

## What is the applicable standard of review in assessing the adequacy of reasons?

By Shaun Fluker

### Cases Considered:

[\*Calgary \(City\) v Alberta \(Municipal Government Board\)\*](#), 2010 ABQB 719

This decision concerns an appeal by the City of Calgary from an order of the Municipal Government Board that set aside a business tax assessment on underground parking facilities owned by BTC Properties II in the downtown area. The *Municipal Government Act*, RSA 2000, c M-26 and applicable City bylaws provide that a business tax is assessable on those persons who operate a business in premises located in Calgary. The issue at the Municipal Government Board was essentially whether BTC is in the business of selling parking, and one particular item of dispute was whether the fact that BTC charges its tenants a separate and additional fee for parking space is decisive evidence that it is in the parking business. The Municipal Government Board concluded that BTC did not operate a parking business, and accordingly set aside the City's business tax assessment. The City was unsuccessful in seeking judicial review at the Court of Queen's Bench. One ground of appeal argued by the City was that the Board did not provide adequate reasons in its decision to set aside the tax assessment. My comment here focuses solely on this issue, and in particular examines the following question: What is the applicable standard of review to be applied by a reviewing court in assessing the adequacy of reasons provided by an administrative decision-maker? Madam Justice Romaine confirms that this issue is not settled law in Alberta (at para 42).

Historically, administrative decision-makers were legally obligated to provide reasons for their decision in only the most exceptional circumstances or where the decision was 'quasi-judicial' in nature. The Supreme Court of Canada significantly changed the common law on this point in 1999 with its decision in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. In that case, the Supreme Court ruled that an administrative decision-maker has a legal obligation to provide reasons for its decision where the decision has important significance to the affected person(s). By attaching the legal obligation to provide reasons on the basis of substance (the impact on the affected person) rather than form (the type of decision), the Supreme Court endorsed the importance of reasons in legitimizing the exercise of legal power. Reasons help the losing party understand why they lost and increase the likelihood that they will accept the result even if they do not agree with the decision.

I firmly agree with the view that an obligation to provide reasons for a decision fosters better decision-making and minimizes the likelihood of an arbitrary exercise of power. Having to explain why you have decided a certain way also constrains the choices available to you as a decision-maker because not all explanations will be viewed as legitimate in the eyes of the

recipient. Your desire to not appear arbitrary will constrain your decision to those outcomes that are defensible on credible grounds.

All of this however is premised on the assumption that a legal duty to provide reasons also includes a measure of adequacy in the explanation offered. The Supreme Court's 1999 *Baker* decision did not directly address whether the duty to provide reasons included a measure of adequacy. Subsequent jurisprudence did confirm that the obligation to provide reasons would not be satisfied merely by reciting the submissions and evidence of the parties and declaring a conclusion.

The jurisprudence confirms there is a measure of adequacy imbedded in the common law obligation to give reasons: A decision-maker must address the major issues, grapple with the substance of the dispute, and provide the affected person(s) with an understanding as to why the decision was made. The path taken by the decision-maker must be clear. (*Via Rail Canada v National Transportation Agency*, [2001] 2 FC 25 (CA); *Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670).

This legal obligation to provide adequate reasons was by and large considered to be an aspect of the common law duty of procedural fairness, first considered by the Supreme Court in *Baker* and subsequently refined in later jurisprudence. The applicable standard of review applied by a reviewing court on procedural matters is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9). In other words, no deference is owed by a reviewing court to procedural choices made by an administrative decision-maker.

Some commentators had observed, however, a fine line between (1) reviewing the adequacy of reasons on a procedural basis and (2) reviewing the merits of the substantive decision. In other words, the finding of inadequate reasons is arguably just another manner of asserting the decision itself is unreasonable in substance.

This blurring of procedural and substantive grounds for review was elevated as an issue in law when the Supreme Court redefined the characteristics of a reasonable decision in its 2008 decision in *Dunsmuir*. The Supreme Court described the reasonableness standard of review applicable in reviewing the merit of a decision as follows:

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. (at para 47)

The *Dunsmuir* decision specifically incorporates the process of giving reasons into the deferential reasonableness standard of review. The obvious difficulty for the law here is the clash between reviewing the adequacy of reasons on a correctness standard under procedural fairness versus reviewing the process of articulating the reasons on a reasonableness standard under substantive review.

Appellate courts in Canada are divided on how to reconcile this issue. Madam Justice Romaine properly observes that the appellate courts in Ontario and Newfoundland have taken contrasting

positions (at paras 36-44). The Ontario Court of Appeal has ruled it is possible to differentiate the procedural and substantive approaches to reviewing the adequacy of reasons:

[I]t is important to differentiate the task of assessing the adequacy of reasons given by an administrative tribunal from the task of assessing the substantive decision made. A challenge on judicial review to the sufficiency of reasons is a challenge to an aspect of the procedure used by the tribunal. The court must assess the reasons from a functional perspective to see if the basis for the decision is intelligible.

This is to be distinguished from a challenge on judicial review to the outcome reached by the tribunal. That may require the court to examine not only the decision but the reasoning offered in support of it from a substantive perspective. Depending on the applicable standard of review, the court must determine whether the outcome and the reasoning supporting it are reasonable or correct. That is a very different task from assessing the sufficiency of the reasons in a functional sense. (*Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670 at paras 31, 32, emphasis in original)

The Newfoundland Court of Appeal has subsequently observed this differentiation to be “an unnecessary and unhelpful complication”, in ruling that the adequacy of reasons is subsumed into a review of the substance of the administrative decision under the *Dunsmuir* framework noted above. According to the Newfoundland Court of Appeal:

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. (*Newfoundland and Labrador (Treasury Board) v Newfoundland and Labrador Nurses' Union*, 2010 NLCA 13 at para 12)

The Supreme Court of Canada has granted leave to appeal this decision.

When the Supreme Court deliberates on this appeal I believe the majority of the Court will decide that reviewing the adequacy of reasons provided by an administrative decision-maker falls under substantive judicial review as the first branch of applying the standard of reasonableness under *Dunsmuir*. I hold this view on 4 grounds:

1. There is no workable distinction between assessing adequacy of reasons on a procedural basis and a substantive basis. The Ontario Court of Appeal’s attempt to distinguish a functional approach from a substantive approach is not convincing;
2. Any attempt to maintain this distinction is not just unconvincing it is actually detrimental to the integrity of judicial review. On a procedural review of the adequacy of the reasons offered by the decision-maker, the reviewing court must apply correctness and ask itself how it would explain this decision. This is completely unworkable with having to then show deference to the justification provided by the decision-maker under the reasonableness standard of review on the merits of the decision (except in cases where the standard of review selected to review the merits of the administrative decision is correctness);

3. The courts have consistently ruled that an assessment on the adequacy of reasons has to be undertaken in the specific context of the decision in question. As a contextual exercise, this assessment resembles a deferential review much more than a correctness review;
4. In the seminal *Baker* decision the inadequacy of the reasons provided by the Minister in that case led to the Supreme Court's ruling that the Minister's discretionary decision not to grant humanitarian and compassionate relief to Mavis Baker was unreasonable. In other words the legal obligation to provide adequate reasons was initially a component of substantive judicial review and the upcoming appeal will simply provide the Supreme Court with an opportunity to confirm this.