

Giving deference to the adequacy of reasons

By Shaun Fluker

Cases Considered:

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), [2011 SCC 62](#)

Earlier this month the Supreme Court of Canada issued its decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, upholding the ruling of an arbitrator concerning vacation entitlements in a labour dispute. This unanimous Supreme Court of Canada decision written by Madam Justice Abella has changed the law in Alberta governing judicial review for adequacy of reasons provided by an administrative decision-maker. For earlier commentary and background for this post, readers should review my December 2010 ABlawg entitled "[What is the applicable standard of review in assessing the adequacy of reasons?](#)" The issue concerns the measure of judicial deference owed to an administrative decision-maker in reviewing the adequacy of reasons given for decision.

In this decision the Supreme Court of Canada has ruled 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 v New Brunswick*, 2008 SCC 9. A reviewing court owes deference to the adequacy of reasons provided by an administrative decision-maker.

This decision overrules a line of authority that held the adequacy of reasons is a component of the procedural fairness obligation placed on an administrative decision-maker. As a matter of procedural fairness, a reviewing court would owe no deference to the administrative decision-maker in reviewing the adequacy of its reasons. The Alberta Court of Appeal (*Sussman v College of Alberta Psychologists*, 2010 ABCA 300 at paras 39-40 and *Spinks v Alberta (Law Enforcement Review Board)*, 2011 ABCA 162 at paras 12-28) and the Ontario Court of Appeal (*Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670 at paras 31-32) had ruled no deference was owed in a functional review of reasons wherein a reviewing court assessed the logical path taken by the administrative decision-maker, and that this functional review of reasons is distinct from a substantive review of the administrative decision itself.

But there is a fine line between reviewing the adequacy of reasons on a procedural or functional basis and reviewing the merits of the substantive decision itself, so the amount of distinction between the two is subject to debate. Some would question whether it is even possible to distinguish between the sufficiency of reasons given for a decision and the reasonableness of the outcome. Can a reasonable decision result from inadequate reasons? Or conversely, can adequate reasons produce an unreasonable outcome? And is it coherent to have the same set of reasons reviewed under different standards of review: no deference for a functional review of

reasons under procedural fairness and deference for a substantive review of the reasons as an outcome? Does this satisfy the simplifying aspirations of *Dunsmuir* for Canadian judicial review?

I presented these questions to my Administrative Law class this past semester here at the Faculty of Law. I argued there is no workable distinction between assessing the adequacy of reasons given on a procedural or functional basis and assessing the substance of the outcome. The essence of my position was that adequacy of reasons should be considered as a substantive matter. My position was challenged by some students who argued decisions like *Clifford* or *Spinks* properly differentiated a review of reasons between procedural fairness and substantive review. One student put it to me this way:

To my mind, although the kinds of questions we ask during both a procedural and substantive analysis of reasons appear similar, we can still differentiate our answers to those questions by keeping in mind notions of function and substance. A functional analysis may conclude "I can follow your line of reasoning to go from A to B" and a substantive analysis may conclude "I find that in going from A to B your decision is unreasonable." In other words, reasons could be functionally sufficient to see how a tribunal got from beginning (A) to end (B), yet the decision itself could be substantively unreasonable. (Peter Ewanchuk JD 2013)

The Supreme Court of Canada has I think put an end to this debate of process versus substance by ruling that deficiencies in the adequacy of reasons should be reviewed as a substantive matter under the deferential reasonableness standard of review. The quality of reasons given for decision is not a matter of procedural fairness (at paras 20-22). This is a significant change in the law that will require the Alberta Court of Appeal and the Ontario Court of Appeal to revisit this issue in the near future.

So then what remains of reasons as a component of procedural fairness? Madam Justice Abella reminds us that the complete absence of reasons in a case where there is a legal obligation to give reasons will offend the doctrine of procedural fairness as per *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. But if it is only a complete absence of reasons that contravenes procedural fairness, then it follows that simply having a reason for a decision should satisfy an obligation of procedural fairness owed by an administrative decision-maker.

While adequacy of reasons has found its proper home in substantive judicial review, something tells me this is not the last word from the Supreme Court on principles of judicial review concerning the adequacy of reasons given by an administrative decision-maker. That 'something' is the fundamental role that reasoning performs in legitimizing the authority of law. Judicial review is about upholding the rule of law, and just 'any reason' is not an acceptable threshold to justify the force of law implemented by an administrative decision-maker on those persons subject to its authority. The rule of law requires a certain measure of adequacy in reasons given for decision, and at times it will be very difficult for a reviewing court to show deference to an administrative decision-maker that has simply given a reason for its decision.