

CARSWELL

**JUDICIAL REVIEW OF
ADMINISTRATIVE ACTION
IN CANADA**

BY

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15:1212 *The Person or Body Exercising the Power*

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.¹² 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.¹³ 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.¹⁴

15:1213 *The Impact of the Administrative Action*

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.¹⁵

ment) (2001), 204 F.T.R. 161 (FCTD) (decision to refer project for environmental review not supported by valid head of federal power, so was *ultra vires*).

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(n); *Compare Gitxaala 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*.

¹³ See e.g. *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24; *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans)*, [1997] 1 S.C.R. 12. See also *Peace Valley Landowner Assn. v. British Columbia (Minister of Environment)*, 2016 BCCA 377 at para. 29; *Mitchell v. Canada (Attorney General)* (1999), 15 Admin. L.R. (3d) 70 (Nfld. S.C.).

¹⁴ *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 at para. 6. *Compare Rocky Point Metalcraft Ltd. v. Cowichan Valley (Regional District)*, 2012 BCSC 756 at para. 29. And see topic 15:3230, *post*.

¹⁵ *New Brunswick (Minister of Education) v. Kennedy*, 2015 NBCA 58 at para. 65.

that the result was not supported by the evidence.²³⁵

In *Lake v. Ontario (Minister of Justice)*,²³⁶ the Court sought to give reasonableness a uniform meaning, by referencing the content and meaning given to it in *Dunsmuir*.²³⁷

15:2424 *Alberta Teachers' Association and Agraira*

Beginning with *Alberta Teachers'*,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".²³⁹ And in *Agraira*,²⁴⁰ the Court confirmed that the presumption applied to all types of administrative decision-making, not only adjudicative ones.²⁴¹

15:2430 *Review for Reasonableness*

15:2431 *The Reasonableness Standard*

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

grounds).

²³⁵ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 41.

²³⁶ *Lake v. Canada (Minister of Justice)*, 2008 SCC 23 at para. 34.

²³⁷ *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9.

²³⁸ *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61.

²³⁹ *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at paras. 34-42.

²⁴⁰ *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 50. See also *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 at para. 21; *France (Republic) v. Diab*, 2014 ONCA 374 at para. 154 (burden of displacing presumption will rarely be met).

²⁴¹ *Kandola (Guardian at Law) v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 85 at paras. 40 and 86, concluding that *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 *Adventure Tours Inc. v. St. John's Port Authority*, 2014 FC 420 at paras. 20-21; *Greenpeace Canada v. Canada (Attorney General)*, 2014 FC 463 at para. 27; *Western Canada Wilderness Committee v. British Columbia (Minister of Forests Lands and Natural Resource Operations)*, 2014 BCSC 808 at paras. 45-52.

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

²⁴² E.g. *Chamberlain v. Surrey School District No. 36* (2002), 221 D.L.R. (4th) 156 (SCC), where the Court applied a standard of reasonableness to a school board's resolution denying approval for certain reading materials. And see topics 15:3311, 15:3321, *post*.

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.

²⁴⁶ E.g. *Delpont Realty Ltd. v. Nova Scotia (Registrar General of Service)*, 2013 NSSC 287 at paras. 8-9 (standards of review of Registrar had been determined in prior decision). Compare *Atlantic Industrial Services v. R.*, 2014 FC 775 (where review of environmental officer's actions is by way of an appeal, appellate standards of review apply). And see topic 14:2000, *ante*.

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

²⁴⁸ E.g. *Thep-Outhainthany v. Canada (Attorney General)*, 2013 FC 59 at para. 18 (denial of security clearance); *Bear Hills Charitable Foundation v. Alberta (Gaming and Liquor Commission)* (2008), 89 Admin. L.R. (4th) 275 (Alta. Q.B.) (extension of time-limits in granting casino licence). See also *3L Developments Inc. v. Comox Valley Regional District*, 2015 BCSC 738 at para. 31 (process leading to refusal to amend development plan unreasonable), *aff'd* 2016 BCCA 148.

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

²⁴⁹ *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59. See also *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at paras 18-9 (review of reasonableness of municipal bylaw).

²⁵⁰ Although this conclusion is most often arrived at directly, in some instances it is achieved by first classifying the administrative action as giving rise to a question of mixed fact and law: *Skobodzinska v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 887. As to the standard of reasonableness in the context of municipal bylaws, see topic 15:3311, *post*.

²⁵¹ E.g. *Marte v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 155 (humanitarian and compassionate standard is reasonableness; here, decision unreasonable due to compound factual errors and ignoring of relevant evidence); *Kablawi v. Canada (Minister of Public Safety and Emergency Preparedness)* (2008), 333 F.T.R. 300 (FC) (inadmissibility due to involvement with violent organizations) at para. 10; *Guadeloupe v. Canada (Minister of Citizenship and Immigration)* (2008), 75 Imm. L.R. (3d) 102 (FC) (humanitarian and compassionate decision); *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 646 at paras. 10ff (*Baker* established that a “humanitarian and compassionate grounds” decision by an officer is reviewable for reasonableness *simpliciter*, which, following *Dunsmuir*, is reasonableness as defined in that case). See also e.g. *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, 2007 FC 955 at para. 135 (review of federal environmental decision), rev’d on other grounds [2009] 2 F.C.R. 21 (FCA), rev’d on other grounds [2010] 1 S.C.R. 6; *Rai v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1338; *Laban v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 661 at para. 26 (failure to give sufficient consideration to best interests of children).

²⁵² E.g. *Denisov v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 550 at para. 9 (application of the standard contained in s. 18.1(4)(d) of the *Federal Courts Act*).

²⁵³ *1673233 Ontario Inc. (c.o.b. Eurohaven Spa) v. Brampton (City)*, [2008] O.J. No. 4983.