The content and parameters of reasonableness review (or: *How much reasonableness can we reasonably bear*?)

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Content and parameters . . .

I. **Why reasonableness?**

II. **What / whose reasonableness?**

i) Judicial supremacy? Reasonableness v. "*disguised correctness*"

ii) Judicial abdication? Reviewing *implicit* reasons

iii) Kinds of *un*reasonableness: can we 'nail it down'?

iv) *Calibrating* reasonableness: to what end?

III. **Values in administrative law**

I. Why reasonableness?

"[S]ocieties governed by the Rule of Law are marked by a certain ethos of justification [in which] an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness . . .

The Rule of Law, in short, can speak in several voices *so long as the resulting chorus echoes its underlying values of rationality and fairness*."

- Chief Justice McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999)

Why reasons? (*Baker* and beyond)

- Enables better decisions (justification versus arbitrariness)
- Enhances parties' perceptions of fairness (transparency / closure / dignity)
- Enhances public confidence (democratic legitimacy)
- Allows individuals to structure behaviour in light of legal expectations (autonomy)
- Assists parties in determining whether to seek review or appeal (procedural fairness)
- Enables meaningful review (accountability)
- Establishes executive / administration (*and affected individuals*) as active participants in governance through law ("constituting fundamental values")

Many voices

How to activate a *culture of justification* . . .

. . . in a way that does not compromise timely, cost-effective, accessible *administrative justice*?

II. What / whose reasonableness?

- "To recognise rationality is at the same time to claim a judicial role in supervising the administrative process to ensure that it meets standards of rationality, even if a sincere attempt is made to conceive those differently".

David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart ed., The Province of Administrative Law (Hart, Oxford, 1997)

A single, unified standard . . .?

Dunsmuir v. New Brunswick, 2008 SCC 9

Respect for administrative reasoning

"[T]he concept of 'deference as respect' requires of the courts 'not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.'"

Para 48, citing Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" (1997)

Respect for distinct constitutional *functions . . .*

"[D]eference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system." (para 49)

Dunsmuir reasonableness

- "[R]easonableness is concerned mostly with the existence of **justification, transparency and intelligibility within the decision-making process**.

- But it also concerned with whether the decision falls **within a range of possible, acceptable outcomes which are defensible in respect of the facts and law**." [para 47]

i) Judicial supremacy? Reasonableness as 'disguised correctness'

Application* of the standard in *Dunsmuir

- A decision wholly disconnected from statutory authority (*unreasonable*) . . .

- . . . or a *failure of deference* & independent arrival at the "right answer"?

Judicial supremacy?

- ***Was the adjudicator's approach – perhaps***

"an interpretation that is more expansive in its protection of the rights of non-unionized employees, but one that is also consistent with a statutory objective of trying to achieve a satisfactory balance between the common law rights of employers and protecting the employment interests of non-unionized employees in a largely unionized workforce?"

David Mullan, "Dunsmuir v. New Brunswick, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" CJALP, July 2008.

Pattern #1 in reasonableness decisions

"Disguised correctness" review?
Or activation of respective capacities?

- Dispute framed as **law-interpretation**
- **Reasonableness standard selected (**in the style of a **presumption)**
- **Lengthy interpretation** situating text in statutory, historical, wider legal context
- **Either ADM was on (same) track . . .**
  - Plourde v. Wal-Mart Canada Corp 2009 SCC 54
  - Agraira (infra), ATCO (infra): reconstruction of *implicit reasons* . . .
- **. . . or not (therefore, unreasonable)**
  - Dunsmuir, ibid
  - Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53 [Mowat]
  - British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52
  - Halifax (Regional Municipality) v. Canada (Public Works and Government Services) 2012 SCC 29 [principles / factors constraining discretion]
  - John Doe v Ontario (Finance), 2014 SCC 36

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ii) Judicial abdication? Reviewing implicit reasons

***Nurses' Union*: Reanimating deference to reasoning *process*? . . .**

"[C]ourts must be careful **not to confuse a finding that a tribunal's reasoning process is inadequately revealed** with **disagreement over the conclusions reached by the tribunal on the evidence before it**"

- *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, para 21 – citing Philip Bryden, "Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 C.J.A.L.P. 191

. . . or eroding the commitment to "a culture of justification"?

- What counts as a ***fatal*** **"gap"** in reasons (or a gap requiring remittance for reasons) . . .

- vs an **"implicit" link** in the reasoning chain (from law or evidence to conclusion)?

Nurses' Union: Not a standard of perfection

- Reasons need not "make an explicit finding on **each constituent element, however subordinate**, leading to [the] final conclusion."

- The conclusion is to be looked at in the context of "**the evidence, the parties' submissions and the process**." (paras 16-18)

Nurses' Union – *supplementing* reasons in view of the record

A court should "seek to *supplement* [ADM reasons] before it seeks to subvert them". (Dyzenhaus, cited at para 12).

"This means that courts **should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome**." (para 15)

Not a “free pass” – dots must be there to be connected

- “[R]easons must be sufficient **to permit the parties to understand why the tribunal made the decision and to enable judicial review** of that decision**.** The reasons should be read as a whole and in context, and must be such as to satisfy the reviewing court **that the tribunal grappled with the substantive live issues** necessary to dispose of the matter.”

  (at para 9, citing NLCA decision below)

. . . & not a free pass for *flawed* reasoning

- Where a "tribunal has made an **implicit decision** on a critical issue, the deference due to the tribunal does not disappear" (para. 50).

- However, attention to reasons that "could be offered" must not collapse into substitution of court's reasoning "in a way that **casts aside an unreasonable chain of analysis in favour of the court's own rationale** for the result" (para 54).

  - Alta (Info and Privacy Comm) v. Alta Teachers Ass'n 2011 SCC 61

Judicial supremacy & abdication?

Has the law ***incentivized skeletal reasoning***?

- Where an ADM *fails to engage* with a central argument put to it (law or evidence) …
- . . . might judges be too quick to fill the gaps?

SHOULD GAP-FILLING BE THE EXCEPTION AND REMITTANCE FOR (MORE) REASONS THE RULE?

*Query: When is **ADM's supplementation** of the record acceptable (linkage to issue of tribunal standing)?*

Pattern #2: Implicit reasons, *not* fatal gaps

- **ATA, 2011 SCC 61**
  - Implicit interpretation (issue not addressed in decision)
  - No arguments on point at ADM level
  - Availability of past decisions of Commissioner on point
- **Nurses Union, 2011 SCC 62**
  - Sparse reasons (implicit links supplied / presumed)
  - Competing arguments made at ADM level . . . not addressed
- **Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission), 2012 SCC 10**
  - Discretionary decision to refer complaint to tribunal (no reasons)
  - Court relied on investigator‘s report & “surrounding circumstances“
- **Construction Labour Relations v. Driver Iron Inc., 2012 SCC 65**
  - Reasons ignored interpretive arguments made & did not address provision acknowledged by parties to be of “essential relevance”
  - Implicit interpretation affirmed in skeletal reasons on review

Implicit reasons, *not* fatal gaps

- **Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36**
  - Absence of interpretive reasoning (& no precedents on point)
  - Judicial reconstruction via reasons, guidelines & principles of stat interp
  - Prohibition on revisiting weighting of factors affirmed
- **McLean v British Columbia (Securities Commission), 2013 SCC 67**
  - Reasons *ignored* interpretive arguments before the tribunal
  - Implicit interpretation informed by E.D. of Securities Commission (empowered to interpret / apply same provision)
- **ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission), 2015 SCC 45**
  - Absence of interpretive reasoning (“prudent” costs)
  - Tools of statutory interpretation deployed by court to fill gap

*iii) Kinds of **un**reasonableness – can we 'nail it down'?*

Pattern #3 – "heads" of unreasonableness

- **Lack of rational basis in law (misguidedly purposive?)**
  - Cases noted under "disguised correctness" (*supra*)
  - **Cases more attentive to administrative reasoning path?**
- **"No" evidence [no rational grounding in evidence]**
  - Halifax (Regional Municipality) v. Canada (Public Works and Government Services), 2012 SCC 29
  - Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), 2015 SCC 39
  - LeBon v. Canada (Attorney General), 2012 FCA 132

Un*reasonableness: Can we nail it down?*

- **Failure to address a central argument / legal issue**
  - Turner v. Canada (Attorney General), 2012 FCA 159 (additional / alternative ground of discrimination)
- **Failure to address key evidence**
  - Salinas v. Canada (Citizenship and Immigration), 2013 FC 558 (**depends on *importance* of the evidence** -- risk on return given violent family feud)
- **Failure to take account of mandatory relevant factor[s], or engage in required balancing**
  - LeBon v. Canada (Attorney General), 2012 FCA 132 (**"must demonstrate some assessment of competing factors"** where not evident from record)
  - RP v Alberta, (Director of Child, Youth and Family Enhancement), 2015 ABCA 171 (**emphasis on one factor "almost to the exclusion of the other criteria"**)
  - Kanthasamy v. Canada (Citizenship and Immigration), 2015 SCC 61 (failure to consider ***v. failure to appropriately "weight"*** best interests / evidence)
  - **BUT *need not* expressly deal with all factors from case law (depends on context)** (Antrim Truck Centre Ltd. v. Ontario (Transportation), 2013 SCC 13 -- & recall Lake v Canada (Min of Justice), 2008 SCC 23)

Inconsistency - *a sign of unreasonableness?*

Inconsistency with decision of Appeal body remitting for reconsideration (& failure to justify inconsistency)

- RP v Alberta (Director of Child, Youth and Family Enhancement), 2015 ABCA 171

Inconsistency with <u>tribunal precedent</u> (& failure to justify inconsistency) – *contra* Domtar?

- Irving Pulp & Paper 2013 SCC 34 (dissenting judgment)
- Canadian Pacific Railway Company v. Canada (Transport, Infrastructure and Communities), 2015 FCA 1 (departure *was* expressly justified)
- Altus Group Ltd. v. Calgary (City) 2015 ABCA 86 (on conflicting lines of tribunal authority)
- Nova Scotia (Human Rights Commission) v Grant, 2016 NSCA 37

iv. Calibrating reasonableness: To what end?

"I agree with my colleagues that 'reasonableness' depends on the context. It must be calibrated to fit the circumstances."

- Binnie J, Dunsmuir (para 150)

"Reasonableness is a single standard that takes its colour from the context."

- Binnie J, Khosa (para 59)

Calibrating reasonableness 1:
Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2

- "Colour from context"
  - Municipal by-law (differential tax rates)
  - Statutory authority (broad discretion)
  - Admin function (Legislative v adjudicative: political)
  - Case law (utmost judicial deference)

- "The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside."

Wednesbury unreasonableness?

Calibrating reasonableness 2:

McLean v British Columbia (Securities Commission), 2013 SCC 67

"**Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation** and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable—no degree of deference can justify its acceptance … **In those cases, the "range of reasonable outcomes" … will necessarily be limited to a single reasonable interpretation—and the administrative decision maker must adopt it**." (para 38)

Traditional division of judicial / administrative labour – correctness-style outer limits

[Compare open-textured language / broad limits: Canadian National Railway Company v. Richardson International Limited, 2015 FCA 180]

Calibrating reasonableness 3:
Doré v. Barreau du Québec, 2012 SCC 12

"In the Charter context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant Charter guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with Charter protection, it is a reasonable one."

Reasonableness as proportionality

Factors of relevance to calibration

- Nature of decision
- Statutory purposes / ADM function
- Privative clause / right of appeal?
- Expertise?
- *Significance of interests at stake?*
- *Independence of ADM?*
- *. . . ?*

How does calibration cash out?

1. Informs range of acceptable interpretations / conclusions / relevant & irrelevant factors?

2. Affects willingness to accept gaps in or absence of express reasoning as "implicit reasons"?

3. Willingness to tolerate non-intuitive proportionality assessment (to a *point*)?

Correctness-style limits on statutory authority?

Or sensitization to ADMs' distinct functions / mandates?

Reconciling ‘calibration’ with ‘respectful attention’?

Reasonableness isn’t the judge’s quest for truth with a margin of tolerable error around the judge’s ideal outcome. Instead, the judge follows the tribunal’s analytical path and decides whether the tribunal’s outcome is reasonable. (Law Society v. Ryan, supra, at paras 50-51.) That itinerary requires a “respectful attention” to the tribunal’s reasons . . .

Egg Films Inc. v. Nova Scotia (Labour Board) 2014 NSCA 33

IV. Values in administrative law
Recalling the reasons for reasons

Tribunal decision-making

- Strive to "connect the dots"
  - *Identify* law & facts relied upon (& explain how these support conclusion),
  - *Explain* departures from tribunal precedent, advice, or contrary submissions
  - *Bring to the surface* values / policy purposes
  - *Demonstrate proportionality* where Charter values engaged
- Institutional level: policy guidance on the above

Values in administrative law
Recalling the reasons for reasons

Judges on reasonableness review

- Deference in the *process* of review
  - "Calibration" as sensitivity to "different worlds"
    - Statutory mandates, processes, *interests at stake, independence*…?
  - Attentiveness to reasons given (including competing priorities at the level of purpose / policy)
  - Resistance to filling gaps *or* setting limits w/ independently discovered "right answers"
  - Tolerance for different (& efficient) reasoning paths
  - **And yet, insistence on justification (including *proportionality*) . . .**

A “culture of justification”

- ***Shared* legal values** informing administrative decision-making & review
  - Democracy & rule of law: “The exercise of all public power must find its ultimate source in a legal rule”
  - Participation (“constituting fundamental values”)
  - Respect for dignity & autonomy
  - Fairness
  - Independence
  - Accountability
  - Accessibility, Efficiency, Timeliness . . .