

Reasonableness as a Evaluative Standard in Ombudsman Work

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Outline

- Introduction – reasonableness as a standard
- Preliminary Definitions – reason, being reasonable, exuding reasonableness
- Rejecting a subjective reasonability
- Establishing an objective standard – models from tort and administrative law
- Conclusions – evidence of reason is not evidence of reasonability or reasonableness

Introduction

- Reasonableness is a standard of evaluation
- Need to explore what informs our understanding of what will be seen as reasonable

Examples of Use of Term “reasonable” in Ombudsman Legislation

- Ombudsperson Act (BC) – “reasonable travelling” (s.4(2)); “reasonable justification” (s. 13(c))- in reference to failure to use alternate remedy; “reasonable number of attempts” to contact (s.13(g(ii)); “at any reasonable time enter” (s.15(2)(a); “reasonable expenses” (s.21(2)”; “as soon as is reasonable” (s. 22(1)(d); “within a reasonable time” (s.25 (1) and s.26(1),(2))
- Interesting, as a standard, the term “unreasonable” appears in s.23

Reasonableness or Unreasonableness as a Standard of Evaluation of Administrative Action - 1

- Ombudsperson Act (BC)

23 (1) If, after completing an investigation, the Ombudsperson is of the opinion that

(a) a decision, recommendation, act or omission that was the subject matter of the investigation was

(v) related to the application of arbitrary, **unreasonable** or unfair procedures, or

(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, or

(c) there was **unreasonable** delay in dealing with the subject matter of the investigation,

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

Reasonableness or Unreasonableness as a Standard of Evaluation of Administrative Action - 2

- Ombudsman Act (Ont)

21. (1) This section applies in every case where, after making an investigation under this Act, the Ombudsman is of opinion that the decision, recommendation, act or omission which was the subject-matter of the investigation,

(b) was **unreasonable**, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act or a practice that is or may be **unreasonable**, unjust, oppressive, or improperly discriminatory;

Reasonableness or Unreasonableness as a Standard of Evaluation of Administrative Action - 3

- Ombudsman Act (Sask)
- 27(1) The Ombudsman shall take the actions described in subsection (2) if, after an investigation pursuant to this Act, the Ombudsman is of the opinion:
 - (a) that a decision, recommendation, act or omission that is the subject-matter of the investigation appears to have been:
 - (ii) **unreasonable**, unjust, oppressive, improperly discriminatory or was in accordance with a rule of law, a provision of an Act, or a practice that is or may be **unreasonable**, unjust, oppressive or improperly discriminatory;
 - (c) that **reasons** should have been given for a decision, recommendation, act or omission that was the subject-matter of the investigation.

Reason

- Reason – “the ability to explain and justify our beliefs and commitments” – M. Lynch *In Praise of Reason*, 2012
- Using Reason – about using certain methods based on certain principles – Lynch, *supra* – understanding from a process of logic
- Patterns of reasoning – paradigms (Kuhn – *Structures of Scientific Revolutions*, 1962)

Reasonableness

- “sounds right” or acting with reason
- Dictionary definitions from The Free Dictionary:
 1. Capable of reasoning; rational: a reasonable person.
 2. Governed by or being in accordance with reason or sound thinking: a reasonable solution to the problem.
 3. Being within the bounds of common sense: arrive home at a reasonable hour.
 4. Not excessive or extreme; fair: reasonable prices.

Acting with Reason; Acting Rationally as a Problem

- Is acting with reason sufficient for an ombudsman to conclude there has not been an administrative problem? Is having a rationale sufficient? Is acting with logic sufficient?
- Few act without reasons; few of us are totally capricious; few of our actions are totally random
- Important to distinguish rationality from reasonability or reasonableness – Rescher “Reasonableness in Ethics”, 2013
- Note that “any process of drawing a conclusion from a set of premises may be called a process of reasoning” *Oxford Dictionary of Philosophy* (2005), p. 310

Reasonableness as a Standard in Law

- Tort law – reasonable person
- Administrative law – reasonable apprehension of bias

Tort Law and the Reasonable Person

- Reasonable person – arose out of negligence law and involves assessment of duty of care
- The standard of care is the care of the reasonable person – note: not the average person – it is seen as an objective standard
- “The standard of conduct is determined by taking into account the practical realities of what ordinary people do and what judges believe they ought to do.” –Osborne, p.28

Source: P Osborne *The Law of Torts* (Irwin, 2003)

Malleability of the Standard in Tort Law

- Circumstances matter as do elements of characteristics of the persons involved
- “The standard is not entirely uniform : a lower standard is expected of a child but a higher standard is expected of someone such as a doctor who purports to have a special skill.” – *Oxford Dictionary of Law* 2006, p. 440

Administrative Law - Reasonable Apprehension of Bias

■ Test –

the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [T]hat test is "what would an informed person, viewing the matter realistically and practically-and having thought the matter through-conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

Source: *Committee for Liberty and Justice v. National Energy Board* [1981] 1 S.C.R. 369 at pp. 394-95.

Administrative Law – Reasonableness

– Standard of Review

- A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, para 47

Reasonableness and Reasonable Person

- Normative, purposive concepts not empirical – not average person, reasonable person – is an ideal type, is a purposive rendering of human action –

Source: P. Bryden “In Search of the Reasonable Person in Canadian Law: Are We Asking the Wrong Question?” 2008

Ombudsman Conceptions of Reasonableness and Unreasonableness -1

- ***Principle:*** An unreasonable procedure is one which fails to achieve the purpose for which it was established. This test focuses on the rationale for a procedure and the results it produces or is likely to produce. The term may be seen as a synonym for an incompetent procedure on the basis that such a procedure is an absurdity and thus contrary to reason.
- ***Principle:*** Delay is unreasonable whenever service to the public is postponed improperly, unnecessarily or for some irrelevant reason.

Source: Office of the Ombudsperson, British Columbia *Code of Administrative Justice*, 2003 Public Report No.42, 2003

Ombudsman Conceptions of Reasonableness and Unreasonableness -2

- The Ombudsman ensures that practices and policies are consistent and applied consistently. If the Ombudsman finds that government's decision in one case is different than in another similar case and if that difference cannot be explained the Ombudsman will find that government acted unreasonably and therefore, unfairly...
- Basically an action or decision will be unreasonable if the available evidence does not support it.

Source: Office of the Provincial Ombudsman, Saskatchewan
Fairness: A Brief Explanation 2004

Ombudsman Conceptions of Reasonableness and Unreasonableness -3

■ **Unreasonable**

A decision, recommendation, act or omission can be defined as unreasonable if it:

- is inconsistent with other decisions, etc., that involve similar facts or circumstances
- has been made without an obvious relationship to the facts or evidence
- has a contrary effect to what was intended or permissible
- results from a refusal to use discretion where the facts or evidence call for its exercise
- cannot be rationally and fairly explained.

■ Source: City of Toronto Ombudsman, *Defining Fairness*, 2010

Conclusions

- Rationality is not reasonableness
- Reasonableness includes rationality
- Reasonableness is a malleable and purposive concept not solely an empirical “average”