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"ADEQUACY OF REASONS" IN A STATE OF FLUX

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Recent case law reveals a degree of uncertainty concerning the proper approach that courts must follow when assessing the adequacy of a Tribunal's reasons. As I will explain in the first section of this paper, I believe that this uncertainty may arise from the overlap between (1) The duty to provide adequate reasons as an element of procedural fairness; (2) Adequate reasons as set out by the Supreme Court in the criminal law context; and (3) Adequacy of reasons in the administrative law context, and its overlap with qualities of a reasonable tribunal decision (the *Dunsmuir* Reasonableness Test[1]). I will review the relevant jurisprudence in these three areas, set out the various overlaps and attempt to explain the confusion.

With this context in mind, the second part of this paper will discuss the current disagreement in case law as to whether adequacy of reasons is a question of procedural fairness to be determined through a separate functional analysis, and differentiated from an assessment of the reasons provided from a substantive perspective in accordance with *Dunsmuir*'s Reasonableness Test. As will be discussed, whereas the Ontario Court of Appeal in *Clifford* v. *Ontario Municipal Employees Retirement System*[2] held that such a two-step approach was required, the Supreme Court of Newfoundland and Laborador Court of Appeal[3] has disagreed, finding that adequacy of reasons constitutes a component of the reasonableness assessment, and "a separate examination of procedural fairness is an unnecessary and unhelpful complication"[4].

A. Procedural Fairness, Adequacy of Reasons and Administrative Decision-making: the Overlaps and the Confusion

1. Duty to Provide Reasons as an Element of Procedural Fairness:

[1] *Dunsmuir* v. *New Brunswick* [2008] 1 S.C.R. 190; [2008] S.C.J. No. 9. The following test set out by the Court in para 47 of the decision will be referred to in this paper as the "*Dunsmuir* Reasonableness Test":
"The 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."
[2] 2009 ONCA 670 [hereinafter *Clifford*].
[3] *Newfoundland and Laborador v. Newfoundland and Laborador Nurses' Union*, 2010 NLCA 13. Leave to appeal has now been granted to the Supreme Court of Canada in this case
[4] *Ibid.* at para 12.

Procedural fairness "is a cornerstone of modern Canadian administrative law"[5]. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual[6]. At common law, this duty did not generally include the obligation to provide reasons by statutory decision makers, unless it was required by statue. The absence of this duty may be related to the "longstanding common law principle that an appeal is based on the judgment of the court, not on the reasons provided to explain or justify that judgment"[7].

However, the law evolved when in *Baker* v. *Canada* (*Minister of Citizenship and Immigration*)[8], the Supreme Court recognized that in certain circumstances, the duty of procedural fairness requires a Tribunal to provide written reasons. Justice L'Heureux-Dube J. stated[9]:

> In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere … It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached. (Emphasis Added)

In determining whether an obligation to give reasons applies, in a particular case, the court must consider the following factors:

(1) The nature of the decision;
(2) The nature of the legislative provision and statutory scheme as a whole under which the decision is made;
(3) The importance of the decision to the individual affected;
(4) The legitimate expectations of the person challenging the decision; and,
(5) The choice of the procedures made by the decision-making agency.

It is important to keep in mind that the duty to provide reasons for a decision has developed as an element of procedural fairness and is grounded in the individual's right to be heard (through an independent and impartial hearing). To achieve this, duty of fairness requires transparent decisions as well as meaningful participation by the individual whose rights are affected:

> "… the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context with an opportunity for those affected by the decision to put forward their views and evidence and have them considered by the decision-maker";
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> "… at the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly"[10] (Emphasis Added).

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[5] *Dunsmuir*, *supra* note 1, at 79.
[6] *Baker* v. *Canada* (*Minister of Citizenship and Immigration*) [1999] 2 S.C.R. 817 [hereinafter *Baker*].
[7] *R v. R.E.M.* [2008] 3 S.C.R. 3 [hereinafter *R.E.M.*].
[8] *Supra* note 6.
[9] *Ibid.* at para 43.
[10] *Ibid* at para 22 & 30.

However, the duty of fairness is also flexible and contextual:

> … the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected …[11].
>
> … all of the circumstances must be considered in order to determine the content of the duty of procedural fairness[12]. (Emphasis Added)

While in *Baker* the Court did not explicitly discuss whether the duty to provide reasons included a measure of adequacy, it held that reasons had to be "well-articulated" and "carefully thought out," allowing the parties "to see that the applicable issues have been carefully considered", which are "invaluable if a decision is to be appealed, questioned, or considered on judicial review"[13]. However, in *Baker*, the Supreme Court also acknowledged that in recognition of the varied day-to-day realities of administrative agencies, the reviewing court must use flexibility in determining what constitutes sufficient reasons to meet this obligation[14].

2. Adequacy of Reasons in the Criminal Law Context:

In determining what is required for reasons to meet the requirements of adequacy and fairness, administrative law has largely borrowed from the legal principles that have emerged in the context of the court system and criminal law[15]. However, "there is seldom unanimity in the Supreme Court on this issue" and "reasonable minds applying the same principles are reaching different results"[16].

One of the first significant cases on adequacy of reasons was *R* v. *Sheppard,*[17] where the Supreme Court set out the following purposes[18]; (1) Providing the losing party reasons in order to determine grounds for appeal; (2) Allowing the public to know the reasons for the way the case was decided; and, holding courts accountable.

However, a number of the Supreme Court's more recent cases concerning adequacy of reasons in the criminal law context tend to emphasize the need for a practical and functional approach to the review of adequacy of reasons, focusing on whether the reasons permit meaningful appellate review[19].

The most recent case concerning adequacy of reasons decided by the Supreme Court is *R. v. R.E.M.*[20] where the Court reviewed the relevant case law and set out the following test for sufficiency of reasons:

> (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered …

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[11] *Ibid.* at para 22.
[12] *Ibid.* at para 21.
[13] *Ibid.*at para 39.
[14] *Ibid.*at para 44.
[15] Justice D. Stratas, J.A. "Decision-makers Under New Scrutiny: Sufficiency of Reasons and Timely Decision-Making," Presented at the CIAJ Roundtable. Toronto, Ontario, May 3, 2010, at 2 [Hereinafter *Stratas*].
[16] *Ibid.* at 3.
[17] [2002] 1 S.C.R. 869.
[18] Para 55(8); para 24; para 15.
[19] *Stratas*, *supra* note 15 at 8.
[20] *Supra* note 7 at 11.

(2) The basis for the trial judge's verdict must be 'intelligible' or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.

(3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of the counsel and the history of the trial to determine the 'live' issues as they emerged during the trial.

3. Reasons in the Context of Administrative Proceedings:

a. Adequacy of Administrative Decision-maker's reason

In *Clifford v. Ontario Municipal Employees Retirement System*[21], the Ontario Court of Appeal applied the principles set out by the Supreme Court in *R.E.M.* in the context of administrative law. Firstly, where reasons are legally required, its sufficiency must be assessed "functionally"[22], such that:

(1) The individual whose rights privileges or interests are affected knows why the decision was made;
(2) It allows for effective judicial review;
(3) Reasons read in contexts sets out why the tribunal decided as it did;
(4) Basis of the decision is explained, and the explanation provided is logically linked to the decision made, setting out the path to the conclusion reached.

Secondly, a review of sufficiency must determine whether the Tribunal "grappled with the substance of the matter", considering the live issues in the proceeding, the context of the record, and the circumstances of the particular case[23].

However, when assessing adequacy of reasons in the administrative law context, the Court in *Clifford* recognized the need to keep in mind the day to day realities of administrative law tribunals[24]. Not all the decision-makers in such agencies are lawyers and the language they use may fall short of "legal perfection". As long as there is "an intelligible basis for the decision" this will not render the reasons insufficient[25].

A review of jurisprudence in the administrative law context reveals a number of trends and observations with respect to adequacy of reasons[26]. First of all, few courts recognize that administrative tribunals are different from courts. Moreover, instead of grounding the duty to provide reasons in *Baker*, many cases have drawn on the principles concerning adequacy of reason emerging from criminal cases, without taking into account considerations such as fairness, efficiency and accessible justice. Finally, while courts correctly state the test for adequacy of reasons (allowing the party to know why claim failed and allow him/her to decide whether to seek leave for judicial review), there is a lack of consistency in the application of this test, with some cases imposing more detailed and demanding requirements.

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[21] *Supra* note 2.
[22] At para 29-32.
[23] *Ibid. R.E.M. supra* note 7 at para 43; *Clifford, supra* note 2 at para 30.
[24] *Supra* note 2, at para 43.
[25] *Ibid.*
[26] *Stratas, supra* note 15, at 18-21.

As Justice Stratas has pointed out, there is currently no unifying principle or consistent methodology in the Supreme Court's jurisprudence in this area of the law, in either the criminal law or the administrative law context[27]. He suggested it may be time "to engage in a careful consideration of administrative tribunals and their reasons as a unique problem that deserves separate and more devoted attention"[28].

Thus, when the opportunity arose in *Vancouver International Airport Authority* v. *Public Service Alliance of Canada*[29] Justice Stratas did just that. He set out a number of purposes that courts ought to consider when evaluating the adequacy of administrative decision-maker's reasons[30]:

> (a) ***The substantive purpose.*** At least in a minimal way, the substance of the decision must be understood, along with why the administrative decision-maker ruled in the way that it did.
>
> (b) ***The procedural purpose.*** The parties must be able to decide whether or not to invoke their rights to have the decision reviewed by a supervising court. This is an aspect of procedural fairness in administrative law. If the bases underlying the decision are withheld, a party cannot assess whether the bases give rise to a ground for review.
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> (c) ***The accountability purpose.*** There must be enough information about the decision and its bases so that the supervising court can assess, meaningfully, whether the decision-maker met minimum standards of legality. This role of supervising courts is an important aspect of the rule of law and must be respected: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Dunsmuir*, *supra* at paragraphs 27 to 31. In cases where the standard of review is reasonableness, the supervising court must assess "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra* at paragraph 47. If the supervising court has been prevented from assessing this because too little information has been provided, the reasons are inadequate: see, *e.g.*, *Canadian Association of Broadcasters*, *supra* at paragraph 11.
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> (d) ***The "justification, transparency and intelligibility" purpose*****:** *Dunsmuir*, *supra* at paragraph 47. This purpose overlaps, to some extent, with the substantive purpose. Justification and intelligibility are present when a basis for a decision has been given, and the basis is understandable, with some discernable rationality and logic. Transparency speaks to the ability of observers to scrutinize and understand what an administrative decision-maker has decided and why … Transparency, though, is not just limited to observers who have a specific interest in the decision. The broader public also has an interest in transparency: in this case, the Board is a public institution of government and part of our democratic governance structure.

As the courts assess whether these purposes have been fulfilled, the following principles must also be "kept firmly in mind"[31]:

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[27] *Ibid.* at 23.
[28] *Ibid.* at 24.
[29] [2010] F.C.J. No. 809; 2010 FCA 158.
[30] *Ibid*. at Para 16.
[31] *Ibid.* at para 17.

(a) ***The relevancy of extraneous material.*** The respondent emphasized that information about why an administrative decision-maker ruled in the way that it did can sometimes be found in the record of the case and the surrounding context. I agree. Reasons form part of a broader context. Information that fulfils the above purposes can come from various sources …

(b) ***The adequacy of reasons is not measured by the pound.*** The task is not to count the number of words or weigh the amount of ink spilled on the page. Instead, the task is to ask whether reasons, with an eye to their context and the evidentiary record, satisfy, in a minimal way, the fundamental purposes, above. Often, a handful of well-chosen words can suffice. In this regard, the respondent emphasized that very brief reasons with short-form expressions can be adequate…

(c) ***The relevance of Parliamentary intention and the administrative context.*** Judge-made rulings on adequacy of reasons must not be allowed to frustrate Parliament's intention to remit subject-matters to specialized administrative decision-makers. In many cases, Parliament has set out procedures or has given them the power to develop procedures suitable to their specialization, aimed at achieving cost-effective, timely justice. In assessing the adequacy of reasons, courts should make allowances for the "day to day realities" of administrative tribunals, a number of which are staffed by non-lawyers: *Baker*, *supra* at paragraph 44; *Clifford v. Ontario Municipal Employees Retirement System* (2009), 98 O.R. (3d) 210 at paragraph 27 (C.A.)…

(d) ***Judicial restraint***. The court's assessment of reasons is aimed only at ensuring that legal minimums are met; it is not an exercise in editorial control or literary criticism. See *Sheppard*, *supra* at paragraph 26.

Now that these purposes and principles have now been clearly articulated, the real challenge is to determine how to apply them in a consistent manner. Moreover, there is clearly an overlap between the principles and purposes that underlie a review of the reasonableness of an administrative tribunal's decision, and an assessment of its adequacy. In addition, while the substantive and procedural purposes set out above may fall under the umbrella of procedural fairness, the accountability purpose, and the justification, transparency and intelligibility purpose definitely overlap with the *Dunsmuir* reasonableness assessment. This is also reinforced by the principles of parliamentary intention in the administrative law context, as well as the principle of judicial restraint.

b. Assessment of Reasonableness on Judicial Review and the Overlap with Adequacy of Reasons

However, it is important to keep in mind that despite the overlap between these purposes and principles, when the court is conducting a judicial review of an administrative tribunal's decision and examining the reasons offered by the tribunal, it is not assessing its adequacy. Rather, it is conducting a different inquiry focused on assessing the "reasonableness" of the decision, considering the process of articulating reasons its outcomes. In *Dunsmuir* v. *New Brunswick*[32] the Supreme Court set out the qualities of a reasonable decision:

[32] [2008] 1 S.C.R. 190; [2008] S.C.J. No. 9.

> … certain questions that come before administrative tribunals do not lend themselves to one specific particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquired into the qualities that make a decision reasonable, referring both to the process of articulating reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] 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 [33] (emphasis added).

In *C.U.P.E. v. Ontario (Minister of Labour)*[34], Justice Binnie J. recognized the potential for confusion between assessment of adequacy of reasons and assessment of the "reasonableness" of the decision[35]:

> The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.
>
> On occasion, a measure of confusion may arise in attempting to keep separate these different lines of enquiry. Inevitably some of the same "factors" that are looked at in determining the requirements of procedural fairness are also looked at in considering the "standard of review" of the discretionary decision itself … The point is that, while there are some common "factors", the object of the court's inquiry in each case is different. Emphasis Added.

However, Justice W. J. Vancise of the Saskatchewan Court of Appeal argues that this analytical framework is flawed, given that administrative tribunals have generally been afforded a relatively high level of deference to their decisions in recognition of their expertise and the mandate conferred on them by statute[36]:

> It follows that by opening the possibility of bypassing the deference owed to such tribunals' reasons in the context of a fairness analysis, reviewing courts are providing parties a method of attacking an otherwise reasonable decision which should be accorded deference. Courts should only intervene when the reasons taken as a whole are not tenable and cannot support the decision. One is reminded of the admonition of Dickson J. (as he then was) not to lightly brand as jurisdictional that which is not jurisdictional so as to permit intervention and the substitution of a court's opinion for that of the administrative decision-maker. Court should take care not to brand as insufficient reasons that are otherwise reasonable. (Emphasis Added).

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[33] Para 47.
[34] [2003] 1 S.C.R. 539.
[35] *Ibid.* at para 102-103.
[36] "Reasons – Because I Said So – Not Good Enough – But What is?" Speech by the Honourable William J. Vancise, Chairman of the Copyright Board of Canada, 16th Annual Conference on IP Law and Policy, Fordham IP Law Institute, March 28, 2008, online: http://www.cb-cda.gc.ca/about-apropos/speeches-discours/20080328.pdf [hereinafter *Vancise*] at 11.

B. Recent Case Law: *Can* Adequacy of Reasons be Differentiated from the Substance of the Decision?

Keeping the above context and discussion in mind, I now turn to an analysis of recent case law concerning this very question: should adequacy of reasons be differentiated from the substance of the decision? In *Clifford*, Goudge J.A. held that assessment of adequacy of reasons should be differentiated from the assessment of the substantive decision made[37]:

> 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. [Emphasis Added.]

In this case, the Court found that the Tribunal had met its legal obligation with respect to providing reasons for the decision, both from a functional and from a substantive perspective. From a functional perspective, the Tribunal's reasons explained why it gave the answers it did to the issues, and from a substantive perspective, it allowed for effective judicial review of the decision itself[38]. The Court concluded that the decision and the reasoning in support of it met the standard of reasonableness[39].

More recently, in *N.L.N.U.* v. *Newfoundland and Labrador (Treasury Board)*[40] the Newfoundland and Laborador Supreme Court - Court of Appeal also disagreed with the approach taken by the Majority of the Ontario Court of Appeal in *Clifford* with respect to differentiating the assessment of adequacy of reasons from the substance of the decision. In effect, it found that "*Baker* is subsumed in *Dunsmuir*" [41] and it is unnecessary to assess every decision firstly on whether the reasons are adequate applying a correctness standard and secondly on whether the reasons are reasonable or correct applying the *Dunsmuir* analysis[42]:

> To summarize, in assessing justification, transparency and intelligibility in the decision-making process as a component of the **Dunsmuir** analysis, reasons must be sufficient to permit the parties to understand why the tribunal made the decision and to enable judicial review of that decision. The reasons should be read as a whole and in context, and must be such as to satisfy the reviewing court that the tribunal grappled with the substantive live issues necessary to dispose of the matter.
>
> Finally, a comment may be of assistance regarding the interplay between adequacy of reasons in the context of procedural fairness and the first prong of the **Dunsmuir** analysis, that is, the aspect of reasonableness directed to the process of articulating the reasons, requiring justification, transparency and intelligibility in the decision-making process. Clearly, the

[37] *Supra* note 2, at para 31-32.
[38] *Ibid.* at para 44.
[39] *Ibid.* at para 48.
[40] 2010 NLCA, 13; 2010 CarswellNfld 49(para 12). This Supreme Court has granted leave to appeal this decision.
[41] *Calgary (City) v. Alberta (Municipal Government Board)*, 2010 ABQB 719, para 41.
[42] Para 11-12.

> **Dunsmuir** analysis requires a consideration of the reasons provided by the tribunal. 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. Unless legislation eliminates the necessity for reasons, reasonableness is the standard required to be met by a tribunal. Since reasons, including adequacy thereof, constitute a component of reasonableness, a separate examination of procedural fairness is an unnecessary and unhelpful complication.

In dissent, Cameron J.A. seemed to prefer *Clifford*'s two-step approach, finding that the distinction between the first part of *Dunsmuir* substantive review of reasonableness and a review of adequacy of reasons in response to a claim based on procedural fairness turns on the purpose of the review[43]:

> The two procedures often use the same vocabulary: words such as 'transparency' and 'intelligibility' appear in the discussions of both. The difference is that a substantive review is concerned with the reasonableness of the decision and, to that end, it looks at the reasons articulated. A procedural fairness review examines the fairness of the process. It is directed to the ability to discern the reasons without reference to the question of whether the decision falls within the range of acceptable outcomes. In my opinion, where procedural fairness requires reasons be provided, *Dunsmuir* has not changed how a reviewing court would approach the task of reviewing adequacy of reasons. Issues of procedural fairness do not involve any deferential standard of review …

In *Calgary (City) v. Alberta (Municipal Government Board)*[44] , the Court recognized that the requirement in *Baker* to give reasons does not occupy the same ground as the Supreme Court of Canada's framework for analyzing the sufficiency of reasons in *Dunsmuir*, and "there is some crossover since both involve an evaluation of the justification, transparency and intelligibility of the reasons …"[45]. However,

> To isolate the first step and characterize it as being subject to some standard of 'correctness' rather than 'reasonableness' is to bring 'correctness' in through the back door into an analysis that does not require such a standard, as reasons that do not meet such a test would surely as Welsh J. has put it in Law Society of New Brunswick, be unreasonable."[46] [Emphasis Added.]

Thus, there seems to be some concerns with whether there is a workable distinction between assessing adequacy of reasons on a procedural basis and a substantive basis. At least one author has argued that attempting to maintain such a distinction is both "unconvincing" and "detrimental to the integrity of judicial review"[47]. That is, applying a standard of correctness with respect to the procedural review of the adequacy of reasons is "completely unworkable with having then show

[43] *Ibid.* at para 38.
[44] 2010 ABQB 719.
[45] *Ibid.* at para 42.
[46] *Ibid.* at para 44.
[47] Shaun Fluker, "What is the Applicable Standard of Review in Assessing the Adequacy of Reasons?" online: http://ablawg.ca/2010/12/13/what-is-the-applicable-standard-of-review-in-assessing-the-adequacy-of-reasons/, at 3.

deference to the justification provided by the decision-maker under the reasonableness standard of review on the merit of the decision"[48].

I believe these concerns should be carefully considered and taken into account by the Supreme Court when it addresses this issue. However, I do not agree that it is impossible to draw a workable distinction between the procedural and substantive elements of adequacy of reasons. Moreover, the Supreme Court's jurisprudence has clearly established that courts are not to defer to administrative decision-makers on issues of procedural fairness[49]. Yet, if adequacy of reasons were to be entirely subsumed in the *Dunsmuir* reasonableness assessment, then courts would be required to defer to administrative decision-makers on both the process and the substance of the reasons, including its procedural fairness element. As such, I would actually argue that it is not workable to conduct an adequacy of reasons assessment entirely under the umbrella of the *Dunsmuir* reasonableness test.

At the end of the day, I do not agree with the Newfoundland and Laborador Supreme Court - Court of Appeal that adequacy of reasons provided by an administrative decision-maker falls under the substantive judicial review as the first branch of applying the standard of reasonableness under *Dunsmuir* and does not require a separate assessment of the fairness of the process. I believe the Ontario Court of Appeal in *Clifford* takes a more sensible approach, which both takes account of the distinct nature of the two inquiries and the different standards which ought to apply in the review of the different components of the reasons.

CONCLUSION

This paper has attempted to provide some context to the recent disagreement in case law with respect to the proper approach to be relied on by courts in assessing adequacy of reasons. It attempts to explain the reasons for this disagreement by looking at the various contexts in which adequacy of reasons has arisen: adequacy of reasons as an element of procedural fairness; adequacy of reasons in the judicial context; and, adequacy of reasons in the administrative law context. This analysis has revealed a significant overlap in the purposes and principles underlying these three areas, resulting in confusion and lack of a consistent and coherent methodology for assessing adequacy of reasons, especially in the administrative law context.

Particularly noteworthy is the challenge of striking the proper balance between the courts ensuring that reasons are discharged in accordance with the duty of procedural fairness, and on the other hand, the courts exercising proper deference to administrative decision-makers. Given that this tension is unique to administrative law, the approach to assessing adequacy of reasons in this context needs to be developed with full awareness and sensitivity to this tension.

Thus far, courts do not seem to have paid attention to this unique context in most cases, and applied the adequacy of reasons principles emerging from the criminal law context to administrative law proceedings. However, that trend will hopefully change with some specific guidance on this issue from the Supreme Court, allowing for less confusion and more clarity and consistency in this area of the law moving forward.

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[48] *Ibid*.

[49] *Baker*, paras 55-62; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] S.C.R. 539, paras 100-103; *Khosa, supra* note 66, 2009 SCC 12; *Clifford*, supra note 2.