JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN CANADA

BY

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VOLUME 2
The identity of the person or body exercising the power may also be a significant indicator of the breadth of the statutory grant of discretion. For example, courts are apt to infer from a grant of discretion to a Cabinet that wide considerations of public policy may be taken into account in its exercise. Thus, in deciding whether to uphold, vary or reverse a decision of the CRTC, it has been said that the Governor-in-Council may take into account virtually any matter that pertains to public convenience and general policy. Similarly, powers exercisable by Ministers are likely to be construed more generously than, say, those conferred on bodies that are not politically accountable through the legislature. And on the basis that their members are democratically elected and politically accountable to the electorate, a broad and purposive approach is taken with regard to the construction of municipalities' powers.

The impact of an exercise of discretion on individuals is also relevant to the courts' assessment of the breadth of the power in question. Powers that are capable of seriously affecting significant rights of individuals, including, for instance, property rights and the right to pursue a trade or vocation, are apt to be construed more narrowly than those that do not. Conversely, discretionary actions based on broad considerations of public policy, and which affect the public at large, are less likely to attract the same degree of scrutiny from the courts.

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12 National Anti-Poverty Organization v. Canada (Attorney General), [1989] 3 F.C. 684 (FCA), leave to appeal to SCC ref'd (1989), 105 N.R. 160(a); Compare Gitxsan Nation v. R., 2016 FCA 187 (Order in Council approving report on Gateway Pipeline project quashed and remitted to GIC as inadequate consultation had taken place). See also topic 15:2120, post.


15 New Brunswick (Minister of Education) v. Kennedy, 2015 NBCA 58 at para. 65.
that the result was not supported by the evidence.\textsuperscript{235} In \textit{Lake v. Ontario (Minister of Justice)},\textsuperscript{236} the Court sought to give reasonableness a uniform meaning, by referencing the content and meaning given to it in \textit{Dunsmuir}.\textsuperscript{237}

\textbf{15:2424} \textit{Alberta Teachers' Association and Agraira}

Beginning with \textit{Alberta Teachers'},\textsuperscript{238} the Court has effectively erased the distinction of a “true question of jurisdiction” in relation to an administrator’s interpretation and application of its home legislation, by creating a presumption that the standard of review is to be “reasonableness”.\textsuperscript{239} And in \textit{Agraira},\textsuperscript{240} the Court confirmed that the presumption applied to all types of administrative decision-making, not only adjudicative ones.\textsuperscript{241}

\textbf{15:2430} \textit{Review for Reasonableness}

\textbf{15:2431} \textit{The Reasonableness Standard}

Reasonableness as a standard of review of non-adjudicative administrative action is now firmly established in relation to the

\begin{itemize}
\item [\textsuperscript{235}] \textit{Suresh v. Canada (Minister of Citizenship and Immigration)}, [2002] 1 S.C.R. 3 at para. 41.
\item [\textsuperscript{236}] \textit{Lake v. Canada (Minister of Justice)}, 2008 SCC 23 at para. 34.
\item [\textsuperscript{237}] \textit{New Brunswick (Board of Management) v. Dunsmuir}, 2008 SCC 9.
\item [\textsuperscript{238}] \textit{A.T.A. v. Alberta (Information & Privacy Commissioner)}, 2011 SCC 61.
\item [\textsuperscript{239}] \textit{A.T.A. v. Alberta (Information & Privacy Commissioner)}, 2011 SCC 61 at paras. 34-42.
\item [\textsuperscript{240}] \textit{Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)}, 2013 SCC 36 at para. 60. See also \textit{British Columbia (Securities Commission) v. McLean}, 2013 SCC 67 at para. 21; \textit{France (Republic) v. Diab}, 2014 ONCA 374 at para. 154 (burden of displacing presumption will rarely be met).
\item [\textsuperscript{241}] \textit{Kandola (Guardian at Law) v. Canada (Minister of Citizenship and Immigration)}, 2014 FCA 85 at paras. 40 and 86, concluding that \textit{Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)}, 2013 SCC 36 made the presumption of reasonableness applicable to all administrative action. See also \textit{Adventure Tours Inc. v. St. John's Port Authority}, 2014 FC 420 at paras. 20-21; \textit{Greenpeace Canada v. Canada (Attorney General)}, 2014 FC 463 at para. 27; \textit{Western Canada Wilderness Committee v. British Columbia (Minister of Forests Lands and Natural Resource Operations)}, 2014 BCSC 808 at paras. 45-52.
\end{itemize}
exercise of discretion, \(^{242}\) apart altogether from review for bad faith or arbitrariness, \(^{243}\) which have been said to be instances of unreasonableness. \(^{244}\) Although the degree of deference accorded in assessing unreasonableness may vary depending upon context, \(^{245}\) the approach to determining the standard of review outlined in *Dunsmuir* in connection with review of adjudicative decisions applies equally to review of non-adjudicative decisions. \(^{246}\) So although deference is not to be accorded to questions of *vires* and fairness, \(^{247}\) it may be appropriate in connection with review of the exercise of discretion. \(^{248}\) In that regard, the standard of review of reasonableness has been described in these terms:

Reasonableness is a single standard that takes its colour from the context. One of the objectives of Dunsmuir was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit


\(^{243}\) Compare *Quebec (Attorney General) v. Germain Blanchard Ltée* (2005), 52 Admin. L.R. (4th) 1 (Que. C.A.) at para. 64 (intervention only where a ministerial discretionary decision is "arbitrary, unjust or irrational").

\(^{244}\) *Malcolm v. Canada (Minister of Fisheries and Oceans)*, 2014 FCA 130 at para. 35.

\(^{245}\) *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 9 at para. 59.


\(^{247}\) E.g. *Lim v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 217 at para. 12.

comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome. 249

15:2432 The Standard Applied

Following a standard-of-review analysis, reasonableness has invariably been found to be the appropriate standard of review of non-adjudicative discretionary administrative action, 250 unless established by past authority, 251 or where legislation has expressly established the standard of review. 252

Accordingly, a refusal to licence a body rub parlour on grounds that it did not comply with zoning was held to be reasonable. 253 As well, a discretionary decision as to whether an institution should be recognized for the purpose of student aid was reviewable by the standard of

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