

**Situating the ombuds in a
“culture of justification”
*Administrative law update:
reasons and reasonableness***

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Forum of Canadian Ombudsman / Association of Canadian
College and University Ombudspersons Conference, Halifax NS,
June 2013

Plan

1. The ombuds in a “culture of justification”
2. The duty to give reasons
3. Adequacy of reasons: a component of substantive reasonableness
4. Discretion engaging *Charter* values: reasonableness as “proportionality”

I. A “culture of justification”

“[S]ocieties governed by the Rule of Law are marked by a certain ethos of justification. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals . . . are subsumed. . .

A “culture of justification”

Where a society is marked by a culture of justification, **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)¹

Justification not strictly separable from accessible, participatory processes

- Procedural *fairness* and substantive *reasonableness* work together to produce a “culture of justification”
- However, we separate these in administrative law doctrine.

See Dyzenhaus (1997)²; Dyzenhaus & Fox-Decent (2001)³

The ombuds in a culture of justification

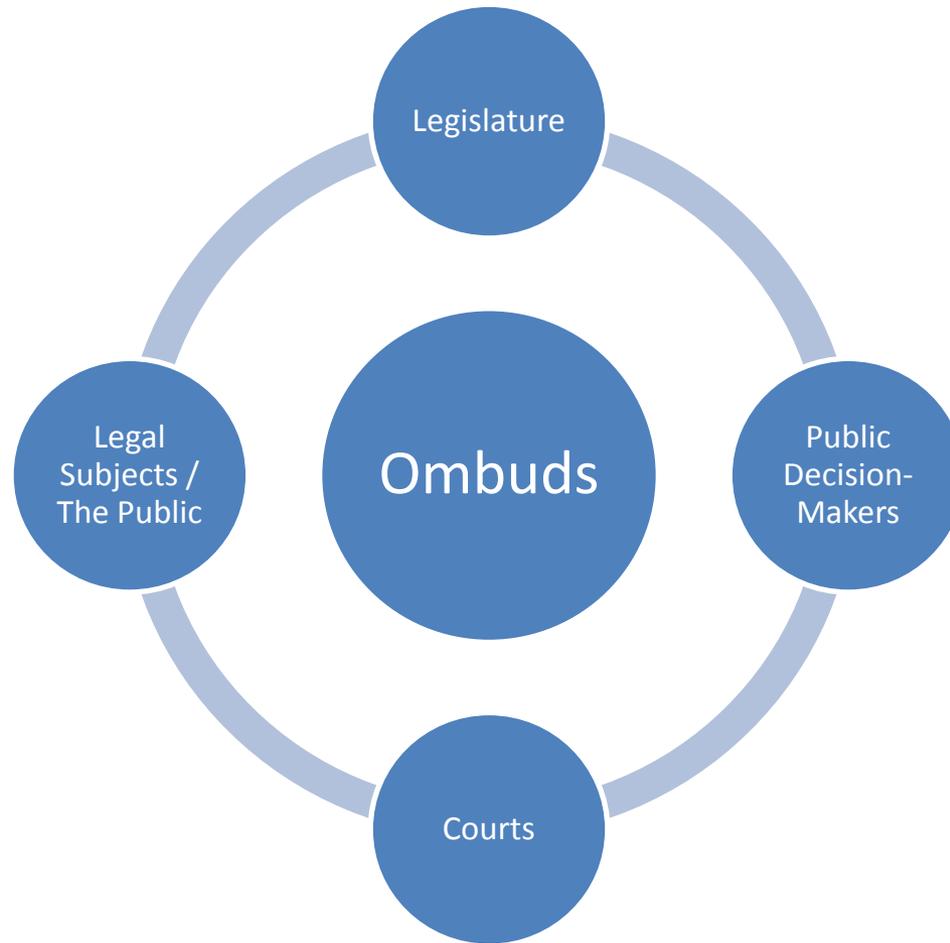
- Traditional ombuds functions
 - Investigations
 - Recommendations in individual cases (dispute resolution options, reconsideration)
 - Recommendations for systemic / institutional reforms

British Columbia Development Corporation v. Friedmann (Ombudsman), [1984] 2 S.C.R. 447

BC Ombudsman powers of investigation / recommendation:

- creates the possibility of dialogue between governmental authorities and the Ombudsman;
- facilitates legislative oversight of the workings of various government departments and other subordinate bodies; and
- allows the Ombudsman to marshal public opinion behind appropriate causes.”

(Statutory) ombuds in a culture of justification



Non-statutory ombuds

- Ombuds created to monitor and facilitate accountability within private organizations may draw on the standards applicable to public decision-makers to inform best practices.
 - see Frank A.V. Falzon, QC “Recent Updates in Administrative Law: What Every Ombudsman Needs to Know” (2011)⁴

Common law administrative law standards

... set a baseline of expectations for public decision-makers, including ombuds.

- Common law judicial review may be available for decisions of statutory ombuds despite their investigative and recommendatory nature.
- Even where there are limitations (e.g., a privative clause), this does not entirely displace the possibility of review.

Legality / Best Practices

“In [focusing on common law], nothing should be taken to encourage administrative decision-makers to aim only for the legal minimums, and no higher. **Administrative decision-makers should strive to follow best practices so that the public gets the service it deserves, including providing exemplary reasons of high standard**: for an example of one authority’s helpful view of best practices, see Ombudsman Saskatchewan, *Practice Essentials for Administrative Tribunals* (2009)⁵.”

- From *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158.

Ombuds' standards as high or *higher* than common law

“[Statutory t]erms such as “unjust”, “oppressive”, “otherwise wrong” or “acted improperly” [...] do not have a pre-set legal definition. [...] I think [...] the Legislature wanted the Ombudsperson to be able to develop his or own standards of good administration – standards that may in some cases call for an Ombudsman to say “yes, you met the minimum legal standard, but you really should have done better.” “

- Frank A.V. Falzon, QC (2011), on s.24 of the *BC Ombudsperson Act*

Reasons and reasons – BC Ombuds

23(1) If, after completing an investigation, the Ombudperson is of the opinion that [...]

(b) in doing or omitting an act or in making or acting on a decision or recommendation, an authority

(ii) failed to give adequate and appropriate reasons in relation to the nature of the matter, [. . .]

the Ombudsperson must report that opinion and the reasons for it to the authority and may make the recommendation the Ombudsperson considers appropriate.

- BC *Ombudsperson Act* [RSBC 1996] c 340, s.23; See also s.21 of the Ontario *Ombudsman Act* (where opinion “that reasons should have been given ” state opinion, “and the reasons therefor”)

II. The duty to give reasons

- Enabling statute (conferring agency powers)
 - BC *Ombudsperson Act, supra*
 - Ontario *Health Care Consent Act* S.O. 1996, c 2, Sch A, s.75 (reasons “on request”)
- Generic legislation, e.g., Alberta’s *Administrative Procedures and Jurisdiction Act, s.7*

A decision-maker exercising “a statutory power so as to adversely affect the rights of a party” must provide each party with a written statement of

 - “the findings of fact on which it based its decision” and
 - “the reasons for the decision”

The duty to give reasons

- Common law (judge-made law) where the statute “is silent”
- Common law did not traditionally impose a duty to give reasons on either judges or ADMs
- This has changed in the last two decades

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

- Common law procedural fairness requires ADMs to give reasons where
 - the decision has **important significance** to the individual
 - there is a **statutory right to appeal**
 - “or in other circumstances. . .” (para 43)
- Broad application . . .

Why reasons? (Baker and later cases)

- Enables better decisions (substantive rationality. . . versus arbitrariness)
- Enhances parties' perceptions of fairness (transparency / closure)
- Enhances public confidence (democratic legitimacy)
- Assists parties in determining whether to challenge or appeal (procedural fairness)
- Enables meaningful review (rule of law)

Competing considerations: efficiency, admin diversity

- Baker: The form / content required to satisfy the duty to give reasons will vary given the diversity of decision-making contexts
 - handwritten notes of junior immigration officer advising senior officer qualified as reasons (subsequently judged “unreasonable”)

Sufficiency of reasons initially deemed part of procedural fairness

- Common sense approach to sufficiency
 - Set out relevant law and policy
 - Principal evidence accepted, principal findings of fact (needn't be exhaustive)
 - Disposition of principal issues / arguments
 - If discretionary decision, show what factors were relevant / determinative
 - Show reasoning path from facts and law to conclusion
 - *But* courts must respect
 - legislative objectives of cost-effective, timely justice
 - integrity of non-court / non-lawyer decision-making

But this has changed . . .

- Sufficiency of reasons now deemed a facet of substantive *reasonableness* . . .

Implications: deference

- Procedural fairness attracts a standard of correctness on review
- Substantive legality: reviewed on one of two standards, reasonableness or correctness.
- On reasonableness review, the quality of the reasons *is one aspect* of substantive legality . .
- Reasonableness review unites judicial expectations of *substantive legality* with judicial obligations of *deference*

III. Adequacy of reasons: a component of substantive reasonableness

1. Overarching question: does the decision evince “*Dunsmuir* reasonableness”?
2. Assess decision as a whole (reasoning and conclusion), in light of the record (prior decisions, transcript, evidence).
3. Looking ahead: Where a discretionary decision engages Charter values, reasonableness may require proportionality as between the statutory mandate and the relevant values.

Dunsmuir reasonableness

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190

- “A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring to both **the process of articulating the reasons and to outcomes.**
- “[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]

Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), [2011] 3 S.C.R. 708

“*Dunsmuir* [does not stand] for the proposition that the “adequacy” of reasons is a stand-alone basis for quashing a decision, or [...] that a reviewing court [must] undertake two discrete analyses - one for the reasons and a separate one for the result.

It is a more organic exercise - the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.” [para 14]

Nurses' Union, supra - deference

“It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons **fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review . . .**

“[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” (para 21)

Nurses' Union, supra

- Distinguishes
 - cases where an ADM offers no reasons
 - Then the question is: was failure to give reasons a breach of procedural fairness?
 - cases where the reasons are allegedly deficient
 - To be reviewed as a matter of substantive reasonableness . . .

Nurses' Union, supra

- Arbitrator's interpretation of collective agreement
- First level court: Reasons inadequate
 - Focused on a passage referring to (lack of) vacation leave entitlement of casual employees, rather than the question in issue: entitlement of *permanent* employees who were *formerly* casuals
- NLCA (affirmed by SCC): Decision reasonable, read as a whole and in light of the record

Nurses' Union – deference / review in light of the record

- Reasons need not “make an explicit finding on each constituent element, **however subordinate**, leading to [the] final conclusion.”
- Reasons do not have to be “perfect”, nor comprehensive, nor are they to be reviewed in a “vacuum”.
- The conclusion is to be looked at in the context of **the evidence, the parties' submissions and the process.**

Nurses' Union – so what *is* required?

- Ask whether, **“when read in light of the evidence before it and the nature of its statutory task, the Tribunal’s reasons adequately explain the bases of its decision”** (para 18, citing Evans J.A)
- Read in context, reasons **must “allow the reviewing court to understand why** the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes.” (para 16)

Rationales at work in *Nurses' Union*

- **Deference** to the expertise of specialized tribunals / recognition of limitations of reviewing courts' perspectives on agency decisions.
- **Efficiency** / resource implications of judicial review
- How do these fit with competing rationales: **rule of law, a “culture of justification”?**

Canada (Citizenship and Immigration) v. Khosa,
[2009] 1 S.C.R. 339

Although the *Dunsmuir* majority refers with approval to the proposition that an appropriate degree of deference “requires of the courts ‘not submission but a respectful attention to the reasons offered or which could be offered in support of a decision’” [...] **I do not think the reference to reasons which “could be offered” (but were not) should be taken as diluting the importance of giving proper reasons for an administrative decision. (para63)**

Summary: in search of . . . *Dunsmuir* Reasonableness

Is the decision **within the range of reasonable outcomes defensible in respect of the facts and the law?**

- Is there “some evidence” capable of supporting the findings of fact?
- Did the interpretation / application of law fall within the range of reasonable options?

Summary: Reasonableness of reasons?

Ask, in light of the decision as a whole & the record:

- Did the ADM ignore **evidence** or **argument** central to the decision (and before the ADM)?
- Did the ADM fail to consider a factor it ought to have taken into account in the exercise of discretion?
- Is the reasoning path from facts / law to conclusion unclear? That is, is it clear (in light of the record). . .
 - what evidence / arguments were relied upon & why?
 - what inferences were made from the facts / law?
 - what factors were relied upon or given particular weight?

Post-Nurses' Union:

Reasonableness affirmed despite “sparse” or facially deficient reasons –

Construction Labour Relations v. Driver Iron Inc., 2012 SCC 65

- Failure to address alternative interpretations of key statutory provision?
 - “The Board **considered the relevant provisions of the *Code* and the facts presented to it by the parties.** Its interpretation of the *Code* and its conclusions were reasonable.”
 - “**The Board did not have to explicitly address all possible shades of meaning of these provisions.** ... For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable.”

Example 2: *Clark v. Alberta (Institute of Chartered Accountants, Complaints Inquiry Committee)* 2012

ABCA 152

Failure to show reasoning path?

“We commence [...] by pointing out the sparseness of reasons. They do not explain how the Appeal Tribunal arrived at a conclusion different from that of the Discipline Tribunal, and why the abuse of process that was found was serious enough to warrant a stay.

Clark v. Alberta (supra) – deference in action

However, since adequacy of reasons is not a stand-alone basis for quashing a decision, we have looked at the record to assess the reasonableness of the outcome. [...] [W]e have examined the reasons “in the context of the evidence, the parties’ submissions and the process”: *Newfoundland* at para 18.” [para 14]

Clark v. Alberta (supra) – deference in action

- **Failed to explain** divergence from decision below (on issue of consent to disclosure), but Tribunal's conclusion reasonable and basis for it was obvious [no basis on which competing arguments could be sustained]
- **Failed to explain** why investigator's action deemed an abuse of process, but this conclusion too was reasonable and basis for it was obvious in light of the law and facts

Clark v. Alberta (supra) – deference in action

- **Failure to explain** the extraordinary remedy of a stay of prosecution “saved” by situating it in light of the law and facts including the record of the proceedings.
 - “It appears that the Appeal Tribunal, [...] in balancing the need to punish unprofessional conduct in the public interest and maintaining the integrity and confidence of its disciplinary process, determined that stay was the only appropriate remedy.” (para 18)

Clark v. Alberta (supra) – deference in action

“The standard of review requires that this Court show deference to the decision of the Appeal Tribunal. **When examined in the circumstances of the investigation, the context of the evidence, the submissions of the parties and the process of the Appeal Tribunal, we conclude that the result falls within the range of reasonable outcomes.**” (para 19)

Post Nurses Union:

Unreasonable flaws in reasoning (not saved by holistic analysis)

Ask: Would a party understand the basis of the decision in order to challenge it? Why was evidence or argument rejected? What factors were relied on in exercising discretion in relation to the facts?

- Failure to address a key piece of evidence or to explain why evidence was rejected
 - *Pinto Ponce v. Canada (Citizenship and Immigration)*, 2012 FC 181; *College of Physicians and Surgeons of Ontario v. Noriega*, 2012 ONSC 4084
- Failure to address a key argument
 - *Turner v. Canada (Attorney General)*, 2012 FCA 159
- Failure to explain how the factors relevant to a discretionary decision were evaluated / weighed
 - *LeBon v. Canada (Attorney General)*, 2012 FCA 132

IV. Discretion engaging Charter values: what does “reasonableness” require?

- What is discretion?

“The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries.”

Baker (para 52)

Discretion attracts deference ...

- [I]t is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised.
 - *Baker* at para 53; and see *Dunsmuir* at para 53.

... *however*, discretion must reflect the “values underlying the grant of discretion”

... though discretionary decisions will generally be given considerable respect, that discretion 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*, para 56)

- ADMs to be “alert, alive and sensitive” to these fundamental values

Application of these principles in *Baker*

. . . the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. (para 65)

Locating “fundamental values” in *Baker*

Statutory purposes, international law, soft law . . .

“Indications of children's interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself. (Baker, para 67)

Revival of *Baker* principles:

Doré v. Barreau du Québec, 2012 SCC 12

“[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’.” (para 35)

Doré v. Barreau du Québec, supra

- Applies to
 - Discretionary decisions . . .
engaging Charter (or other fundamental) values

“*Charter values*” (old and new)?

Begin with the explicit guarantees:

- Fundamental freedoms (conscience, religion, thought, belief, expression, the press and other media, peaceful assembly, association)
- Mobility rights (s.6)
- Life, liberty, security of the person (s.7)
- Legal rights (unreasonable search and seizure, etc – ss.8-14)
- Equality (s.15)
- Language rights (english or french)

“Charter values” (old and new): Questions

- Broader scope of Charter “values” versus rights
- Relevance of jurisprudential analyses for establishing breach of rights?
- Weight of “Charter values” versus other values privileged in common / private law?
 - E.g., reputation versus freedom of expression (*Hill v. Church of Scientology* [SCC 1995], cited favourably in *Doré*)
 - “Depends on the context”?

Values underlying s.1 “reasonable limits ... demonstrably justified in a free and democratic society”

- respect for the **inherent dignity** of the human person
- commitment to **social justice and equality**
- **accommodation of a wide variety of beliefs**
- respect for **cultural and group identity**, and
- faith in social and political institutions which **enhance the participation** of individuals and groups in society
 - *R. v. Oakes* (SCC 1986)

Doré: Background

- Lawyer discipline case
 - Did strongly worded personal / professional criticisms in letter to judge breach Que. *Code of Ethics*, art.2.03 “objectivity, moderation and dignity”?
 - Reprimand / 21 day suspension
- Decisions re breach and remedy both discretionary decisions engaging / limiting freedom of expression . . .

Doré v. Barreau du Québec, supra

- “ This raises squarely the issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions. ” (para 3)

Review of discretion affecting *Charter* rights:
“Orthodox” approach

Slaight Communications (SCC 1989)

1. Does the impugned decision infringe a Charter right?
2. If so, can the infringement be saved under section 1?

Administrative law review was regarded as having insufficient structure / rigour for overseeing an alleged *Charter* breach . . .

Charter, s.1

(per *R. v. Oakes* (SCC 1986))

- Is the *Charter* limitation *prescribed by law*?
- Is the objective pursued by the law *pressing and substantial in a free and democratic society*?

proportionality:

- rational connection between the impugned law/action and objective
- minimal impairment of the right
- proportionality (deleterious vs salutary effects)

Doré, supra

- Adopts “administrative law approach”
- Where discretion engages “Charter values,” reasonableness review includes expectations of *proportionality* . . .
 - *Substantive legality requires that discretion take account of / reconcile competing values*
 - *Departure from the traditional rule against courts revisiting the weight ADMs place on competing factors*

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)

Doré proportionality as viewed by the ADM

- “In effecting this balancing, the decision-maker should first consider the statutory objectives.”
- Next “ask how the *Charter* value at issue will best be protected in view of the statutory objectives.” (para 56)

Doré proportionality as viewed by the court on review

- “On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play.” (para 57)

Deference does not mean low expectations

“[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”. (para 35)

Failure to consider a *Charter* value?

- Where a *Charter* value is raised by an applicant and is not addressed, this is a likely basis for judicial review
- Where a *Charter* value is not initially raised by the applicant, but later, on review, is argued to have been engaged
 - A court *might* refuse to consider this on the basis that Charter issues “should not be decided in a vacuum” (insufficient foundation) OR
 - *might* reference the traditional ground of “failure to consider a (mandatory) relevant factor”

Questions – *Doré* proportionality

- How can ADMs and courts inject more structure / predictability into the analysis where *Charter* values are engaged?
 - Clearer expectations from courts, e.g., what counts as adequate attentiveness to significant interests; limits on deference where gov't is in role of interested party vs neutral adjudicator
 - Policy-making to guide discretion (Ontario HRC: Policy on Competing Rights)
 - Stakeholder consultations to inform policies. . .

Questions

- Social advocates view *Doré* as an opportunity to secure positive legal entitlements not yet recognized by Canadian judges
 - on the principle that discretion should advance *Charter* and other fundamental values, including those recognized in international law.
- Role of the ombuds in facilitating conversations about the nature and implications of *Charter* and other fundamental values?

Discretion engaging *Charter* (and other fundamental) values

- *Doré* analysis
 - Statutory purposes (purpose of provision)?
 - *Charter* values?
 - Other fundamental values (reflected in purposes of statute, international law, soft law)?
- Advancing the mandate should impair the value no more than necessary.
- Restated positively? Advancing the mandate should advance the value as far as possible.

References (not otherwise supplied)

1. Chief Justice McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1999) 12 C.J.A.L.P. 171 at 174.
2. D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 279
3. D. Dyzenhaus & E. Fox-Decent, “Rethinking the Process/Substance Distinction: Baker v. Canada” (2001) 51 U.T.L.J. 193
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