relationships. Accordingly, it is

51. Brossard Supra n. 49 at 654 (D.L.R.).
52. Supra, note 46.
essential to address, as Justice Wilson has done in these two decisions, how less empowered groups of employees experience life under it and how reorganisations can be built that honour ethical and feminist values - care, responsibility, connection and sharing.

Conclusion

As you know, Justice Wilson contributed to many economic decisions - I have chosen only a sampler to give you some extent of the breadth and sometimes contradictory philosophies which guided them. I have concentrated on those cases which are most troubling to me as well as those which bring me greatest joy. Even though I have disagreed with Justice Wilson legally and ideologically on many occasions, I cannot end this paper without mentioning the important role she has played for so many people like me in Canada. Women lawyers, academics, judges all owe a great debt of gratitude to you. While it might be a great honour, it is never easy to be the first. As one of the first women law deans I can personally attest to that. We all make a great many mistakes - the fact that Justice Wilson made so few is no doubt due to her wisdom and humanity.

Like so many others, I was very disappointed to hear that you had chosen to retire. I remember thinking then, as I do now, of an old quote of Yogi Berra’s:

“The future ain’t what it used to be.”

Justice Wilson, thank you on behalf of men and especially women everywhere. May you continue to play an important role in our country.