Inter-Institutional Comity and Deference as Respect

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INTRODUCTION

In recent years, the idea of judicial deference to the decisions of administrative decision-makers has played an increasingly prominent role in the Supreme Court of Canada's jurisprudence on judicial review. The conceptual motor driving this jurisprudential movement is David Dyzenhaus's idea of 'deference as respect'[1], which obliges courts to recognize that there are often multiple possible solutions to an administrative dispute and that decision-makers are often in a better position than judges to determine what option best furthers legislative objectives. At the same time, a democratic society built on the rule of law requires that individuals be provided with compelling reasons when state action affects their rights, interests and privileges. It is the role of courts – assisted by the reasons provided by decision-makers – to ensure that such state actions can be justified in light of the facts and the law.

This rather elegant picture of the institutional relationship between the administrative state and the courts is complicated by the reality that administrators' written reasons will sometimes leave much to be desired. Reasons may be incomplete or flawed. Immigration officers may sometimes omit to define certain key terms when issuing a deportation order and labour arbitrators may inadvertently leave out mention of applicable legislation in their decisions. While judges have traditionally set aside such flawed decisions on procedural fairness grounds, post-*Dunsmuir* Supreme Court jurisprudence has consistently applied Dyzenhaus's claim that deference as respect requires judges to look to reasons that could hypothetically or in principle be offered in support of an administrative decision. This has generated not inconsiderable conceptual

[1] David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford, UK: Hart Publishing, 1997) 279 [Dyzenhaus, "Judicial Review and Democracy"].

difficulties. Chief among these is the uncertainty with regards to the proper institutional functions of administrative decision-makers and courts once the latter are essentially permitted, if not required, to swoop in and supplement the flawed or incomplete work of the former. My paper will focus on how an approach centered on inter-institutional comity can be fruitfully applied in resolving this conceptual difficulty.

In Part I, I provide an overview of the Supreme Court jurisprudence that endorses and applies Dyzenhaus's call to look to reasons that could be offered. I begin with a discussion of the seminal decision *Dunsmuir v New Brunswick*[2], which endorses 'deference as respect' as the crux of reasonableness analysis. I then move on to discuss *Newfoundland Nurses*[3]*, Alberta Teachers' Association*[4], and *Agraira*[5] – cases that specifically invoke the requirement to look to reasons that could have been offered. I round off this section with an overview of some critiques of this line of jurisprudence to suggest that, particularly with *Agraira*, Dyzenhaus's 'deference as respect' has been pushed to the conceptual breaking point.

Part II discusses recent academic work pioneered by Aileen Kavanagh[6], Jeff King[7], and Eoin Carolan[8] on institutional approaches to judicial review and, in particular, Kavanagh's theory of inter-institutional comity. Through this discussion, I hope to show that these approaches can provide a more solid conceptual foundation for the requirement

[2] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].
[3] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*].
[4] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers' Association*].
[5] *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 [*Agraira*].
[6] Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft, ed, *Expounding the Constitution* (Cambridge, UK: Cambridge University Press) 184 [Kavanagh, "Deference or Defiance"]; Aileen Kavanagh, "Judicial Restraint in the Pursuit of Justice" (2010) 60:1 UTLJ 23 [Kavanagh, "Judicial Restraint"].
[7] Jeff A King, "Institutional Approaches to Judicial Restraint" (2008) 28:3 Oxford J Leg Stud 409.
[8] Eoin Carolan, *The New Separation of Powers* (Oxford, UK: Oxford University Press, 2009).

of judges to supplement the reasons of decision-makers. Since these approaches construe judges and administrators as relating to one another as constructive and complimentary partners in governance, they can better ground the requirement of judges to build on the justificatory foundations laid by administrative decision-makers.

Part III extends the discussion in Part II by attempting to sketch out the division of labour between judges and administrators that would allow for judges to supplement administrative reasons while holding the decision-makers accountable to their role in the justificatory framework. This line drawing exercise consists essentially of an inquiry into the foundations of what courts have traditionally called the requirement to provide adequate reasons. Here I suggest that Abella J's call in *Newfoundland Nurses* to look at the reasons and outcome as an organic whole adds uncertainty to the task of determining what constitutes adequate reasons and, by extension, what would be a proper division of labour between courts and administrators. Picking up on a suggestion by Matthew Lewans, I suggest that *Baker's* "alert, sensitive, and alive" approach to reasonableness[9] can be re-tooled as a method to determine whether administrators have constructed a proper justificatory foundation to build upon.

Finally, in Part IV I attempt to show that the methodology discussed in Part III is implicitly and fragmentarily present in recent decisions, using *Canada Post*[10] and *Agraira* as case studies.

PART I: BACKGROUND

A. *Dunsmuir*: Reasonableness and Deference as Respect

[9] See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75, 174 DLR (4th) 193.
[10] *Canada Post Corporation v Canadian Union of Postal Workers,* 2013 BCCA 108, 42 BCLR (5th) 57.

While *Dunsmuir* was not the first decision to endorse Dyzenhaus's deference as respect, it was the case that first articulated a conception of reasonableness centered on deference as respect. David Dunsmuir, an employee of the province of New Brunswick, initiated a grievance against his employer under s. 100.1 of New Brunswick's *Public Service and Labour Relations Act* (*PSLRA*), alleging that he was denied an opportunity to respond to the employer's concerns, proper notice, due process, procedural fairness, and an adequate notice period.[11] The matter was eventually referred to adjudication. The adjudicator held that ss. 97(2.1) and 100.1 of the *PSLRA* authorized him to look into whether Mr. Dunsmuir was disciplined or otherwise discharged with cause. On judicial review, the reviewing judge applied a correctness standard of review and determined that the arbitrator overstepped his authority in inquiring into the reasons for the dismissal. The New Brunswick Court of Appeal upheld the reviewing judge's decision on a reasonableness review, ruling that the arbitral decision was unreasonable in wrongly applying s. 97(2.1).[12]

The Supreme Court seized the case as an opportunity to simplify the standard of review analysis as well as clarify the requirements of a reasonableness analysis. An inquiry into the reasonableness of a decision is to be above all characterized by deference. Where reasonableness is the standard of review, judges are not to substitute their own view of what is the correct answer to a dispute but must instead recognize that multiple outcomes may be available to the decision-maker. Judges must focus their inquiry on

> the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is

[11] *Dunsmuir*, *supra* note 2 at para 9.
[12] *Ibid* at para 22.

> concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.[13]

In contrast to a conception of deference as "blind submission" to decision-makers, the Court endorsed David Dyzenhaus's notion of deference as respect, which requires "a respectful attention to the reasons offered or which could be offered in support of a decision."[14] Deference as respect is rooted in the recognition that administrative decision-makers bring a degree of expertise and experience in implementing complex administrative schemes.[15] In deferring to the reasons that administrative decision makers offered or could have offered, judges give respect to the place of administrative tribunals within the Canadian constitutional system.[16]

At the same time, deference as respect cannot be understood apart from the imperative to offer justifications. As Dyzenhaus notes in the article cited in *Dunsmuir*, deference as respect is rooted in the assumption that public power is justified only if its incumbents are able to offer adequate reasons affecting individuals who are subject to this power.[17] As Dyzenhaus writes elsewhere, "[w]hen the exercise of power interferes with a legally protected interest, the justification must be attuned to justifying that interference, whether the interest is protected by constitutional law or the common law of judicial review."[18] It is ultimately the courts' role to ensure that those who wield public power assiduously fulfill this requirement of public accountability.[19]

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[13] *Ibid* at para 47.
[14] *Ibid* at para 48.
[15] *Ibid* at para 49.
[16] *Ibid* at para 50.
[17] Dyzenhaus, "Judicial Review and Democracy", *supra* note 1 at 305.
[18] David Dyzenhaus, "Proportionality and Deference in a Culture of Justification", in Grant Hushcroft & Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge, UK: Cambridge University Press, 2014) 234 at 254 [Dyzenhaus, "Proportionality and Deference"].
[19] Dyzenhaus, "Judicial Review and Democracy", *supra* note 1 at 303.

B. *Newfoundland Nurses* and *Alberta Teachers Association*: Deference to Reasons that Could be Offered

Newfoundland Nurses is a watershed case in directly invoking Dyzenhaus's call to look to reasons that could be offered in order to justify an administrative action. At issue was an arbitral decision declaring that, according to the terms of the collective agreement between the nurse's union and the government, time spent as causal employees could not be included in calculating vacation entitlement once the casual employee becomes permanent staff.[20] The arbitrator had decided that time spent as a casual employee could not be credited on the following basis: 1) casual employees work on an occasional and non-obligatory basis; and 2) the collective agreement expressly excluded casual employees from vacation benefits.[21] On judicial review, the chambers judge overturned the arbitrator's decision for lacking cogency. A majority of the British Columbia Court of Appeal (BCCA) ultimately reversed the chambers judge's ruling, on the basis that the reasons satisfied *Dunsmuir*'s criteria of justification, transparency, and intelligibility even if a more comprehensive explanation would have been preferable.[22] The minority, under the pen of Cameron JA, found the arbitrator's decision unreasonable in that it did not disclose a clear line of reasoning to his conclusion.[23]

A unanimous Supreme Court, under the pen of Abella J, upheld the Court of Appeal's decision in favour of the arbitrator. The Supreme Court seized upon the affair as an occasion to clarify – and arguably expand – the meaning of deference as enunciated in

[20] *Newfoundland Nurses*, *supra* note 3 at para 2.
[21] *Ibid* at para 6.
[22] *Ibid* at para 9.
[23] *Ibid* at para 10.

Dunsmuir. Insofar as deference requires courts to respect the expertise of specialized tribunals, the adequacy of a decision-maker's reasons are not to be taken as stand-alone basis for quashing a decision. Rather, the inquiry into reasons and outcome are to be construed as a "more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."[24] Judges have an active role to play in this conception of deference, being required to supplement gaps in the decision-maker's reasoning by looking at background materials such as the record. The Court thus lightened the justificatory burden on decision-makers: "[r]easons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred."[25] This development of Dyzenhaus's deference as respect signaled a shift away from a model of judicial review where an administration decision's fate depended exclusively on a judge's satisfaction with the reasons provided by the decision-maker. Abella J's characterisation of the inquiry as an 'organic exercise' affirmed the need to both balance and reconcile the requirement to offer justifiable and intelligible reasons for decisions with a robust conception of deference towards decision-makers.

In *Alberta Teacher's Association*, a decision released days apart from *Newfoundland Nurses*, the Court similarly appealed to Dyzenhaus's call to look to reasons that could be offered in determining the reasonableness of an administrative decision. The case involved whether an adjudicator's implied decision to extend the timeline for a privacy investigation was reasonable. The Information and Privacy Commissioner (the Commissioner) had opened an investigation into an alleged leak of

[24] *Ibid* at para 14.
[25] *Ibid* at para 16.

private information by the Alberta Teachers' Association (ATA). The investigation extended beyond the statute-imposed timeline of 90 days. The adjudicator designated by the Commissioner subsequently issued a judgment against ATA 29 months after the initial complaint was made, notwithstanding the statutory deadline.[26] The adjudicator offered no reasons for the extension and the issue of compliance with the statutory timelines was raised by ATA only on judicial review.

The issue facing the Supreme Court was whether deference was owed to the adjudicator's implied decision to extend the deadline. Rothstein J, writing for the Court, responded unequivocally in the affirmative: "[w]here the reviewing court finds that the tribunal has made an implicit decision on a critical issue, the deference due to the tribunal does not disappear because the issue was not raised before the tribunal."[27] Rothstein J was quick to add the qualification that the requirement to defer to reasons that could be offered should not be interpreted as "*carte blanche*" for judges to substitute their own rationale for an unreasonable chain of reasoning. Deference is most given effect when judges defer to intelligible and transparent justifications actually provided by the decision-maker.[28]

C. *Agraira*: Deference to the Minister's Implied Statutory Interpretation

Building off of *Alberta Teacher's Associations*, the Court in *Agraira* pushed the boundaries of Dyzenhaus's call for judges to defer to reasons that could be offered. At issue was the Minister of Public Safety and Emergency Preparedness's (the Minister's) finding that Mr. Ramadan Agraira, a citizen of Libya who had resided in Canada for

[26] *Alberta Teachers' Association*, *supra* note 4 at para 2.
[27] *Ibid* at para 50.
[28] *Ibid* at para 54.

years, was inadmissible to Canada on security grounds. Specifically, the Minister found that it was against the national interest to admit individuals who have had sustained contact with known terrorists and/or terrorist-connected organizations for the purposes of s. 34(2) of the *Immigration and Refugee Protection Act* (*IRPA*).[29] In support of this decision that Mr. Agraira's admission into Canada would be contrary to national interest, the Minister noted the following: 1) the applicant's contrary statements of his involvement in the Libyan National Salvation Front (LNSF); 2) the LNSF's history of violent and terrorist acts; 3) LNSF's previous associations with Al-Qaeda; and 4) a strong likelihood that applicant was aware of the LNSF's previous activity.[30] While the Minister's decision was overturned at Federal Court for failing to consider factors in favour of Mr. Agraira's case, the Federal Court of Appeal found that consideration of such factors was unnecessary and that the Minister's decision was reasonable.

Central to the case as the issue of whether the Minister's interpretation of the term "national interest" was entitled to deference. As the Supreme Court noted, "the meaning of 'national interest' in the context of [s. 34(2) of the *IRPA*] is key as it defines the standard the Minister must apply to assess the effect of the applicant's presence in

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[29] At the time, s. 34 provided that:

- ***'****(1) A permanent resident or a foreign national is inadmissible on security grounds for*
  - *(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;*
  - *(b) engaging in or instigating the subversion by force of any government;*
  - *(c) engaging in terrorism;*
  - *(d) being a danger to the security of Canada;*
  - *(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or*
  - *(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).*
- ***Exception***
  (2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.'

(Note: S. 34(2) has been repealed as of 2013).

[30] *Agraira*, *supra* note 5 at para 13.

Canada in order to exercise his or her discretion."[31] The difficulty for the Minister's position was that he offered no explicit definition of "national interest" in his reasons and, as such, the Court was left in a position of "having no *express* decision of an administrative decision maker to review."[32] At this point, the Supreme Court turned to *Alberta Teachers' Association* for the proposition that courts may imply a particular interpretation of a statutory provision even if the decision maker has not expressed an opinion on that provision's meaning. The Court ruled that "an interpretative decision as to [the term 'national interest'] is necessarily implied within his ultimate decision on ministerial relief, although this Court is not in a position to determine with finality the actual reasoning of the Minister."[33] Upon consideration of the Ministerial Guidelines and the *IRPA*, the Court proceeded to imply a definition of national interest that encompassed not only public safety and security concerns but also a wide range of Canadian values captured in these documents.[34]

D. Deference post *Newfoundland Nurses*: Critiques

Prior to *Agraira*, lower court judges and academic commentators have been somewhat critical of the judicial gap filling envisioned by the Supreme Court in *Newfoundland Nurses* and *Alberta Teachers' Association*. In *Lemus*, Stratas J criticized Abella J of citing Dyzenhaus "in an unqualified manner without any rationale" in *Newfoundland Nurses*.[35] He went on to question whether a reviewing court, in trying to sustain an outcome reached by flawed reasoning, might be lending support to an outcome

[31] *Ibid* at para 55.
[32] *Ibid* at para 56.
[33] *Ibid* at para 58.
[34] *Ibid* at para 78,
[35] *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114, 372 DLR (4th) 567.

that the administrator, knowing of its error, might not have itself reached.[36] Matthew Lewans has similarly critiqued the "restorative approach" of *Newfoundland Nurses* and *Alberta Teachers' Association* for providing government officials a perverse incentive to remain silent or to provide obscure reasons as well as encouraging judges to speculate about decision-makers' justifications.[37]

Underlying these critiques is the worry that allowing judges to look to reasons that could be offered risks diluting or even disregarding the duty incumbent on decision-makers to provide reasons to those affected by their decisions. This is particularly problematic if one conceptualizes judges as playing fundamentally a supervisory role in relation to administrative decision-makers. Such an understanding of deference would seem to militate in favour of judges looking at the reasons actually offered by the decision-maker in order to determine whether the decision was made in a way that is justifiable in light of the law and facts and, thus, worthy of respect. Judges still have to take a tribunal's reasoning seriously, but in the end it is the decision-makers who must convince judges that their decisions are indeed justifiable.[38]

If this is indeed the logic underlying deference as respect, it may be somewhat difficult to wrap one's head around the idea of deference towards reasons not actually offered. One way to make sense of Dyzenhaus's call to look to hypothetical reasons might be to see the outcome as the proper object of deference. In this sense, judges fulfill their supervisory role by conducting an independent analysis to determine whether the outcome is justifiable. If the answer is in the affirmative, the judge will either overlook

[36] *Ibid* at para 33.
[37] Matthew Lewans, "Deference and Reasonableness Since Dunsmuir" (2012) 38 Queens LJ 59 at 94-95.
[38] As Dyzenhaus writes, "The issue for the court is not what decision it might have reached had the tribunal not pronounced, but whether the reasons offered by the tribunal justify its decision." See Dyzenhaus, *supra note* 1 at 303.

the insufficiency of reasons or offer her own reasons. Leblanc J in *Power v Newfoundland* interpreted the import of *Newfoundland Nurses* along these lines, noting that "…. It appears that the process of a review of the articulation of reasons has taken a more reduced role in any judicial review than what some thought in the past was necessary."[39] Similarly, Rennie J in *Komolafe* interprets *Newfoundland Nurses* as ensuring "that the focus of judicial review remains on the outcome or decision itself, and not the process by which the outcome was reached."[40] The obvious problem is that such an interpretation, if taken to its logical conclusion, risks eviscerating the requirement to provide any reasons at all. Furthermore, construing the outcome as the primary object of deference goes against Abella J's ruling that reasonableness is an 'organic exercise' consisting of an inquiry into both the outcome *and* the quality of the reasons.[41]

The Supreme Court arguably pushes deference as respect to its conceptual breaking point in *Agraira*. Along similar lines as Lewan's critique of the restorative approach in *Newfoundland Nurses* and *Alberta Teachers' Association*, Paul Daly offers a particularly blistering critique of the Supreme Court's search for the Minister's implied interpretation:

> How can a reviewing court know see [sic] into the mind of an administrative decision-maker and answer counter-factuals about what the decision-maker would have done had different arguments been made? The answer is that they cannot and should be much more forthcoming in the use of their power to remand decisions for clarification. Fairness to the individual subject to the authority of administrative decision-makers requires no less.[42]

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[39] *Power v Newfoundland and Labrador (Workplace Health, Safety Compensation Review Division)*, 2012 NLTD(G) 4 at para 56, 318 Nfld & PEIR 222.
[40] *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 10, 16 Imm LR (4th) 267.
[41] *Newfoundland Nurses*, *supra* note 3 at para 14.
[42] Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52:3 Alta L Rev 1 at 21 [Daly, "Reasonableness Review"].

It may be difficult to see how deference as respect can, by itself, conceptually ground the kind of judicial speculation that the Supreme Court seems to be engaging in in *Agraira*. As Rothstein notes in *Alberta Teachers' Association*, where no reasons are offered there is nothing to defer to.[43] Insofar as there is a requirement of judges to supplement the reasons of decision-makers, it will have to be grounded in a theoretical framework that recognizes the constructive and active role that judges play in the culture of justification.

PART II: INTER-INSTITUTIONAL COMITY/COOPERATION

A. Institutional Approaches to Judicial Restraint

Recent academic work on institutional approaches to judicial restraint may provide key insights as to why it may be appropriate in certain circumstances for a court to supplement the deficient reasons of administrative decision makers. Jeff King defines judicial restraint as conduct whereby judges identify certain questions as inappropriate for judicial review or refuse to substitute their judgement for that of another person based on competency grounds.[44] Such restraint can be justified, King writes, via reference to the "comparative merits of the judicial process as an institutional mechanism for solving problems."[45] King lists several general features of institutional approaches that are relevant in the context of judicial review of administrative action. Institutional approaches emphasize judges' epistemic deficits when it comes to evaluating the effects of a judgement on patterns of behaviour as well as the consequences and systematic

[43] *Alberta Teachers' Association, supra* note 4 at para 52.
[44] King, *supra* note 7 at 409.
[45] *Ibid* at 410.

effects that flow from these epistemic deficits.[46] At the same time, institutional approaches are also concerned with justification.[47]

A particularly relevant feature of institutional approaches is their emphasis on the importance of inter-institutional comity and collaboration.[48] Aileen Kavanagh defines inter-institutional comity as the requirement of respect between the branches of government.[49] Courts pay respect to Parliament and the executive not by agreeing with everything Parliament or the executive does, but by attaching weight to their decisions. She goes on to make a distinction between minimal and substantive deference: judges owe minimal deference across the board to decisions by elected bodies in the sense that judges must presume such decisions to be bona fide attempts "to solve whatever social problem they set out to tackle."[50] Substantive deference, on the other hand, is deference owed to elected bodies that have: a) more institutional competence, b) more expertise, and/or; c) more legitimacy to assess the particular issue.[51]

It should be noted that the work of King and Kavanagh are mostly situated within the academic discourse on deference in human rights adjudication (particularly in the United Kingdom). That being said, much of Kavanagh's and King's remarks on judicial restraint will be applicable to judicial deference in constitutional rights review as well as in the review of administrative action. Kavanagh herself notes a common thread running through both: "what unites this disparate array of doctrines is the belief that the courts ought to adopt a cautious and restrained approach to the choices presented to them in

[46] *Ibid* at 426
[47] Institutional approaches see "the process of rights adjudication as a form of accountability in which a challenged decision is filtered through a judicial process of reasoned, public justification according of legal and moral standards." *Ibid* at 427.
[48] King, *supra* note 7 at 428
[49] Kavanagh, "Deference or Defiance", *supra* note 6 at 189.
[50] *Ibid* at 191.
[51] *Ibid* at 192; see also Kavanagh, "Judicial Restraint", *supra* note 6 at 38.

their adjudicative function."[52] When confronted with the choice of whether to endorse a decision issued by a democratic body or a person designated by a democratic body to make a decision, judges must decide on the degree of intensity with which they will scrutinize the decision. The focus in constitutional review is on whether a piece of legislation complies with the rights enshrined in a constitutional document such as the *UK Human Rights Act*.[53] Here, judges must decide how intensely to scrutinize whether, among other things, an impugned legislative provision minimally impairs constitutionally protected rights.[54] The focus in the administrative context is on administrative decision-makers' exercise of statutory discretion as it affects the rights, interests, and privileges of individuals who are subject to their authority.[55]

Where the standard of review is reasonableness, deference will generally speaking be concerned with the Court's scrutiny of an administrative decision in light of the statute that grants the decision-maker her authority as well as the common law requirements of procedural fairness. Institutional approaches will determine the proper intensity of review on the basis of the features of the institution doing the review (i.e. the judiciary) and of the entity whose decision is subject to review (e.g. legislature or administrative decision-maker). As such, Kavanagh's insight that courts suffer "institutional deficits" in lacking the institutional competence, expertise, and/or legitimacy in relation to a particular social problem[56] applies equally to judges conducting constitutional review of legislation as it does to tribunals with statutory mandates. On this point, there seems to be some overlap between Kavanagh and Dyzenhaus. For Dyzenhaus, the fact that the legislature has

[52] *Ibid* at 25.
[53] *Ibid* at 25.
[54] See, for instance, *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.
[55] See Baker, *supra* note 9 at para 28.
[56] See Kavanagh, "Deference or Defiance", *supra* note 6 at 192.

chosen a particular tribunal to be the front line adjudicative body constitutes what he calls the formal reason for judicial deference. The fact that the tribunal is "closest to the problems out of which the issues arises" and can draw from its accrued expertise to deal with these problems efficiently are substantive reasons for judicial deference.[57]

In contrast to Dyzenhaus's approach to judicial review, the notion of deference as flowing from a *partnership* between courts and the elected bodies occupies a more prominent place for Kavanagh. She writes that "part of [judges'] task *qua* judges is to convince the legislature and executive that the courts are constructive partners in the joint enterprise of sustaining just government in a constitutional democracy."[58] Institutional approaches thus go beyond what Dyzenhaus's account offers in providing a more comprehensive account on how courts and administrators play interlocking roles in the task of providing justification for administrative actions. On this point, Jeff King notes that notions of collaboration or complementarity are central to the conception of inter-institutional comity:

> But the institutional approach also takes the view that the three primary branches of government essentially collaborate in the general promotion of commonly accepted public values such as fairness, autonomy, welfare, transparency, efficiency, etc. Parliament, the executive and courts are on this vision part of a joint-enterprise for the betterment of society. Conflicts between them are subsumed within one vision of governance.[59]

That there are conflicting perspectives on a given issue between various institutions in this joint enterprise will come from their different roles in the overall framework of governance. In restraining themselves from substituting their own views on how an

[57] Dyzenhaus, "Judicial Review and Democracy", *supra* note 1 304
[58] Here, she is explicitly building off of Dyzenhaus's claim that the rule of law is best understood as a shared project among all organs of government. See Kavanagh, "Judicial Restraint", *supra* note 51 at 38 and Dyzenhaus, "Proportionality and Deference", *supra* note 18 at 256.
[59] King, *supra* note 7 at 428.

administrative decision maker should have been made, judges show the minimal deference owed to elected and specialized bodies. At the same time, judges do not relinquish their supervisory role of ensuring that such decisions are made in conformity with the rule of law. What institutional approaches argue is that while this may seem like a purely vertical relationship – with the Courts exercising a supervisory role *over* the elected bodies – the courts and administrative bodies also enjoy a horizontal relationship whereby courts and elected bodies work together as partners in instantiating and sustaining important social values. This opens up the possibility of a certain institutional division of labour between judges and administrative decision-makers in this project of joint governance.[60]

On how reason giving enters into this picture of cooperative governance, Eoin Carolan may offer a useful perspective. In *The New Separation of Powers*, he puts forward a theory for the separation of powers premised on the acceptance of "the inevitability and potential legitimacy of alternative views."[61] The various institutions in the administrative state each represent a different constituent perspective which, taken together, contribute to the ongoing social debate about social values and good governance. The fact that each institution is biased in its susceptibility to a particular form of argument means that the perspective of any one institution will have to be corrected by those of other institutions. In this model of coordinated governance, "[e]xercising power is a collaborative and deliberative process in which each institution

[60] The Court in Dunsmuir seems to have been tracking this idea albeit without using the language of inter-institutional cooperation: "deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the *different roles* of the courts and administrative bodies within the Canadian constitutional system." *Dunsmuir*, *supra* note 2 at para 49. Emphasis added.
[61] Carolan, *supra* note 8 at 185.

engages with the others' decisions on its own terms, subjecting them to its own internal scrutiny."[62] Mutual scrutiny requires that each institutions come to a proper understanding of the motivations and actions of its counterpart, hence the importance of reasons:

> The giving of reasons to explain why a particular position was reached enables the other branches of government to consider the rationality of that determination, and to incorporate it into their own assessment of what the situation requires. Where one institution has the advantage of better or more relevant information, for example, it should explain and identify that advantage so that the other institutions can subsequently take account of it in making their own independent judgements. This suggests that a requirement to give reasons is a necessary element of the relationship between the institutions of government. Without justification or reasons, each institution will be left to insist on the veracity of its own position without having to engage in any sort of critical reflection on the rationality or plausibility of alternative views.[63]

Situating the practice of reason giving within this project of cooperative governance may shed insight on the doctrine of deference in Canadian law. The requirement to provide adequate reasons is a way of maintaining a clear flow of information between those who are democratically selected to be on the "front lines" of adjudication and the courts. This flow of information is needed if the courts are to be able to exercise their supervisory responsibilities and play their distinct role in the overall framework of governance.

What institutional approaches can provide, which Dyzenhaus's theory seems to fall short on, is a more comprehensive account of *why* judges can defer to reasons that could have been offered. If the practice of judges implying or supplementing reasons can be justified at all, it cannot be on the sole basis of deference as respect. Deference is a fundamentally passive notion that assumes a pre-existing object. As such, deference as respect will have limited application to cases where the proper object of deference – i.e.

[62] *Ibid* at 186.
[63] *Ibid* 188. Emphasis added

the reasons for a decision – is non-existent, having been omitted by the administrative decision-maker. One can only make conceptual sense of deference to reasons not offered via recourse to the legal fiction of implied, hypothetical or counter-factual reasons.

Under the institutional approach, there is no need for recourse to the fiction that judges are merely "implying" reasons that could have been offered as if judges were merely extracting what was in the minds of the decision-makers at the time they issued their decisions. The institutional approach acknowledges that judicial supplementing of reasons constitutes a contribution by judges to the project of reason giving left incomplete by the decision-maker. In supplementing inadequate reasons, judges are actively building upon the unfinished foundation laid by the decision-maker. Judges are permitted to do this because, as we have seen, reason giving is part and parcel of the project of joint governance. Decision-makers and the courts have interlocking roles in the instantiation of a culture of justification in administrative decision making.

What looks like a vertical relationship of courts hovering over and supervising decision-makers is in reality a division of labour whereby administrative decision-makers – by virtue of their expertise, proximity to the dispute, and democratic legitimacy – have first stab in the task of providing justification. If the decision-maker gets it right by giving adequate reasons, as they often do, then the courts have nothing to add. Where the structure of justification is incomplete, however, the courts can legitimately bring their own bricks and mortar. The caveat here is that there must be at least a foundation – this the judges cannot build. To use Carolan's language, it is the first-instance decision-makers that have to provide the information on the basis of which judges may then examine the rationality of a decision. Thus, where there is no justification given at all, the

courts will have no authority to swoop in.[64] This is one way to give meaning to Rothstein's comment in *Alberta Teachers' Association* that judges' ability to supplement reasons is not "*carte blanche*" for them to substitute their own reasons for those of the administrative decision-maker.

This re-casting of the relationship between courts and the judiciary thus opens up new ways of understanding why judges may be permitted, or even required, to pay attention to the reasons that could have been offered. If we move away from a vision of administrative law that sees democratic expression and rule of law as competing projects – presided over by separate branches of government with one (the courts) checking the other (the elected bodies) – then the question of *who* offers the complete reasons for a particular administrative decision starts to take on a secondary importance. As Cohen-Eliya and Porat observe, "[b]oundaries are less important, even dysfunctional at times, if we view justification as our main aim."[65] Ultimately, what is central to a culture of justification is that every governmental action is in need of justification, with the administrator being but one possible purveyor of reasons that go to justify the action taken against the affected party. At the same time, it would be mistaken to think that this partnership relieves decision-makers from having to make a good faith effort to provide detailed reasons for their decisions. If we take seriously the idea that courts and democratically-chosen decision-makers exist in a relationship of cooperative governance, decision-makers have a duty to provide enough information such that courts may, in

[64] For example, see *JMSL v Canada*, 2014 FCA 114, 372 DLR (4th) 567 and *7687567 Canada Inc. v Canada (Foreign Affairs and International Trade Canada)*, 2013 FC 1191 at 63, 443 FTR 201.
[65] Moshe Cohen-Eliya and Iddo Porat, "Proportionality and the Culture of Justification" (2011) 59:2 Am J Comp L 463 at 477.

Carolan's words, "consider the rationality of the determination."[66] Insofar as the decision-maker has neglected to provide sufficient reasons to the Court, she has failed to fulfill her role in as a constructive partner in joint governance. [67]

PART III: INSTITUTIONAL DIVISION OF LABOUR

A. What Constitutes a Proper Foundation?

Having established a theoretical framework for why a court might be required to supplement deficient administrative reasons, I now turn to the question of how to determine when administrative decision-makers have met the requisite threshold such that judges can step in. Dyzenhaus locates this threshold at what he calls justifiability i.e., the reasons must be "defensible, taking all the important considerations into account." [68] In other words, to immunize their decisions from judicial intervention, administrative decision-makers must discharge the onus of showing that there were, all things considered, adequate reasons for the decision. The problem here is determining exactly when that onus has been discharged and to what extent such an onus is compatible with the idea of deference as respect.

On this point, Abella J's statement that determining whether reasons are adequate is an 'organic exercise' that requires looking at both the reasons and the outcome may provide some guidance. As long as the outcomes fall within the range of acceptable outcomes taking into account certain factors such as the decision-maker's expertise, the terms and objectives of the enabling statute, the presence or absence of a privative clause,

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[66] Carolan, *supra* note 8 at 185.
[67] In such instances, it may be appropriate for the reviewing judge to remit the issue back to the decision-maker to offer more complete reasons. See Daly, "Reasonableness Review", *supra* note 42 at 31.
[68] David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14:11 African J on Human Rights 11 at 28 [Dyzenhaus, "Law as Justification"].

and the nature of the issue being decided, then the reviewing judge can be more flexible with the quality of the reasons. As Abella J notes,

> A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion [reference omitted]. In other words, if the reasons allow 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, the *Dunsmuir* criteria are met.[69]

The problem here is that this formulation is rather imprecise on the required connection between the reasons offered and the conclusion reached by the decision-maker. What are the ingredients (if any) that a reviewing judge would *not* be able to pull from the trial record in plugging in the missing steps in the decision-maker's chain of reasoning? If the only requirement for a reviewing judge to step in to supplement reasons is to be able to "understand how the decision maker reached her conclusion", then this could be construed as a licence for the Court to "speculate about possible legal justifications for the outcome."[70]

This lack of a clear, principled statement of what information a decision-maker needs to provide for the purposes of judicial gap-filling may explain why recent case law on deference has swung incoherently back and forth between what Matthew Lewans calls the restorative and interventionist approaches to reasonableness review.[71] Lewans classifies the Supreme Court's approach in *Newfoundland Nurses* and *Alberta Teachers' Association* as restorative in that they either impose no duty to give reasons or allow judges to fill gaps in deficient reasons. In contrast to the restorative approach, the Court adopted an interventionist approach in *Figliola* and *Mowat* which allowed it to scrutinize

[69] *Newfoundland Nurses*, *supra* note 3 at para 16.
[70] Lewans, *supra* note 37 at 95.
[71] *Ibid*.

the administrative body's interpretation of its enabling statute and conclude that the outcomes were unreasonable despite the fact that in both cases the administrative bodies "clearly explained how the outcome advanced the policies, purposes and principles of human rights legislation."[72] My point here is that Lewans's critique of the Supreme Court's seemingly incompatible approaches to reasonableness derives its force from a certain vagueness in both Supreme Court jurisprudence on deference and in Dyzenhaus's corpus as to the threshold of adequacy above which an administrator's reasons will demand judicial supplementation and below which the reasons will be found unreasonable and thus unjustifiable. It is this vagueness and uncertainty that foster the Court's *ad-hoc* approach in determining whether a restorative or interventionist treatment is appropriate.

Abella J's formulation is also unsatisfactory from the inter-institutional comity approach in having little to say about the respective roles that judges and administrative decision-makers play in the project of joint governance. The requirement that judges undertake an organic exercise whereby they are required to look to background materials and the case record to supplement the deficient reasons of the administrator risks obscuring the unique insights and perspective offered by the administrator. Part of the problem is that Dyzenhaus's formulation, on which Abella J's remarks are premised, does not make any sort of distinction between the reasons actually offered (by the decision-maker) and those that could *in principle* be offered (as determined by a reviewing judge) for a decision. From an inter-institutional comity perspective, this is not in itself objectionable since the question of whether reasons are provided by judges, administrators, or a combination is secondary to the question of whether the reasons,

[72] *Ibid* at 92.

whatever their provenance, were justifiable. The problem is that such a broad equating of actual reasons and hypothetical reasons – without further specification – risks giving the impression that judges and administrators are functionally equivalent or even interchangeable with each other. Understanding deference from the standpoint of inter-institutional comity, at least as construed by commentators such as Carolan, requires a more articulated account of the distinct and complimentary insights that each institution contributes to the culture of justification. Dyzenhaus's vague language of administrators needing to discharge onuses[73] does not go far enough in accomplishing this task.

B. The Relevance of *Baker* to the Adequacy of Reasons Post-*Newfoundland Nurses*

At the end of his essay, Lewans suggests that a return to *Baker* might hold the key to building a more coherent and flexible account of reasonableness. In particular, he suggests that the *Baker* approach's emphasis on contextual sensitivity – embodied in the Court's injunction to be "alert, alive, and sensitive" to relevant factors – could be a constructive way of negotiating "the different normative considerations associated with procedural fairness, judicial deference and reasonableness review."[74] Building off on Lewan's invitation to re-examine Baker, I would suggest that the *Baker* approach can help illuminate the division of labour in a model of inter-institutional comity in light of *Newfoundland Nurses*, *Alberta Teachers' Association* and *Agraira*. Indeed, I would suggest that a decision-maker's demonstration that she was alert, alive, and sensitive to key issues and legal principles forms the crux of the administrative decision-maker's role

[73] Dyzenhaus, "Law as Justification", *supra* note 68 at 29.
[74] Lewans, *supra* 37 at 97.

in the model of inter-institutional comity. Demonstration of this contextual sensitivity may very well serve as the foundation that judges build upon through supplementing reasons.

At this point, it may be helpful to go over some of the key points of *Baker*. In this case, the applicant challenged the Minister's exercise of discretion in denying immigration relief to an applicant on the basis of humanitarian and compassionate (H&C) grounds as provided by the *Immigration Act*. L'Heureux-Dubé J found that the immigration officer's decision to deny relief was unreasonable owing to the decision's lack of sensitivity to the interests of the applicant's children. The importance of these interests was mentioned in the enabling legislation, ministerial guidelines and the international agreements to which Canada was a signatory. To the extent that the officer's written reasons focused on the applicant being a (perceived) burden to Canada's welfare systems to the exclusion of the best interests of the child, the decision was unreasonable.[75]

On L'Heureaux-Dubé J's account, the requirement of contextual sensitivity qualifies and counter-balances deference as respect.[76] Deference was not owed in this case due to the officer's lack of attentiveness and sensitivity to the importance of the rights of children, to their best interest, and to the hardship that may be caused to them by a negative H&C decision.[77] It is important to note that L'Heureaux-Dubé J's remarks on contextual sensitivity were specifically directed towards the question of whether the decision was reasonable and *not* whether there were adequate reasons. This latter question was addressed during the inquiry into procedural fairness, which was at the time

[75] *Baker*, *supra* note 9 at para 75.
[76] *Ibid* at para 65.
[77] *Ibid* at para 74.

treated as distinct from the analysis of the reasonableness of the decision itself. That having been said, it would be a mistake to think that L'Heureaux-Dubé J's remarks have nothing to contribute to the adequacy of reasons as the inquiry is understood post-*Newfoundland Nurses*. Underlying both the inquiry into the adequacy of reasons and the reasonableness of the decision is, as Fox-Decent has put it, the question of "whether the decision is justifiable in the sense of whether it is defensible, *taking all the important considerations into account*."[78]

Indeed, this idea of contextual sensitivity or taking important considerations into account is one concrete way of cashing out Abella J's remarks in *Newfoundland Nurses* that the reasonableness inquiry is an "organic exercise."[79] That is, reasonableness analysis is organic in conceptualizing the two branches of reasonableness – the adequacy of reasons and reasonableness of the decision – as components of an overall inquiry into whether the administrator demonstrated a contextual sensitivity to the relevant issues. Where the administrator offers fully fleshed-out reasons for her decision, this will serve as explicit and incontrovertible proof that the administrator was in fact alert, sensitive, and alive to the relevant issues. And where the administrator has offered only incomplete or deficient reasons, this does not entail that she was not alert, sensitive or alive to the relevant issues; an examination of the reasonableness of the outcome could reveal the contextual sensitivity looked for by the reviewing judge.

At this point, one might raise the objection that I go too far in narrowing the inquiry into the adequacy of reasons into one that focuses on contextual sensitivity. After all, courts have traditionally required that the reasons provided be intelligible and

[78] Evan Fox-Decent, "The Internal Morality of Administration", in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford, UK: Hart Publishing, 2004) at 156.
[79] *Newfoundland Nurses*, *supra* 3 at para 14.

transparent as to the reasoning process embarked upon by the administrator in reaching her decision.[80] In response, it is important to note that intelligibility and transparency admit of degrees such that a decision-maker's chain of reasoning may exhibit some of these traits while falling short of the level of intelligibility and transparency that would satisfy a reasonable person affected by the decision. My contention is that so long as a decision-maker has demonstrated the requisite contextual sensitivity, judges will be permitted to build the reasons up to a satisfactory level of intelligibility and transparency.

A comprehensive and satisfactory account of why judges are permitted to do this would have to go beyond the oft-expressed view that decision-makers are subject to lower standards of reason-giving on account of institutional constraints.[81] First, this is a hardly satisfying response from the point of view of the affected party who has to live with the decision. Second, this view also assumes that the administrative decision-maker is the sole purveyor of reasons for the decision and, as such, that the affected party has no choice but to accept these unsatisfactory reasons.

An institutional approach would reject both of these premises in affirming the affected party's right to fully intelligible and transparent reasons while also holding that the duty to provide these reasons is one that is distributable among both decision-makers and judges. Such an approach would insist that any division of labour be articulated along the lines of how the administrative state and the judiciary complement and support each

[80] See e.g., *VIA Rail Inc v National Transportation Agency*, [2001] 2 FCR 25, 193 DLR (4th) 357. Here, the Federal Court struck down a decision issued by the National Transportation Agency (NTA) on the basis that the NTA's findings against VIA Rail lacked intelligibility. The NTA's impugned decision declared that VIA Rail's Special and Joint Passenger Tariff 1, section 13-D constituted an undue obstacle to the mobility of persons with disabilities. The NTA's failure to define the term "obstacle" was deemed fatal to the reasons.

[81] Courts have noted that it would be too burdensome for decision-makers to provide fully intelligible and transparent reasons. See, for example, *Amjad v Canada (Minister of Citizenship and Immigration)*, 2015 FC 385.

other. Judges play a distinct role in this model of collaborative governance by virtue of their legal training, impartiality, and critical distance from the dispute. In support of this point, I note that some commentators have recognized that judges may sometimes play a creative role. Timothy Endicott has suggested that judges may legitimately engage in 'invention', which involves "creating a new answer to a legal question either i) where there is no rule to apply, or ii) in place of an existing rule."[82] Judicial 'invention' is appropriate in disputes involving vague standards where interpretive techniques may not be sufficient to decide the case. Endicott gives the example of the 'sufficient interest' requirement for standing to seek judicial review as an example of when invention may be more appropriate than interpretation.[83]

Without dwelling too much on the finer points of Endicott's distinction, I note simply that the task of rendering reasons intelligible may involve both interpretation and invention. The interpretive dimension in *Agraira*, for example, came from an analysis of the existing legislation and guidelines. The inventive dimension, on the other hand, consisted in the Court's act of formulating a definition of "national interest" susceptible of direct application to a particular set of facts. My point here is that the Court's 'inventive act' can be viewed as complimenting and building upon the administrator's demonstration of a contextual sensitivity to the pertinent issues such that the original reasons are rendered fully intelligible and transparent to the affected individual.

It would be overly ambitious to claim that there is always (or often) a clean division of labour between administrators and judges. There is no formula that will

[82] Timothy Endicott, *Vagueness in Law* (Oxford, UK: Oxford University Press, 2000) at 180.
[83] "It seems that deciding whether the applicant's interest is sufficient in an unclear case is not necessarily a matter of interpreting the provision, any more than deciding how to exercise an express discretion is necessarily a matter of interpreting the provision that grants discretion. In giving effect to the 'sufficient interest' provision, there may be nothing to interpret." *Ibid* at 181.

definitively tell an administrative decision-maker whether she has provided adequate reasons for the purposes of joint-governance. My proposal is simply that the "alert, sensitive, alive" test serves as helpful indicia to when decision-makers have played their role in this cooperative endeavour. It makes sense from the point of view of inter-institutional comity to focus on contextual sensitivity as the locus of the administrator's function in the joint governance. The administrator will have privileged insight into the factual details, the various interests of applicant and third parties (such as an applicant's children), as well as the legislative objectives that she is tasked with furthering. These are insights that a judge will presumably not have convenient access to by virtue of the judge's institutional distance from the parties, the dispute, and day-to-day administrative operations. To the extent that a competent administrator demonstrates in her written reasons that she has identified and engaged with the pertinent issues, there is a strong presumption that she has provided the informational basis on which a judge can, if necessary, construct reasons that meet the requirements of justifiability.

PART IV: LESSONS FROM CASE LAW

A. Contextual sensitivity and Inter-institutional Comity: *Canada Post*

Something akin to the *Baker* "alert, alive, sensitive" analytical framework is increasingly being employed by courts to determine whether reasons were adequate.[84]

[84] In *Burton v Canada (Minister of Citizenship and Immigration)*, 2014 FC 910, 30 Imm LR (4th) 294, for example, the Federal Court found that a Pre-Removal Risk Assessment Officer (PRRA)'s decision concerning whether an applicant would be in danger if deported back to Jamaica was unreasonable. Gleason J faulted the officer for having failed to consider the adequacy of state protection in Jamaica. That the PRRA officer failed to address this key issue in his reasons renders the decision devoid of justification, transparency and intelligibility. Along a similar line of reasoning, the Federal Court in *Momtaz v Canada (Minister of Citizenship and Immigration)*, 2015 FC 362 ruled that an immigration officer's reasons for rejecting the applicants' application for permanent residence based on H&C grounds were adequate on the basis that the key issue of the "particular situation of the Applicants [was] discussed and an explanation

Canada Post is a particularly interesting example of this trend and merits, in my view, close attention. The case concerned a grievance made by the Union of Postal Workers (the Union) alleging that Canada Post interfered with the Union's exclusive representation of employees by employing tactics such as physically barring a Union representative from participating in discussion forums between management and employees and subtly pressuring employees into accepting reduced benefits, thus violating s. 94(1) of the *Canadian Labour Code* which prohibits employers from interference in a union's representation of its members.[85] The labour arbitrator sustained the grievance in a 40 page long decision that referenced an arbitration decision he himself had authored 10 years earlier in 1999 centering on the rights of Canada Post and the Union in the context of similar employer-employee forums.[86]

On judicial review, the chambers judge set aside the arbitrator's reasons as unreasonable on the basis that the arbitrator's reasons lacked transparency and intelligibility. In particular, the judge faulted the arbitrator for having failed to draw a discernable line between legitimate actions that an employer can engage in and impermissible interference in the union's function as the exclusive bargaining agent for its members. The judge noted that as there was no recognizable line drawn, it was not his place to draw this line himself. Furthermore, the judge faulted the arbitrator for failing to reference s. 94(2)(c) of the *Canadian Labour Code*, which provides for exemptions from s. 94(1).[87]

[was] given as to why they do not face unusual and undeserved or disproportionate hardship if they return to Bangladesh.*"*

[85] *Canada Post*, *supra* note 10 at paras 11-12. a

[86] *Ibid* at paras 18-19.

[87] *Ibid* at para 33.

The BCCA, under the pen of Bennett JA, restored the arbitrator's original decision. Bennett JA engaged in a discussion of *Dunsmuir* and *Newfoundland Nurses*, highlighting the importance that those decisions accord to deference toward arbitrators. Applying this jurisprudence, the Court ruled that the arbitrator's "reasons in the instant case, when viewed in light of previous arbitral decisions, exhibit the requisite transparency and justification customary with the reasonableness standard."[88] Bennett JA responded to the chambers judge's ruling that the arbitrator failed to draw a clear line between permissible and impermissible employer conduct by highlighting the importance of the 1999 decision in the arbitrator's reasons. According to the BCCA, the chambers judge was wrong to minimize the importance of this earlier decision, which provided guidance as to the kind of information that would (and would not) count as interfering with the exclusive role played by the union.[89]

There was thus a clear disagreement between the BCCA and the chambers judge as to what constitutes intelligible and transparent reasons by an arbitrator. The chambers judge decision makes sense if we conceive of intelligibility and transparency as requiring arbitrators to draw their conclusions from a complete set of explicitly stated premises and consideration of all relevant provisions. The arbitrator omitted, after all, any reference to s. 94(2)(c) of the *Canadian Labour Code*, a provision that exempts employers from the restrictions enumerated in 94(1) under certain conditions. The chambers judge seized upon the omission as proof that the decision lacked intelligibility and transparency. The logic here seems to be that if the arbitrator does not explicitly address the exemption provision and explain why it does not apply in the case of Canada Post, there is no way

[88] *Ibid* at para 65.
[89] *Ibid* at para 61

for a reviewing judge to understand how the arbitrator reached the conclusion that Canada Post's actions fall outside the exemption clause. On this basis, the chambers judge felt constrained to find the decision unreasonable for lack of intelligibility and transparency.

It was *Newfoundland Nurses* that provided the analytical framework for the BCCA to move away from an approach that shoulders the entire burden of rendering reasons intelligible and transparent onto the decision-maker. Bennett JA specifically applied *Newfoundland Nurses*' ruling that "a reviewing court has an obligation to support the reasons – not subvert them. The law does not require reasons to be perfect."[90] In true collaborative fashion, the BCCA worked off of the arbitrator's presentation of the issues and made references to pertinent legislation to determine that the outcome reached by the arbitrator was reasonable. As Bennett JA writes, "[t]he outcome arrive at in this case was available to [the arbitrator] on the basis of s. 94(1) and the Agreement. He referred to s. 94 in the order. *He was clearly alive to the issue before him, and failure to reference s. 94(2) does not mean he failed to consider it*."[91] The BCCA thus drew attention to evidence of the arbitrator's contextual sensitivity, particularly his sensitivity to the objectives of the *Canadian Labour Act* as well as to the particular interests and circumstances of the various parties. This sensitivity was demonstrated in passages of the 1999 decision that provided examples of permissible and impermissible behaviour,[92] as well as in passages of the impugned decision that contextualized the veiled threats uttered by senior managers at the discussion forums.[93] Insofar as a reviewing judge could have

[90] *Newfoundland Nurses*, *supra* note 3 at para 73.
[91] *Canada Post*, *supra* note 10 at para 74. Emphasis added.
[92] *Newfoundland Nurses*, *supra* note 3 at para 64.
[93] *Ibid* at para 66.

drawn from the aforementioned evidence the conclusion that the arbitrator specifically grappled with the issues touching upon s. 94(2), the arbitrator's decision was reasonable.

An institutional approach would applaud the BCCA's decision to the extent that it was grounded in a collaborative engagement with the information provided by the arbitrator. Where an institutional approach would differ, however, is in the necessity of making the inference that the arbitrator considered s. 94(2). It is simply impossible to know whether the arbitrator did in fact specifically consider s. 94(2) and making these sort of factual inferences opens the court up to Paul Daly's and Matthew Lewan's critique that the requirement to look for hypothetical reasons merely invites speculation. An institutional approach would not use evidence of the arbitrator's contextual sensitivity as a premise to infer the arbitrator's consideration of a specific section, but would instead focus on the arbitrator's contextual sensitivity as an indicia of the arbitrator having provided a solid foundation on which the judge can bring the original reasons up to an adequate level of intelligibility and transparency. That the arbitrator did not direct her mind towards a specific section loses relevance, following an institutional approach, if we see the requirements of providing intelligible and transparent reasons as distributable among judges and decision-makers. So long as the arbitrator provides the requisite information in a way that supports a particular conclusion (e.g., that the employer did not meet the exemption requirements), then the reviewing judge can "connect the dots"[94] to give the fully fleshed-out justification that the applicant and the public are owed.

The basic point to bear in mind here is that when a decision-maker demonstrates that she is alert, alive, and sensitive to the pertinent issues and legal provisions, the reasons will necessarily exhibit some degree of intelligibility and transparency. However,

[94] This was the metaphor used by Rennie J in *Komolafe*, *supra* note 40 at para 11.

this may not be enough for justifiability; a decision-maker can exhibit a high degree of contextual sensitivity while leaving legal terms undefined or omitting to mention pertinent legal provisions. It is precisely in such circumstances that judges have a positive contribution to make. This, I think, was the BCCA's underlying message in *Canada Post*. Through referencing a previous discussion of permissible and impermissible communications by employers to employees, the arbitrator demonstrated that he was alert, alive, and sensitive to the key issue of when an employer has impermissibly interfered with the union's legislatively assigned role as the sole representative of its members in the areas of benefits and working conditions.

An intelligible and transparent finding of whether Canada Post's actions enjoyed protection under the exemption clause requires some reference to the exemption clause itself – and this is precisely what the chambers judge could and should have contributed given the information that the judge had in his possession. By seizing on the arbitrator's omission of the exemption provision as determinative of the inquiry into the adequacy of the reasons, the chambers judge did not treat the arbitrator's decision as a bona fide attempt to solve the social problem that Parliament has empowered the arbitrator to tackle. To use Kavanagh's language, the chambers judge failed in his role as a constructive partner.

B. Contextual sensitivity and Inter-institutional Comity: *Agraira*

While less obvious, I would argue that fragments of this logic appear in the Supreme Court's decision in *Agraira*. As the Supreme Court notes, while the decision-maker did not provide a definition of "national interest", he

> … reviewed and considered all material and evidence before him. Having done so, he placed particular emphasis on: the appellant's contradictory and inconsistent accounts of his involvement with the LNSF, a group that is engaged in terrorism; the fact that the appellant was most likely aware of the LNSF's previous activity; and the fact that the appellant had had sustained contact with the LNSF.[95]

To the extent that these considerations demonstrate that Minister was alert, alive and sensitive to relevant factors, they constitute the foundation that the Court builds upon when supplementing the Minister's (not entirely intelligible) reasons.

It is unclear, however, whether the extracts of the Minister's reasons referenced by the Supreme Court in its 'implied interpretation' analysis demonstrates that the requirement of contextual sensitivity was fulfilled. Nowhere in this passage does it show that the Minister was alert, alive or sensitive to the importance or even relevance of the values in the *IRPA* that the Court draws our attention to, particularly the value of democracy.[96] This is problematic as the Court formulates and applies its understanding of 'national interest' on the basis of the *IRPA*'s concern with promoting democracy and not merely safeguarding national security. Thus, what is missing is the complementarity that King speaks of or, alternatively, the idea that judges, in supplementing reasons, should be building on the foundations provided by the decision-maker. The Court's 'implied reasons' approach opens the Court up to Lewan's and Daly's criticism that the requirement to look for hypothetical reasons constitutes little more than a licence to speculate.

The Supreme Court's analysis would have been more compelling if it had given some evidence of how the Minister demonstrated sensitivity to the values and objectives enshrined in the *IRPA*. This avenue was available to the Court: the Minister noted in his

[95] *Agraira*, *supra* note 5 at para 89.
[96] *Ibid* at para 78.

reasons that the LNSF, with which the applicant was involved, had previously used violence to overthrow a government (which could be interpreted as an anti-democratic act in that violence is inherently anathema to democracy).[97] The fact that the Minister considered the LNSF's violent history could have been interpreted as evidence that the Minister was somewhat alert, sensitive and alive to the importance of democracy in the *IRPA* and, by extension to the potential dissonance between the applicant's LNSF affiliation and this value. Here, it is important to note that the inquiry into whether a decision-maker has fulfilled the requirement of contextual sensitivity is a flexible one.[98] As Abella J observes in *Newfoundland Nurses*, specialized decision-makers like the Minister "routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist."[99] The inquiry into contextual sensitivity must take into account the fact that decision-makers routinely apply their governing statutes and may in good faith omit to put in writing all the issues that they were grappling with.[100]

Had the Court done a more compelling job of recognizing the Minister's contextual sensitivity, its formulation of the term 'national interest' would have been relatively unproblematic from the point of view of inter-institutional comity. The Court would have been able to build upon the Minister's contextual sensitivity by providing a more defined articulation of 'national interest' where the term was hitherto vague and could have been articulated in a variety of ways much like the 'sufficient interest'

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[97] *Ibid* at para 13.
[98] Or what the Court in Dunsmuir called a 'somewhat probing examination'. See Dunsmuir, *supra* note 2 at para 20.
[99] *Newfoundland Nurses*, *supra* note 3 at para 13.
[100] The economist and political philosopher Amartya Sen provides a helpful bit of perspective by noting that "[w]hen the reasons for a particular choice are established in our mind through experience or habit formation, we may often choose reasonably enough without sweating over the rationality of every decision." See Amartya Sen, *The Idea of Justice* (Cambridge, MA: Belknap Press, 2009) at 181.

requirement that Endicott references. In this sense the 'implied interpretation' would not have been an interpretation at all but rather a judicial 'invention' in Endicott's sense of the term. There was, after all, nothing in the *IRPA* itself that articulated the concept of 'national interest' by reference to any particular objective in Act or by reference to all the objectives in the Act.[101] While the Court might have been a bit off in identifying how the Minister was alert, alive and sensitive, there was a nonetheless a recognition that a court can contribute its judicial capacity in rendering reasons transparent and intelligible only if the decision-maker provides a sufficient flow of information.

Assuming that the Minister had fulfilled the requirement of contextual sensitivity, the Court's formulation of 'national interest' added the layer of intelligibility and transparency to the Minister's reasons necessary to render these reasons justifiable. It is irrelevant that the Supreme Court's articulation of 'national interest' was inconclusive in that the evidence could have been used to argue the other way (i.e. for a more restrictive understanding of national interest encompassing only national security). Public justification requires only that reasons are "sufficient to justify the decision and thus not reasons that necessitated that decision."[102] Despite the uncertainty as to whether the Court

[101] *Walchuk v Canada (Minister of Justice)*, 2012 FC 958, 65 Admin LR (5th) 39 provides another good example of judicial 'invention' that builds upon a demonstration of contextual sensitivity. At issue in this case was the respondent Minister's decision to refuse the applicant ministerial review of his second-degree murder conviction. The Minister's reason was that, despite expert evidence that supports the applicant's position, upholding the applicant's conviction would not be a "miscarriage of justice" pursuant to s. 696.4 of the *Criminal Code* which allows the Minister to review prosecutions where there might be a 'miscarriage of justice'. The Federal Court found the Minister's decision reasonable despite the absence of an explicit definition of 'miscarriage of justice'; the Minister's implied interpretation focused on whether the applicant would have been convicted notwithstanding the favourable expert evidence. The Federal Court cited the Minister's attention to compelling evidence that attested to the applicant's guilt. Here, one may question whether it is more accurate to say that the Court was inferring a definition from the Minister's mind rather than to state that the Court was actively building upon the Minister's demonstration of being alert, alive, and sensitive to the evidence against the applicant.

[102] Dyzenhaus, "Law as Justification", *supra* note 68 at 28. Gerald Graus makes a similar distinction between conclusions being *inconclusive* and *indeterminate.* See also Gerald Graus, *Justificatory Liberalism* (Oxford, UK: Oxford University Press, 1996) at 153.

properly recognized the foundation laid by the decision-maker, the Supreme Court should be give partial credit for acting as a constructive partner in the project of joint governance.

CONCLUSION

Post-*Dunsmuir* cases have confirmed that 'deference as respect' is here to stay and that judges will have to be indulgent with the less-than-perfect reasons of administrative-decision makers. At the same time, that reasons must be justifiable in light of the facts and the law remains a cornerstone of the rule of law. While it will never be a simple task to reconcile these competing demands, a conceptual framework that centers on the institutional features of courts and administrators could go a long way. Theories of inter-institutional comity can ground the requirement to supplement reasons in an account of the institutional strengths and weaknesses of courts vis-à-vis those of administrative decision-makers. Like Dyzenhaus's deference as respect, an approach based on inter-institutional comity recognizes that courts and administrators have different perspectives and tools they can bring to governance. Providing justifiable reasons for the countless administrative actions undertaken on a daily basis is a herculean task that can hardly be saddled on any one institution. As such, theories of inter-institutional comity affirm that judges can properly draw from their own intellectual repertoire and institutional capacity in making a positive contribution to the intelligibility and transparency of administrative decisions.

However, theories of inter-institutional comity by themselves face explanatory limits due to their high level of abstraction and may require other conceptual resources to

delineate what each institution is responsible for. To this end, I have suggested that we re-appropriate the rich insights of L'Heureux-Dubé J's decision in *Baker*. While the "alert, sensitive, and alive" approach was originally geared towards an analysis of the reasonableness of a decision as distinct from the adequacy of reasons, I have endeavoured to show that it can be re-tooled as a method of determining when a decision-maker has provided a sufficient justificatory foundation for a reviewing judge to build on. In the BCCA's decision in *Canada Post*, we see a fragmentary recognition that this contextual sensitivity can serve as a principled basis on which judges can add an important layer of intelligibility and transparency to the decision-maker's reasons. A more faithful adherence to this methodology in *Agraira* would have made the Supreme Court's decision a more compelling statement on the structure and importance of joint governance.

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