Reasons Review by the Courts: Rise, Fall and Rise Again?

2017 SOAR Annual Conference
Exploring Justice: An Experiential Journey

November 2, 2017

Chestnut Conference Centre
Toronto, ON

Raj Anand
4100 - 66 Wellington Street West
TD Bank Tower
Toronto, ON M5K 1B7
(416) 947-5091 / ranand@weirfoulds.com

ACT ONE: THE RISE

- *Dunsmuir v New Brunswick* 2008 SCC 9
  - Reasonableness v correctness
  - Reasoning must exhibit "justification, transparency and intelligibility"
- *Clifford v Ontario (Attorney General)* 2009 ONCA 670
  - Where a tribunal has an obligation to give reasons, the proper standard for whether this legal obligation has been complied with is correctness.
- *Law Society of Upper Canada v Neinstein* 2010 ONCA 193
  - Reasons must allow the Court to understand why the decision maker came to their conclusion

ACT TWO: SUPREME COURT INTERPRETATION
NLNU v Newfoundland and Labrador ("Newfoundland Nurses") 2011 SCC 62

- Reasons and outcome should be examined as a single contextual analysis
- As a whole, does the decision meet the standard of reasonableness?
- Are reasons required?
  - Administrative decision makers need not always provide detailed reasons, or any reasons at all, if the decision is reasonable.
- Where reasons are required:
  - Reasons don't have to include every issue and detail. A decision maker does not have to make an explicit finding on each element.

WeirFoulds

Newfoundland Nurses cont'd
2011 SCC 62

- Looking beyond the *reasons given*, to the reasons that *could have* been given.
  - Professor Dyzenhaus: the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision".
  - "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, *the court must first seek to supplement them before it seeks to subvert them*. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.]

(David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

Is procedural fairness breached where there is a failure to give adequate reasons?

- Abella, J. in *Newfoundland Nurses*
  - There is only a breach of procedural fairness where reasons are required and there are no reasons to review (i.e. they are completely missing)

- *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47
  - " When procedural fairness requires a tribunal to provide some form of reasons, a complete failure to do so will amount to an error of law"
  - Where tribunal's failure to give reasons does not breach procedural fairness, the court may consider reasons "which could have been offered"
  - The Board was not required to provide reasons on a certain issue because the the party expressly conceded the point:
    - "Parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons" (*Alberta Teachers'*, at para. 54). Accordingly, I shall review the Board's decision in light of the reasons which *could be* offered in support of it."

WeirFoulds

Correctness Standard for Procedural Fairness

In general, the Ontario and Federal courts have followed the principle set out in *Newfoundland Nurses:*

- procedural fairness will only be breached where there was a requirement to provide reasons, and no reasons were given.

Ontario:

- *Reid v College of Chiropractors of Ontario*, 2016 ONSC 1041
  - The Appellant argued that the Panel breached its duty of procedural fairness by providing insufficient reasons.
  - "Even if there are insufficiencies, … , the adequacy of reasons is not a stand-alone ground for overturning a decision."

WeirFoulds

Correctness Standard for Procedural Fairness cont'd

- *Figueiras v York Police Services Board*, 2013 ONSC 7419
  - Circumstances dictated that procedural fairness would require the Board to provide some reasons
  - No reasons were given:
    - "It is important to note that this is not a case where the reasons given were inadequate. There were no reasons."

Federal:

- *Cycles Lambert Inc v President of the Canada Border Services Agency*, 2015 FCA 45
  - "the issue with respect to the CITT's reasons is ... more properly one of the adequacy of those reasons."

SCC Decisions
Post – *Newfoundland Nurses*

- *ATA v Alberta (Information and Privacy Commission)*, 2011 SCC 61
  - Where a reviewing court cannot adequately show deference without reasons, they may send the issue back to the tribunal to provide reasons
  - However, where a reasonable basis for the decision is apparent to the reviewing court the decision should simply be upheld as reasonable.
- *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36
  - The minister's implied interpretation was reasonable and the decision as a whole was valid.
- *Kathasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61
  - Majority :
    - Officer's decision was unreasonable. The court held that the officer did not turn her mind to a number of significant issues and the matter should be remitted for reconsideration in light of these factors.
  - Dissent:
    - Decision fell within the range of possible acceptable outcomes. The majority resolved ambiguities against the officer and reweighed the evidence.

SCC Decisions Post – *Newfoundland Nurses* (cont'd)

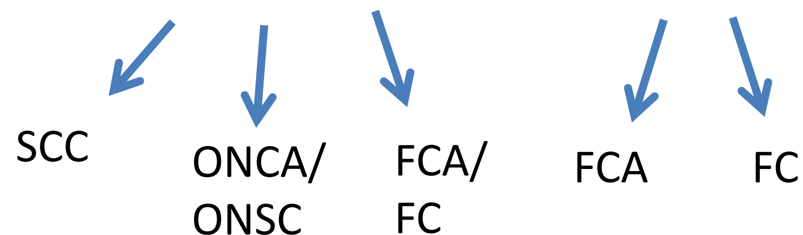
- *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47
  - The Board was not required to provide reasons.
  - Court reviewed the Board's reasons *in light of reasons which could have been used* to support its decision to determine that the decision was reasonable.

- *Canada Attorney General v Igloo Vikski Inc*, 2016 SCC 38
  - The reasons lacked clarity however the decision was reasonable because it allowed "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".

ACT THREE: LOWER COURTS Post- *Newfoundland Nurses*

- Two trends
  - "followers" v "resistors"
  - "inadequate" v "unreasonable"

"followers" v "resistors"



WeirFoulds

Federal Court and FCA

- Followers:
- *Maple Lodge Farms Ltd v Canadian Food Inspection Agency*, 2017 FCA 45
  - While the tribunal's reasons on some issues were not "a model of clarity, precision or concision" the reasons along with the record were sufficient to support the tribunal's decision. The FCA held that reasons "do not run afoul of the principles in *Newfoundland Nurses*".
  - The FCA cited *Newfoundland Nurses* for the proposition that:
    - "A administrative decision maker that does not refer to evidence cannot be taken to have ignored that evidence".
- *Canada (Attorney General) v Grant*, 2017 FCA 10
  - The reasons were sufficient and the decision was reasonable. When fairly read, the reasons showed that the Board turned their mind to the issues. When assessing and considering the reasons, portions of the reasons cannot be read in isolation from the rest of the reasons.
- *Chirum v Canada (Minister of Citizenship and Immigration)*, 2017 FC 101
  - The reasons and the record were sufficient to support the decision
  - *Newfoundland Nurses* established that adequacy of reasons could not be a stand-alone basis for quashing a decision.
  - The FC held that in this case given the record, more reasons were not necessary.

Federal Court and FCA (cont'd)

- Resistors:
- *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431
  - "*Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page".

Federal Court and FCA (cont'd)

- *D'Errico v Canada (Attorney General)*, 2014 FCA 95
  - Cites *ATA v Alberta*:
    - "the power to uphold an outcome is not a 'carte blanche' to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result."
  - Distinguishes *Newfoundland Nurses*
    - "It is one thing for an administrative decision-maker to issue sparse reasons to sophisticated parties who regularly engage in labour arbitration and, thus, are familiar with the legal and factual landscape. It is quite another to issue adverse reasons of this sort to a person like Ms. D'Errico, on a record that calls for explanation."

- *2251723 Ontario Inc (VMEDIA) v Rogers Media Inc*, 2017 FCA 186
  - The reasons were not sufficient to explain why or how the Commission came to their decision.
  - Without a reasonable explanation for its decision, the court could not find that the decision was reasonable.

Ontario Courts

- Have not generally departed from the SCC's ruling in *Newfoundland Nurses.*
- *Asa v University Health Network*, 2017 ONSC 4287
  - The applicant's assertion that the court cannot supplement the reasons to assess reasonableness is contrary to *Newfoundland Nurses.* The reasons along with the record were sufficient.
- But see *Wall v IPRD*, 2014 ONCA 884
  - Unclear what standard of review was applied.

    "I would not go so far as to say the letter falls into the "no reasons at all" category. But it comes close. I do not think it matters to the reasons analysis, however, because the same factors emphasized by the Court in stating that the letter constituted "no reasons" also undermine the adequacy of the reasons."

WeirFoulds

QUESTIONS?

©2017 WeirFoulds LLP