Case Comment
Commentaire d’arrêt

ADEQUACY OF REASONS – FROM PROCEDURAL FAIRNESS TO SUBSTANTIVE REVIEW: *NEWFOUNDLAND AND LABRADOR NURSES’ UNION V NEWFOUNDLAND AND LABRADOR (TREASURY BOARD)*

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The Supreme Court of Canada’s recent decision in *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*[1] marks a fundamental shift in the law on reasons provided for administrative decisions. Not to be overlooked on account of its short length, the Court’s pithy decision represents an important milestone on the road to the broader fulfillment of the restructuring of Canadian administrative law undertaken in *Dunsmuir v New Brunswick*.[2]

The genesis of the issue raised in *Nurses’ Union* is not *Dunsmuir*, but rather *Baker v Canada (Minister of Citizenship and Immigration)*[3] and L’Heureux-Dubé J’s recognition that in some circumstances, the duty of procedural fairness will require written reasons for a decision. The appellant Nurses’ Union argued that the labour arbitrator, who had provided some reasons, nonetheless provided reasons that were so inadequate that they rendered the decision-making process unfair, thus engaging the correctness standard of review. The Supreme Court disagreed and held that where reasons are provided, the adequacy of the reasons is not reviewable as a matter of procedural fairness and is not a freestanding ground of review. In other words, where applicants allege a deficiency in reasons, their remedy is substantive review and, in *Nurses’ Union*, that review was conducted on the reasonableness standard.

The fluidity of the Court’s reasons belies the appellate divergence on this issue that has been simmering since *Dunsmuir*. Notably absent from *Nurses’ Union* is mention of the Ontario Court of Appeal’s decision in

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* Associate, Stevensons LLP. The author thanks James Green and Richard Macklin for their thoughtful comments.

1 2011 SCC 62, 3 SCR 708 [*Nurses’ Union*].

2 2008 SCC 9, 1 SCR 190 [*Dunsmuir*].

3 [1999] 2 SCR 817 [*Baker*].

Clifford v Ontario Municipal Employees Retirement System,[4] where the Court of Appeal clung to the traditional distinction between assessing the adequacy of reasons and substantive outcome, or appellate decisions from British Columbia and Alberta following *Clifford*.[5] The Supreme Court took a different course than the balance of the appellate jurisprudence and effectively eliminated the adequacy of reasons as an element of procedural fairness, restricting the fairness review of reasons to their existence, not their content.[6] By so doing the Court confirmed that the three hallmarks of reasonable decision-making identified in *Dunsmuir* – justification, transparency, and intelligibility – will be the lodestars of an increasingly broad range of applications for judicial review.

While the theoretical and practical implications of *Nurses' Union* are enormous – counsel will now be wise not to waste ink advancing parallel challenges to reasons under both standards of review – the change to the reasoning process undertaken by judges will likely be minimal. This is why *Nurses' Union* is such a salutary development; it simplifies the structure of administrative law without changing the underlying deliberations or denying aggrieved parties an equally thorough consideration of their cases. The criteria of justification, transparency, and intelligibility are sufficiently broad to encompass any practical advantages litigants would have enjoyed under a review for procedural fairness. The breadth of these criteria means that the universe of decisions that are unreasonable due to inadequate reasons is broader than the more narrow range of decisions that would be procedurally unfair due to a lack of reasons.[7]

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4 2009 ONCA 670, 98 OR (3d) 210 [*Clifford*]. It is also curious that the Supreme Court denied leave to appeal to *Clifford* ([2009] SCCA No 461), but then effectively overturned *Clifford* in *Nurses' Union* two short years later.

5 See *Clifford*, *ibid* at paras 31-32. See also *Gichuru v Law Society of British Columbia*, 2010 BCCA 543 at para 27, 297 BCAC 543; *Sussman v College of Alberta Psychologists*, 2010 ABCA 300 at paras 39-40, 37 Alta LR (5th) 177. Only the Newfoundland and Labrador Court of Appeal held otherwise in *Newfoundland and Labrador (Treasury Board) v Newfoundland and Labrador Nurses' Union*, 2010 NLCA 13, 294 Nfld & PEIR 161[*Nurses' Union CA*]; the majority concluded at para 12 that:

> … [a] failure to give reasons, or inadequate reasons, would be decisive in the reasonableness assessment. A complete lack of or inadequate reasons could not be said to provide the justification, transparency and intelligibility in the decision-making process required to satisfy reasonableness under the *Dunsmuir* analysis. Unless legislation eliminates the necessity for reasons, reasonableness is the standard required to be met by a tribunal. Since reasons, including adequacy thereof, constitute a component of reasonableness, a separate examination of procedural fairness is an unnecessary and unhelpful complication.

6 *Nurses' Union*, *supra* note 1 at para 22.

7 The higher requirements of the *Dunsmuir* reasonableness standard are logical given that the threshold for requiring reasons as a matter of substantive review cannot be

This eclipse of the adequacy of reasons as a question of fairness by the *Dunsmuir* reasonableness standard has not gone unremarked-upon. Before *Nurses' Union*, a large number of trial-level decisions recognized the practical redundancy of a dual analysis of reasons as a question of fairness and then again as a question for substantive review. Nowhere is this more apparent than the Federal Court, where a docket heavily slanted towards administrative law has led to frequent musings on this point, as the following examples show:

> … [T]he standard for the sufficiency of the reasons is in fact more similar to reasonableness than to correctness.[8]
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> … [I]t would be the rare case where a decision-maker can be found to have made no error of law and to have arrived at a conclusion that is not unreasonable on the evidence, yet to have failed to articulate adequate reasons.[9]
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> Either way, the analytical framework remains the same.[10]

Other decisions have said much the same.[11]

Although not specifically citing these decisions, the Supreme Court has taken heed of them, or at least engaged in the same reasoning. *Nurses'*

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reduced by considerations extraneous to the core question of whether the basis for the decision is understandable, whereas the threshold for requiring reasons as a matter of procedural fairness can be lowered by considerations foreign and irrelevant to interpreting the decision itself, such as the importance of the decision to the person affected or the legitimate expectations of the person challenging the decision. Under *Baker*, *supra* note 3, the level of procedural fairness required for a particular decision is calibrated by balancing (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency itself. The Supreme Court recently emphasized that these factors constitute a non-exhaustive list; see *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 42, 2 SCR 504 [*Mavi*]. It should be noted that in *Nurses' Union* the Court did suggest, at para 18, that the process followed in making the decision may be relevant to reasonableness review.

8 *Nicolas v Canada (Minister of Citizenship and Immigration)*, 2010 FC 452 at para 11, 367 FTR 223.

9 *Turner v Canada (Attorney General)*, 2011 FC 767 at para 37, [2011] FCJ No 960 (QL).

10 *Kang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 293 at para 20, FCJ No 378 (QL).

11 *Ralph v Canada (Attorney General)*, 2010 FCA 256 at para 3, 334 DLR (4th) 180; *Holmes v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 112 at paras 42 and 45, 22 Admin LR (5th) 147; *Jakutavicius v Canada (Attorney General)*, 2011 FC 311 at paras 27-34, [2011] FCJ No 391; *Trainor v Canada (Attorney General)*, 2011 FC 484 at para 30, 388 FTR 268.

Union, as the above-noted Federal Court decisions, recognized the holistic character of a challenge to the adequacy of reasons:

> [Reviewing the adequacy of reasons] 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. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes."[12]

Notwithstanding this congruence, the Supreme Court's admonition that the duty to give reasons relates to the existence and not the quality of the reasons marks a sharp departure from the interpretation of *Baker* that has become accepted wisdom in the Federal Courts and elsewhere. The Court in *Nurses' Union* held that:

> ... *Baker* stands for the proposition that "in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision (para. 43). It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness. …
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> 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. As Professor Philip Bryden has warned, "courts 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" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.*191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to Baker and Beyond", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).
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> It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.[13]

This passage marks an important shift away from the established interpretation of *Baker* evident from the myriad cases where courts have undertaken a review of the adequacy of reasons on the correctness standard as a matter of procedural fairness.[14] Dawson J's words in *Alexander v*

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[12] *Nurses' Union*, *supra* note 1 at para 14.

[13] *Ibid* at paras 20-22.

[14] *Clifford*, *supra* note 4; *Gichuru*, *supra* note 5; *College of Veterinarians of Ontario v Hanif*, 2011 ONSC 1155 at para 11, 277 OAC 1 (Div Ct); *Andryanov v Canada*

Canada (Solicitor General) are emblematic of the prevailing view prior to *Nurses' Union*: "The provision and adequacy of reasons is a matter of procedural fairness."[15] Post-*Nurses' Union*, it is only the provision – not the adequacy – of reasons which is a matter of procedural fairness.

How can we explain the Supreme Court's seemingly abrupt shift away from the established jurisprudence? One answer is that *Nurses' Union* represents a recalibration of *Baker* in light of *Dunsmuir*.

Although frequently cited for the proposition that the adequacy of reasons is an element of the duty of procedural fairness, *Baker* itself only provided that some reasons, not good reasons, could be required as part of the duty.[16] Soon after *Baker*, however, the Federal Court of Appeal supplemented the Supreme Court's decision and provided applicants for judicial review with the opportunity to challenge the adequacy of the reasons as a matter of fairness. In *Suresh v Canada (Minister of Citizenship and Immigration)*, the Court of Appeal held that:

> If, as was held in Baker, *supra*, the scribbled notes of an immigration officer can be deemed written reasons then so too can the memorandum submitted to the Minister in the present case. That being said, I do accept that the adequacy of those reasons is a matter which can be properly raised on a judicial review application to the extent that those reasons do not reflect consideration of relevant factors …[17]

This finding was quickly picked up by the Trial Division,[18] and the rest is (now overturned) history.

The development of the law appears to have been further complicated by the transplanting of jurisprudence on reasons from both criminal law

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(Minister of Citizenship and Immigration), 2007 FC 186 at para 15, 308 FTR 292; *Kanareitsev v TTC Insurance Co* (2008), 297 DLR (4th) 373 (Ont Div Ct) at para 23; *Boroumand v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1219 at para 64, [2008] 3 FCR 507; *Woods v Canada (Minister of Citizenship and Immigration)*, 2008 FC 262 at para 11, FCJ No 334 (QL); *Keqaj v Canada (Minister of Citizenship and Immigration)*, 2008 FC 388 at para 27, 71 Imm LR (3d) 269; *Masych v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1253 at para 29, FCJ No 1563 (QL); and *Ganem v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1147 at para 15, FCJ No 1404 (QL).

[15] 2005 FC 1147 at para 24, [2006] 2 FCR 681 (FC).

[16] See *Baker*, *supra* note 3 at para 43 and *Nurses' Union*, *supra* note 1 at para 20.

[17] [2000] 2 FCR 592 (CA) at para 55, rev'd on other grounds 2002 SCC 1, 1 SCR 3.

[18] *Ip v Canada (Minister of Citizenship and Immigration*) (2000), 4 Imm LR (3d) 77 (TD) at para 26; *Russell v Canada (Minister of Citizenship and Immigration)* (2000), 7 Imm LR (3d) 173 (TD) at para 16; and see subsequent cases cited *supra* at note 14.

and in the context of a statutory obligation to give reasons into the case law on reasons as a matter of administrative procedural fairness. In criminal law cases on the duty of a trial judge to give reasons and in cases involving a statutory duty to give reasons, courts have adopted a functional approach where the adequacy of reasons is evaluated by assessing the fulfillment of the purposes reasons serve.[19] A similar approach has often been applied by courts considering whether reasons adequately fulfill the duty of procedural fairness.[20] Conversely, *Nurses' Union* suggests that the positive effects of requiring reasons as a matter of fairness are the natural effect of a reasons requirement, not standards by which to assess whether reasons meet the duty of procedural fairness. By holding that *Baker* only relates to the provision of and not the quality of reasons, the Court in *Nurses' Union* implies that the positive effects of a procedural fairness reasons requirement – allowing an unsuccessful party to understand why they lost, assisting with review of the decision, assuring parties their submissions have been considered, encouraging well thought-out decisions, giving guidance to others who are subject to the decision maker's jurisdiction, and providing public accountability – are by-products rather than yardsticks.

The impetus behind this subtle but theoretically important clarification is *Dunsmuir*. *Dunsmuir* reasonableness assesses the fulfillment of all of the positive effects of reasons outlined in *Baker* and effectively transforms them into yardsticks under the new standard: a decision that is justified will be one that is well thought-out; a decision that is transparent will provide public accountability and assure parties their submissions have been considered; a decision that is intelligible will allow an unsuccessful party to know why they lost, assist with review, and give guidance to others subject to the decision maker's jurisdiction.

Before *Dunsmuir*, there was a fine line between assessing the adequacy of reasons (fairness) and assessing whether the reasons make sense (outcome). This line effectively disappeared with *Dunsmuir*, its all-encompassing trinity of justification, transparency, and intelligibility, and the explicit statement that these three hallmarks of reasonableness relate to

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19 In the criminal law context, see *R v Sheppard*, 2002 SCC 26, 1 SCR 869; *R v Braich*, 2002 SCC 27, 1 SCR 903; *R v Gagnon*, 2006 SCC 17, 1 SCR 621; *R v Dinardo*, 2008 SCC 24, 1 SCR 788; and *R v REM*, 2008 SCC 51, 3 SCR 3. In the context of a statutory obligation to give reasons, see *Northwestern Utilities Ltd v Edmonton (City)*, [1979] 1 SCR 684; *VIA Rail Canada v National Transportation Agency*, [2001] 2 FC 25 (CA), and *Canadian Assn of Broadcasters v Society of Composers, Authors and Music Publishers of Canada*, 2006 FCA 337, 354 NR 310.

20 *Clifford*, *supra* note 4 at paras 25-32; *Judd v Alberta (Energy Resources Conservation Board)*, 2011 ABCA 159 at paras 19-20, 513 AR 260; *Weekes (Litigation guardian) v Canada (Minister of Citizenship and Immigration)*, 2008 FC 293 at paras 11 and 24, 71 Imm LR (3d) 4.

the decision-making process and the process of articulating reasons.[21] *Dunsmuir* thus rendered the adequacy of reasons as an element of procedural fairness duplicative; this was duly noted by the decisions of the Federal Court, the Newfoundland and Labrador Court of Appeal, and others.[22] These decisions foretold the direction in which the law would move in *Nurses' Union*.

Looking forward, the decision in *Nurses' Union* has the potential to serve as the seed for the complete abandonment of reasons as an element of procedural fairness. Although the Court maintained the provision of reasons as a potential element of procedural fairness,[23] the broad interpretation of the reasonableness standard in *Nurses' Union* suggests that a procedural fairness analysis using the *Baker* factors to determine whether reasons are required is an increasingly redundant exercise. After all, if a decision is justified, transparent, and intelligible, can it be procedurally unfair due to a lack of reasons? If the answer is no, then maintaining reasons as an element of procedural fairness can only lead to practical redundancy and conceptual confusion – or, stated more charitably, practical redundancy for the sake of the conceptual purity of administrative law. Given that the *Dunsmuir* reasonableness standard can justify setting aside any decision that would have been set aside on fairness grounds due to a lack of reasons, it may be time to recognize that reasons as fairness are a superfluous appendage to Canadian administrative law. As stated by the majority of the Newfoundland and Labrador Court of Appeal in *Nurses' Union*, "A failure to give reasons … would be decisive in the reasonableness assessment."[24]

Perhaps counterintuitively, this further development would promote access to justice and would not impose any substantive restriction on aggrieved parties' judicial review arsenals. Courts already consider a party's ability to understand the decision under review in determining whether fairness requires reasons; entitlement to reasons, even as a matter of fairness, is not divorced from the context of the decision at issue.[25] As

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[21] *Dunsmuir*, *supra* note 2 at para 47.

[22] *Supra* notes 8-11; *Nurses' Union CA*, *supra* note 5 at para. 12.

[23] *Nurses' Union*, *supra* note 1 at para 22.

[24] *Nurses' Union CA*, *supra* note 5 at para 12.

[25] In *Gardner v Canada (Attorney General)*, 2005 FCA 284, 339 NR 91, the Federal Court of Appeal found that given the context of the impugned proceedings before the Canadian Human Rights Tribunal, the appellant should have been able to infer why the Tribunal dismissed her complaint, and that accordingly reasons for the Tribunal's decision were not required. At paras 28 and 30, the Court held:

> … If, as a result of an intimate involvement in the process leading to the decision, a person understands, or has the means to understand the reason for the decision, the

outlined above, a separate inquiry into whether reasons are required as a matter of fairness is a waste of time and resources which can only alter the theoretical, not substantive, outcome. Streamlining judicial deliberations by using one rather than two tools to accomplish the same task may be a helpful move towards creating the unburdened, efficient, and accessible system of administrative law envisaged in *Dunsmuir*. As Deschamps J wrote in her concurring opinion, "The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes."[26]

> duty to give reasons will vary accordingly. … It is, I believe, a fair inference that, in deciding that an inquiry was not warranted, the Commission preferred Treasury Board's view of the circumstances to Ms. Gardner's or the investigator's.

See also *Johnston v Canada (Attorney General)*, 2010 FC 348 at para 26, 5 Admin LR (5th) 171; and *Mavi*, *supra* note 7 at para 5, where the Supreme Court held that no reasons were required with respect to the enforcement of sponsorship debts for immigrants: "This is a purely administrative process. It is a matter of debt collection. There is no obligation on the government decision maker to give reasons. The existence of the debt is, in the context of this particular program, reason enough to proceed."

26 *Dunsmuir*, *supra* note 2 at para 158.