Expert? Says Who?
Getting past the authority wars and getting (to) reasonableness

Sheila Wildeman

Dalhousie University, Schulich School of Law

2017 National Roundtable on Administrative Law: *"These are the principles; if you don't like them, we've got others . . ."* (May 27, Vancouver)

Deference and justification

- Selection of the standard of review continues to dominate discussion
- Another tack: Strengthening the principled foundations and practices of reasonableness review (reconciling **deference** and **justification)**
- What should be required of judges by way of **deference**, & decision-makers by way of **demonstrating expertise**?
  - **How is reasonableness review (of law-interpretation, in particular) any different from correctness?**

Background: Dunsmuir's neo-formal functionalism

I. Presumptions of reasonableness review: Fact, mixed law and fact, policy, **interpretation of the home statute & closely connected stats**

II. Rebuttal?

- a. Correctness categories

i) constitutional questions (minus Dore), ii) true jurisdiction or vires, iii) ADM turf wars, iv) "general law of central importance to the legal system as a whole and outside expertise"

- b. Contextual analysis (modeled on Pushpanathan)

i) privative clause [stat appeal?] ii)nature of question iii) expertise / specialized regime iv) purpose of Act / provision

1. Interpretation & "The Institutional Turn" The Fight in *Capilano*

Majority: Deference (on interpretation of the home statute) "is not a matter of qualifications or experience," but "inheres in a tribunal itself as an institution"

VS

Dissent: The presumption of expertise (in regard to law-interpretation) must be subject to rebuttal in light of legislative signals and related inferences about relative expertise

-- See *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, majority at para 33, dissent at para 85.

Relative expertise: statutory signs / judicial inferences

- Southam, Pushpanathan: "The most important factor" in selecting standard of review [harnessed to question in issue]
  - **Technical**: Mandated qualifications
  - **Functional:** Non-judicial functions
  - **Experiential:** Immersion in sector
  - **Political (electoral accountability):** Ministers, school boards, municipal councilors
  - **Political (interest group reps):** Tripartite labour bds, laypersons as reps of public interest/values (Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247)
  - **Polycentric interest-balancing:** discretion &/or exceptions to ordinary application of law

The Institutional Turn (Interpretive legitimacy)

- **Underlying claims in Capilano: *institutional* expertise**
  - **Statutory interpretation** often involves "a choice among multiple reasonable options" [policy working inside law]
  - ADMs are **best placed** to make these choices
    - *legislatively-conferred authority*
    - *sector-specific experience & mandate-advancing ethic*
  - **There is room in "reasonableness" for robust judicial supervision (query whether the claim includes sensitivity to relative expertise)**

The Institutional Turn (Interpretive legitimacy)

- **Variation on the above: "culture of justification"**
  - Agencies'/ADMs' **constitutional position requires them to anchor decisions in law and evidence (justification)**
  - Agencies'/ADMs' institutional capacities equip them for this (**or should**)
    - *Agencies/ADMs must "develop a conception of the purposes that the statute requires them to pursue and select a course of action that best carries forward those purposes within the means permitted by the statute; in short, agencies must take a purposivist approach"*

- Kevin M. Stack, Purposivism in the Executive Branch: How Agencies Interpret Statutes, 109 NW. U. L. REV. 871 (2015)

The Institutional Turn (Interpretive legitimacy)

- **Counter-claims (general & specific bases for rebutting)**
  - **Separation of powers**: Executive must not be "a law unto itself"
  - **Interpretive theory**: Statutory interpretation rarely involves discretion
  - **Institutional expertise**: Judges are (typically – or at least sometimes) best placed to interpret statutes (discern statutory purposes)
  - **Institutional bias vs universalism**: ADM views tend to be "*coloured by the concerns and possibly by the biases of their own professional culture. They may have particular interests to promote on behalf of their department or agency or they may have strong views respecting the groups or problems regulated by their legislation*." [Sullivan 2007]
  - **Institutional independence**: ADM may be in adversarial relationship with legal subject (legitimacy requires independent court)
  - **Institutional authority**: **No *stare decisis* among tribunals: Reasonableness review presents threat of inconsistency (eroding rule of law)**

Deference as dialogue

- **Spatial deference (sharp divide: supremacy or abdication)**
  - "Who gets to decide?"
  - Legislature gives signals about turf, court's job is to read signals and disengage from tribunal turf ("policy" [purposive interp?]) while keeping ADMs inside legal limits
  - Model is destabilized by recognition of ADMs as (sometimes) superior in purposive interpretation – stabilization sought by redrawing lines according to "relative expertise"
- **Deference as dialogue**
  - "Is this decision justified?" – courts and ADMs ask same question: courts respect & give presumptive weight to ADM perspectives on how best to achieve statutory purposes

Query: what if any relevance do institutional rationales for deference have to evaluation of justification?

2. Dunsmuir reasonableness Quotable quotes

- "[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]

Recalling the reasons for reasons

- 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 / autonomy)
- Enables meaningful review (accountability)
- Establishes executive / administration (*and affected individuals*) as active participants in governance through law ("constituting fundamental values")

Giving weight to expert *reasons*

- "Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. **If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions. If they cannot, they are not very expert**. [. . .] **Expertise loses a right to deference when it is not defensible**. That said, it seems obvious that [appellate courts] manifestly must give great weight to cogent views thus articulated. "
  - Southam [1997] 1 S.C.R. 748 at para 62 [citing Kerans, R. P. Standards of Review Employed by Appellate Courts. Edmonton: Juriliber, 1994.]

Dunsmuir reasonableness in practice: Veering btw supremacy and abdication

Post-Dunsmuir *applications* of reasonableness review

Caught between

- Judicial supremacy (disguised correctness review)

- Judicial abdication (overindulgence of sketchy or unsupplied reasoning; failure to incentivize public justification)

Constitutional imperatives perceived to be at war: rule of law & parliamentary supremacy.

How to integrate the imperatives of deference and justification?

What is "disguised correctness" review?

- Independently ascertaining "the right answer" and comparing that against the tribunal's decision
  - How to evaluate tribunal reasoning / decisions without ascertaining the right/best answer?

Pattern #1
"Disguised correctness" review?

- Dispute framed as **law-interpretation**
- **Reasonableness standard selected** (as 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 v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36, ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission), 2015 SCC 45: 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

What is abdication? (overindulgence of sparse / absent / flawed reasons)

Has the case law post-*Nurses' Union* gone too far toward abdication?

"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)

-- *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62

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."

(Nurses Union at para 9, citing NLCA decision below)

. . . not a free pass for *flawed* reasoning [ATA]

- 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

Pattern #2 Supplying reasons (abdication?)

- **Construction Labour Relations v. Driver Iron Inc., 2012 SCC 65**
  - Reasons ignored interpretive arguments made & did not address provision parties deemed of "essential relevance"
  - Implicit interpretation affirmed in skeletal reasons on review
- **Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36**
  - Absence of interpretive reasoning (& no precedents on point)
  - Judicial reconstruction using principles of stat interpretation
- **McLean v British Columbia (Securities Commission), 2013 SCC 67**
  - *No reasons* despite interpretive arguments on limitation period made to the tribunal
  - Implicit interpretation informed by submissions of 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)
  - Principles of statutory interpretation used by court to fill gap

3. Reasonableness Review as . . .

Reasonableness . . . as *dialogue between courts and tribunals* *(& broader conversation involving legislatures & legal subjects)*

- **Step 1: Orientation to the agency environment**
  - not about ascertaining the right answer; it is about gaining sensitivity to the statutory & institutional environment
- **Step 2: Tracking agency reasons**
  - attentive to implicit or explicit ADM prioritization of statutory purposes, & to ADM attentiveness to parties' concerns
- **Step 3: Evaluating justification against indicia of unreasonableness**
  - mindful of institutional and constitutional reasons for deference

Step 1. Orientation / Mapping (Same as Identifying the Scope / Margins?)

Sliding scale of deference? (Binnie J in Dunsmuir)

- [139] The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. **"Contextualizing" a single standard of review will shift the debate (slightly) from choosing between two standards of reasonableness that each represent a different level of deference to a debate within a single standard of reasonableness to determine the appropriate level of deference**. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense.

No sliding scale: Abella J (with Cromwell J on this point)

Wilson v. Atomic Energy of Canada Ltd., 2016 SCC 29

[18] Nor do I accept the position taken in this case by the Federal Court of Appeal that even if a reasonableness review applied, the Adjudicator should be afforded "only a narrow margin of appreciation" because the statutory interpretation in this case "involves relatively little specialized labour insight". **As this Court has said, the reasonableness standard must be applied in the specific context under review. But to attempt to calibrate reasonableness by applying a potentially indeterminate number of varying degrees of deference within it, unduly complicates an area of law in need of greater simplicity.**

No sliding scale: Rothstein J

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61 at para 47

"Once it is determined that a review is to be conducted on a reasonableness standard, **there is no second assessment of how intensely the review is to be conducted. The judicial review is simply concerned with the question at issue.** A review of a question of statutory interpretation is different from a review of the exercise of discretion. **Each will be governed by the context. But there is no determination of the intensity of the review with some reviews closer to a correctness review and others not."**

Mapping statutory/institutional context: beyond "the question at issue"?

Suggestions from cases and commentary (setting the *range/ scope*)

- Nature of question in issue
- Statutory purposes / ADM function
- Privative clause / right of appeal?
- Relative expertise?
- ***Significance of interests at stake?***
- ***Electoral accountability of ADM?***
- ***State-individual adversarialism****?*

See, e.g.: Stratas JA in Canada (Transport, Infrastructure and Communities) v. Farwaha, 2014 FCA 56 at paras. 93-97).

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

- "Colour from context"
  - Decision: 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?

Structuring reasonableness 2:
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."

Discretion + Charter values = Reasonableness as proportionality?

Structuring reasonableness 3??

Obiter, 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)

Ascertaining the right answer and asking if the ADM's answer matches?

How does mapping cash out?

- **No "degrees / sliding scale of deference" (apparently)**

BUT query whether or how "context" . . .

- **affects willingness to accept gaps** in or absence of express reasoning ("implicit reasons")?
- **informs range** of acceptable interpretations / conclusions? (setting "scope". . . but how to avoid the old poles of abdication &/or "right answer" reasoning?)
- **informs expectations of proportionality** -- & willingness to tolerate non-intuitive proportionality assessment (to a *point*)?
- sensitizes court to features of ADM's statutory/institutional context that **may make facially unreasonable reasoning intelligible -- or vice versa?**

Step 2: Tracking reasons

Tracking reasons

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, ...) That itinerary requires a "respectful attention" to the tribunal's reasons . . .

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

Step 3: Evaluating reasons in light of indicia of *un*reasonableness

(Un)reasonableness is . . .?

"I cannot think of any area of law in which reasonableness has been successfully defined with any precision. Moreover, attempts to develop categories of reasonableness seem to me to come uncomfortably close to reinventing the old categories of judicial review. Perhaps the best we can do is to urge reviewing courts to identify the qualities of the decision under review that, in their opinion, make it unreasonable. [. . .] **[S]imply making more rules – be they presumptions or categories – may ultimately work against a purposive application of the rules and thereby undermine the whole point of the rule in the first place.**

"What I Think I've Learned About Administrative Law" The Honourable Thomas A. Cromwell, Retired Supreme Court of Canada Justice, Ottawa, ON, Opening Address, Continuing Legal Education Society of British Columbia, November 2016.

Evaluating reasons in light of indicia of *un*reasonableness?

- **Badges or indicia of unreasonableness (to be weighed in light of values of rule of law & democracy)**: Stratas JA, *Delios v Canada (Attorney General)* 2015 FCA 117; Paul Daly, "Struggling Toward Coherence in Administrative Law?" forthcoming McGill LJ

- **Proposed structure of reasonableness review**
  - Presumption of reasonableness
  - Indicia of unreasonableness shift onus: Has the ADM justified the decision?

  Daly, "Unreasonable Interpretations of Law" in Joseph Robertson, Peter Gall & Paul Daly, *Judicial Deference to Administrative Tribunals in Canada: Its History and Future* (Lexis Nexis: Toronto, 2014).

Indicia of unreasonableness?
Assessed in light of "mapping" (decision in context) & values (culture of justification)

A. *Unintelligibility* / incoherent reasoning / fatal or un-backfillable gaps

- Taman v. Canada (Attorney General), 2017 FCA 1?
  - Unintelligible per se or unintelligible because of competing values/ priorities (public perceptions of political neutrality versus political participation)?

B. Failure to address or explain inconsistency with advice / prior decisions . . .

Values advanced: Protecting rule of law (clarity, consistency/even-handedness)

Inconsistency - *a sign of unreasonableness? (requiring justification)*

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 tribunal precedent (& failure to justify inconsistency) – is this *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 (conflicting lines of tribunal authority)
- Nova Scotia (Human Rights Commission) v Grant, 2016 NSCA 37

Lack of rational/reasonable basis in the law or evidence

C. Unreasonable fact-finding / distortion of evidence?

- Fact-finding contradicts evidence?
- Goal: to avoid de novo second-guessing, yet not empty out requirement of justification
- Consider "patent unreasonableness" review in British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority, 2016 SCC 2

  - Defer "where there is evidence capable of supporting a finding of fact"; mere "insufficiency" is not enough (akin to "no evidence" nominate ground)

Lack of rational/reasonable basis in the law or evidence

D. Law-interpretation / application *defeats statutory text/purpose* *[assessed dialogically/deferentially]*

- Mowat? (a good example?) Dunsmuir? (a good example?)
- *What counts as a good example? i.e., alive to purposive reasoning of ADM, invalidating only if "unreasonable"?*
- *Should ADMs be allowed (encouraged?) to use different interpretive tools/principles, or to merely "approximate" versus precisely apply judge-made legal tests? When does an ADM get it wrong versus modify/approximate to suit the purposes of administrative justice?*
  - *E.g., Council of Canadians with Disabilities v. VIA Rail Canada Inc., [2007] 1 S.C.R. 650; Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals, 2011 SCC 59*

Lack of rational/reasonable basis in the law or evidence

E. Discretion (and embedded interpretation / application) *defeats statutory text/purpose*
[assessed dialogically/deferentially]

- *Use of categorical / nominate grounds as indicia?*
  - E.g., "Irrelevant factor"
  - "Failure to consider a relevant factor" or to engage in required balancing
    - *A question of law setting limits on discretion, or a question internal to the exercise of discretion?(If both get deference, does this matter?*)

Nominate grounds as guides to unreasonableness?

"The nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, **while still useful as familiar landmarks, no longer dictate the journey**."

- Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226 at para 24

Nominate grounds & deference

At one time, the taking into account of irrelevant considerations and the failure to take into account relevant considerations were nominate grounds of review — if they happened, an abuse of discretion automatically was present. However, over time, calls arose for decision-makers to be given some leeway to determine whether or not a consideration is relevant: [. . .]

Today, the evolution is complete: courts must defer to decision-makers' interpretations of statutes they commonly use, including a decision-maker's assessment of what is relevant or irrelevant under those statutes. [. . .]

- *JP Morgan Asset Management (Canada) Inc. v Minister of National Revenue*, 2013 FCA 250 (CanLII) para 74 per Stratas JA

Guidance from the nominate grounds? Example: "failure to consider"

- **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 or to ***give serious consideration*** *to* best interests / evidence)
  - **BUT *need not* expressly deal with all factors id'd in 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)

F. New kid on the block: Doré proportionality

"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**." (para. 7)

- "Preliminary issue": Has a Charter right/value been limited? (Loyola para 39)
- Then: consider the statutory objectives and "ask how the *Charter* value at issue will best be protected in view of the statutory objectives." (Doré para 56)

Doré v. Barreau du Québec, 2012 SCC 12

Proportionality as an ordinary expectation of reasonableness?

- Traditional prohibition on revisiting the weight placed on factors of relevance (Suresh, Khosa)
- Does proportionality inhere in reasonableness – beyond *Charter* values understood as *Charter*-protected interests?
  - Disproportionate administrative penalties?
  - Disproportionate weight placed on, or discounting of relevant factors (significant interests)? (Baker VS Suresh, Khosa)
- Academic support
  - E.g., Evan Fox-Decent, "The Internal Morality of Administration" in *The Unity of Public Law*, (Portland, Oregon: Hart, 2004) 143; Guy Régimbald, "Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review" (2005) 31 Man. L.J. 239; M. Taggart, "Proportionality, Deference, Wednesbury" (2008) NZ Law Review 423; David Mullan, "A Proportionate Response to an Emerging Crisis in Canadian Judicial Review Law?" (2010) NZ Law Review 233 [Mullan (2010)]. Me in my 2011 LLM thesis, *Romancing Reasonableness*)

4. Values in administrative law
Recalling the reasons for reasons

Tribunal decision-making

- Strive to "connect the dots"
  - *Identify* law & facts relied upon (& explain how they support conclusion),
  - *Explain* departures from tribunal precedent, advice, or contrary submissions
  - *Bring to the surface* values / policy purposes
  - *Demonstrate proportionality* where Charter values (or other signif interests?) 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
  - "Mapping" as sensitivity to "different worlds"
    - Statutory mandates, processes, *interests at stake…?*
  - Attentiveness to reasons (including competing priorities / purposes)
  - Resistance to filling gaps *or* setting limits w/ independently discovered "right answers"
    - More willingness to remit for reasons?
  - Openness to different (& efficient) reasoning paths, while insisting on justification
    - Yet more willingness to say that competing views from parties or courts below *defeat purpose* (vs "equally reasonable")?

5. Exercise

Denial of application for Record Suspension

- Assume reasonableness standard
  - **Unreasonable interpretation of law?** (period relevant to assessment of "good conduct")
  - **Unreasonable exercise of discretion?** (decision to deny)

  - Whether/how to set the "range of reasonable options"?
  - Whether/how to review implicit decisions (absent reasons)?

How is reasonableness review distinct from correctness?

Is it an attitude? Or a structured analysis?

<u>Is correctness the better standard for the question of law</u>?

Appendix: Reasonableness Review & Interpretation / Discretion: A Few Supports

Rothstein J in ATA: Implicit decisions

- Courts should ordinarily **refuse to hear** challenges to ADM decisions on matters **that were not [*but could have been*] raised** before the ADM (deference to ADM, prejudice to parties, no evidentiary foundation)
- But possible exceptions if: 1) alternative ways of ascertaining the ADM's reasoning; and 2) no prejudicial effect – e.g., "a straightforward determination of law"
- In some cases it may be best *to remit the matter to the tribunal for reasons.* This avoids the problem of the reviewing court inserting its own interpretation or failing to appreciate the reasoning of the ADM. However, "where there is a reasonable basis for the decision apparent to the reviewing court" economy of resources supports review of the implicit decision.
  - Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61, per Rothstein J at paras 52-55

Factors of relevance to "mapping"?

Suggestions from cases and commentary

- Nature of decision
- Statutory purposes / ADM function
- Privative clause / right of appeal?
- Relative expertise?
- ***Significance of interests at stake?***
- ***Electoral accountability of ADM?***
- ***Independence of ADM?(State-individual adversarialism****?)*
- ***Inconsistency with tribunal precedent ?***

See: Binnie J in Dunsmuir (paras 135-155); Stratas JA in Canada (Transport, Infrastructure and Communities) v. Farwaha, 2014 FCA 56 at paras. 93-97).

Law-Interpretation: Driedger's "Modern Principle"

"Today there is only one principle or approach, namely, the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

"The modern principle has been used in Canada to justify every possible approach to interpretation and, more importantly, has been used as a substitute for real justification."

– Ruth Sullivan, "Statutory Interpretation in Canada: The Legacy of Elmer Driedger," in T. Gotsis (ed.), Statutory Interpretation: Principles and pragmatism for a new age. (Judicial Commission of New South Wales, 2007) 105.

Justification in hard cases? (Sullivan, ibid)

"While most cases that come before tribunals and courts are hard, Driedger's modern principle does not acknowledge this problem and offers no guidance on how to resolve it. My own view of how this problem should be resolved, set out below, is a version of "pragmatism". […]

In hard cases, when the factors identified by Driedger as relevant to statutory interpretation do not all point to a single answer, the tribunal or court is forced to weigh and choose. It must devise an outcome that, in its opinion, is appropriate in the circumstances. An appropriate outcome is one that can be justified in terms of:

- (a) Its linguistic plausibility: that is, its compliance with the legislative text.
- (b) Its efficacy: that is, its promotion of legislative intent.
- (c) Its acceptability: that is, its accordance with accepted legal norms."

Interpretation, Ambiguity, International Law & Charter values

- "Statutory enactments embody legislative will. They supplement, modify or supersede the common law. [. . .] [A]lthough it is sometimes suggested that 'it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not' **… it must be stressed that, to the extent this court has recognized a 'Charter values' interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, that is, where a statutory provision is subject to differing, but equally plausible, interpretations."**
  - **Bell Express Vu Ltd Partnership v Rex [2002] 2 SCR 559at para 62**

Ambiguity first?

- *[I]f there are multiple possible interpretations* of a legislative provision, we should avoid interpretations that would put Canada in breach of its international obligations: [. . .] This canon of construction is based on a presumption that our domestic law conforms to international law: R. v. Hape, 2007 SCC 26 (CanLII), [2007] 2 S.C.R. 292 at paragraph 53.

- **As a practical matter, this canon of construction is seldom applied because most legislative provisions do not suffer from ambiguity and, thus, "must be followed even if they are contrary to international law": Daniels v. White, 1968 CanLII 67 (SCC), [1968] S.C.R. 517 at page 541, 2 D.L.R. (3d) 1. Overall, then, international law can play a role in the interpretation of legislative provisions – indeed, sometimes an important one – but it is a well-defined, limited role.**

  - Gitxaala Nation v. Canada, 2015 FCA 73

L'Heureux-Dubé in Baker [paras 54, 56]

- "**[T]here is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options.**

- … [D]iscretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society and the principles of the Charter."

Baker: International Law at para 62

- "International treaties and conventions are not part of Canadian law unless they have been implemented by statute. [. . .] Nevertheless, **the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.** As stated in R Sullivan, Driedger on the Construction of Statutes (3rd ed 1994), p 330:
  - **'[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.'"**

Charter values not directly raised before ADM - Taman v. Canada (Attorney General), 2017 FCA 1 at para 18

- I choose not to address the Charter issues because, apart from a single reference to the Charter in her response to the DPP's position (AB at 788), Ms Taman does not appear to have pursued them before the PSC. This Court is reluctant to embark upon Charter reviews where the parties have not pursued their Charter remedies before the initial decision maker: see Forest Ethics Advocacy Association v. Canada (National Energy Board), 2014 FCA 245 (CanLII), [2015] 4 F.C.R. 75 at para. 37. This reluctance is grounded in the need to allow the federal board, commission or tribunal an opportunity to lead evidence to support a "reasonable limitation" argument, which is best done before the trier of fact. It is grounded as well in our recognition that the initial decision maker's analysis will provide valuable insights into the proper balancing of the various factors at play.

Doré at para 35: "always required to consider fundamental values . . ."

"[A]dministrative decisions are always required to consider fundamental values. The Charter simply acts as "a reminder that some values are clearly fundamental and . . . cannot be violated lightly" (Cartier, at p. 86). The administrative law approach also recognizes the legitimacy that this Court has given to administrative decision-making in cases such as Dunsmuir and Conway. These cases emphasize that administrative bodies are empowered, and indeed required, to consider Charter values within their scope of expertise. Integrating Charter values into the administrative approach, and recognizing the expertise of these decision-makers, opens "an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship" (Liston, at p. 100)."