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The Methodology of Reasonableness Review in Administrative Law: *Hillier v. Canada*

Jason MacLean, Assistant Professor, University of Saskatchewan College of Law

Introduction

The Federal Court of Appeal's recent administrative law decision in *Hillier v. Canada*[1] is both timely and telling. It is timely given the Supreme Court of Canada's pending reconsideration[2] of the nature and scope of judicial review of administrative action and, in particular, the standard of review test set out in *Dunsmuir*.[3] It is telling because, despite its avowed intention to provide a much-needed step-by-step methodology of reasonableness review, it unwittingly falls into the trap of "disguised correctness review" that it sets out to avoid. If nothing else, the Federal Court of Appeal's decision in *Hillier* throws into sharp relief just how daunting is the challenge of renovating *Dunsmuir* and judicial review. Indeed, *Hillier* unwittingly reveals the fundamental tension underlying reasonableness review of administrative action. Will the Supreme Court of Canada heed its lesson in time?

Factual and Statutory Background

Sue Hillier sought disability benefits under the *Canada Pension Plan*. The Minister of Employment and Social Development denied her claim, finding her disability insufficiently severe. Hillier contested the decision before the Social Security Tribunal, whose General Division affirmed the Minister's decision.

The Social Security Tribunal's Appeal Division granted Hillier's application for leave to appeal from the General Division's decision.[4] In hearing Hillier's appeal, however, the Appeal Division considered only some—*i.e.* two of eight—of the grounds for appeal advanced by Hillier, deciding at the leave stage that a number of the grounds were hopeless.[5] It is on this basis—the Appeal Division's decision to consider some but not all of the grounds for appeal advanced by Hillier—that Hillier applied to the Federal Court of Appeal for judicial review.[6] Hillier asked the Court to quash the Appeal Division's decision and remit the matter back to a different member of the Appeal Division on all of the grounds originally alleged by Hillier.[7]

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[1] *Hillier v. Canada (Attorney General),* 2019 FCA 44 (CanLII).
[2] See *Bell Canada, et al v. Attorney General of Canada* (SCC Case No 37896); *National Football League, et al v. Attorney General of Canada* (SCC Case No 37897); *Minister of Citizenship and Immigration v. Alexander Vavilov* (SCC Case No 37748).
[3] *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190.
[4] *S.H. v. Minister of Employment and Social Development,* 2018 SST 95 (Tribunal File No AD-16-1349) at para. 3 [*Appeal Division Decision*].
[5] *Ibid.*
[6] *Ibid.* at paras. 2-3.
[7] *Ibid.* at para. 3.

Hillier's application for judicial review turned on the interpretation given to section 58 of the *Employment and Social Development Act*, which provides as follows:

> **Grounds of appeal**
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> **58** (1) The only grounds of appeal are that
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> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.
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> **Criteria**
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> (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.
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> **Decision**
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> (3) The Appeal Division must either grant or refuse leave to appeal.
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> **Reasons**
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> (4) The Appeal Division must give written reasons for its decision to grant or refuse leave and send copies to the appellant and any other party.
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> **Leave granted**
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> (5) If leave to appeal is granted, the application for leave to appeal becomes the notice of appeal and is deemed to have been filed on the day on which the application for leave to appeal was filed.[8]

Standard of Review: Reasonableness

Writing for a unanimous Court, Stratas J.A. concluded that the standard of review applicable to the Appeal Division's decision was reasonableness: "Section 58 sits in the *Department of Employment and Social Development Act*, a statute the Appeal Division frequently considers

[8] *Employment and Social Development Act*, S.C. 2005, c. 34, at s. 58.

and with which it is very familiar. In circumstances such as these, presumptively we are to review the Appeal Division's decision for reasonableness."[9]

Reasonableness Review: A Proposed Methodology

This brings Stratas J.A.—and the rest of us—to the crucial if sorely under-examined question of just what reasonableness review is, and how it is to be done. How does a reviewing court go about conducting reasonableness review of an administrative decision without simply substituting its own *de novo* determination of the matter in place of the administrative decision-maker's (known as the sin of "disguised correctness review")?

Before proceeding to discuss the reasonableness review methodology proposed by Stratas J.A. in *Hillier*, it is worth briefly recalling the Supreme Court of Canada's guidance in *Dunsmuir*. Upon framing the question as "[h]ow are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?",[10] the majority in *Dunsmuir* explained:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: 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 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.
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> The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? […] We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart,

[9] *Hillier*, *supra* note 1 at para. 12.
[10] *Dunsmuir*, *supra* note 3 at para. 46.

> ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).[11]

Dunsmuir otherwise provided neither rules nor steps nor *practical* guidance of any kind to reviewing courts about how to conduct reasonableness review. In a number of post-*Dunsmuir* decisions, the Supreme Court of Canada endeavored to further clarify the meaning of reasonableness review by explaining that reasonableness "takes its colour from the context"[12] of administrative action.

It is against this backdrop that Stratas J.A. proposes in *Hillier* a step-by-step methodology for reasonableness review of administrative action.[13] His proposed methodology includes the following four steps:

(1) conduct a "tentative examination" of the relevant statutory provisions;[14]

(2) ascertain the range—including the "margin of appreciation"—of interpretive options available to the administrative decision-maker;[15]

(3) assess whether the administrative decision-maker's statutory interpretation falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law";[16] and

(4) determine whether the administrative decision-maker's appreciation of the purposes, nuances, and ramifications of the applicable statutory provisions—by dint of the decision-maker's "daily, in-the-field work or genuine expertise"[17] is relevant and explained or otherwise evident.[18]

Application of Stratas J.A.'s Reasonableness Methodology

At step one, Stratas J.A. concludes—*tentatively*—that the words of the relevant provisions of the *Department of Employment and Social Development Act*, in particular those of section 58,

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[11] *Ibid.* at paras. 47-48.
[12] See *e.g. Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at para. 59; *Catalyst Paper Corp v. North Cowichan (District)*, [2012] 1 S.C.R. 5 at para. 18; *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770 at para. 22; and, as Stratas J.A. notes in *Hillier*, *supra* note 1 at para. 40, "many, many others."
[13] *Hillier, supra* note 1 at para. 13.
[14] *Ibid.* at para. 14.
[15] *Ibid.* at paras. 14-15.
[16] *Ibid.* at para. 16, citing *Dunsmuir, supra* note 3 at para. 47.
[17] *Hillier, supra* note 1 at para. 17.
[18] *Ibid.*

"*seem* precise and unequivocal. They *seem* to lead to *one acceptable and defensible result*. They support Ms. Hillier's position."[19]

So far, so tentative.

Stratas J.A. proceeds by observing that subsection 58(1) of the *Act* limits the grounds of appeal to (a) violations of natural justice and jurisdictional error, (b) an error of law, and (c) decisions based on erroneous findings of fact made in a perverse and capricious manner. For Stratas J.A., the "necessary *implication* here is that a ground not falling within these categories cannot be raised on appeal; only in these circumstances can the Appeal Division disregard a ground of appeal."[20]

Stratas J.A. further observes that subsection 56(1) of the *Act* provides that "[a]n appeal to the Appeal Division may only be brought if leave to appeal is granted."[21] From this Stratas J.A. (tentatively) concludes: "*Inferentially*, this reinforces the idea that the Appeal Division has not been given a general power to grant leave in part, *i.e.*, to consider only some of the grounds put to it."[22]

For Stratas J.A., notwithstanding his use of the interpretive tools of implication and inference, "the words of the legislative provision *seem* to be precise and unequivocal."[23] In his view, "unless an appeal has no merit at all, the Appeal Division should take on the appeal on all grounds provided that those grounds fall within the categories of subsection 58(1)."[24]

The difficulty with Stratas J.A.'s tentative-in-name-only interpretation of the relevant statutory provisions, leaving aside the obvious ambiguity of the *Act's* leave to appeal provisions requiring implication and inference, manifests itself at step two. Having arrived at a "tentative" determination that the interpretation of the *Act* yields but one defensible interpretation, as Stratas J.A. has here (and as reviewing courts virtually always do), how can a reviewing court proceed to meaningfully—let alone deferentially—ascertain the *range* of interpretive options available to the decision-maker?

Having worked himself into this all-too-familiar corner of judicial review, Stratas J.A. falls back on a judicial oxymoron introduced by the Supreme Court of Canada in *McLean v. British Columbia (Securities Commission)*.[25] According to Stratas J.A., the range of interpretive options

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[19] *Ibid.* at para. 19 [emphasis added].
[20] *Ibid.* at para. 22.
[21] *Department of Employment and Social Development Act, supra* note 8 at ss. 56(1).
[22] *Hillier, supra* note 1 at para. 23 [emphasis added].
[23] *Ibid.* at para. 24.
[24] *Ibid.* at para. 28.
[25] *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895 at para. 38.

available to administrative decision-maker such as the Social Security Tribunal Appeal Division can be narrow, "perhaps even *a range of one*."[26]

Unsurprisingly, and unavoidably, Stratas J.A. proceeds to find that the Social Security Tribunal Appeal Division's interpretation of its own *Act* to be outside his narrowly constructed "range of one" defensible result, and consequently unreasonable.[27]

How did the Court end up in this familiar yet unhelpful place, yet again, despite avowing to do just the opposite? The answer can be found in the judicial approach to statutory interpretation on judicial review. In other words, the judicial approach to statutory interpretation generally.

Once Stratas J.A. finally turns his attention to how the Appeal Division itself approached section 58 of its home statute, his reasons for decision already two-thirds complete, he offers the following assessment: "[The Appeal Division] did not follow the *accepted approach* to interpreting a legislative provision nor did it explain why it did not."[28] For Stratas J.A., "[o]ur focus must be the *authentic meaning* of the particular provision in issue, here section 58."[29]

So much for reasonableness review's *range* of acceptable options.

Stratas J.A. further observes of the Appeal Division that "[a]ll it did was to declare that '[it could not] see anything in the legislation…that prohibits the Appeal Division from limiting the scope of an appeal as it moves from consideration at the leave stage to consideration at the merits stage' (at para. 19)."[30] Nor, according to Stratas J.A., did the Appeal Division say anything "in detail" about the *Act's* purpose. "Instead, it expressed its own preference for 'hold[ing] full hearings only on issues of substance' (at para. 19)."[31]

This would be troubling, were it true. What is more troubling, however, is that it is not true. The Appeal Division's reasons for decision devote 16 paragraphs to its interpretation of section 58 of the *Act*, including a close and careful consideration of previous decisions of the Appeal Division, the Federal Court, and the Federal Court of Appeal interpreting section 58, decisions that Stratas J.A. inexplicably neither discusses nor even cites.[32]

In *Mette*, for example, the Federal Court of Appeal held that section 58 of the *Act* "does not require that individual grounds of appeal be dismissed."[33] In the not-unreasonable view of the

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[26] *Hillier, supra* note 1 at para. 15 [emphasis added].
[27] *Ibid.* at para. 40.
[28] *Ibid.* at para. 31 [emphasis added].
[29] *Ibid.* at para. 35 [emphasis added].
[30] *Ibid.* at para. 31.
[31] *Ibid.*
[32] See *e.g. Mette v. Canada (Attorney General),* 2016 FCA 276; *Maunder v. Minister of Employment and Social Development* (AD-15-1290); *S.F. v. Canada Employment Insurance Commission,* 2017 CanLII 1890; *M.C. v. Minister of Employment and Social Development,* 2016 SSTADIS 308; *Canada v. O'Keefe,* 2016 FC 503; *H.M. v. Minister of Employment and Social Development,* 2015 SSTAD 988; *Minister of Employment and Social Development v. S.D.,* 2016 CanLII 59173.
[33] *Mette, supra* note 32 at para. 15.

Appeal Division, if section 58 does not require individual grounds to be dismissed at leave, "it does not prevent such an action either."[34]

More troubling still, Stratas J.A. inexplicably neglects to mention—much less credit—the Appeal Division's reliance on the principles of natural justice and judicial economy, which are reflected, according to the Appeal Division, "in section 2 of the *Social Security Tribunal Regulations,* which states that they 'must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications."[35] This is entirely consistent with the Attorney General's submission on behalf of the Appeal Division that the *Act* as a whole is aimed at making the area of federal social security more efficient.[36]

Nor does Stratas J.A. attend to the Appeal Division's own eminently reasonable construction of the *Act* in respect of Hillier's claims. According to the Appeal Division:

> The standard for the leave to appeal stage is notably lower than the standard once leave has been granted. Therefore, if the ground has failed to meet a lower threshold of success at the leave to appeal stage, to re-examine the ground again at the appeal would be a waste of judicial resources. If the ground does not have a reasonable chance of success, then it certainly will not succeed on a balance of probabilities. Allowing an argument to be re-heard at the hearing will not change the outcome.[37]

Nonetheless, Stratas J.A. somehow decides that the Appeal Division "failed to analyze the text of section 58 in any meaningful way."[38]

So much for reasonableness review's "respectful attention to the reasons offered or which could be offered in support of a decision."[39]

Conclusion: It's Correctness All the Way Down!

In *Hillier* the Federal Court of Appeal intended to provide a methodology for conducting reasonableness review of administrative action. What *Hillier* unintentionally provides, however, is a demonstration of the unacknowledged and unresolved tension between statutory interpretation (as practiced by courts) and judicial review for reasonableness.

Statutory interpretation is about finding a statute's *best* interpretation, its *correct* interpretation. In *Rizzo & Rizzo Shoes Ltd (Re),* the Supreme Court of Canada's reliance on the *Interpretation Act* to explain the correct approach to statutory interpretation is instructive. Section 10 of the *Interpretation Act*, the Court explains in *Rizzo*, "provides that every Act 'shall be deemed to be remedial' and directs that every Act shall 'receive such fair, large and liberal

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[34] *Appeal Division Decision, supra* note 4 at para. 22.
[35] *Ibid.* at para. 25.
[36] *Hillier, supra* note 1 at para. 34.
[37] *Appeal Division Decision, supra* note 4 at para. 25.
[38] *Hillier, supra* note 1 at para. 31.
[39] *Dunsmuir, supra* note 11 at para. 48.

construction and interpretation as will *best ensure* the attainment of the object of the Act according to its *true* intent, meaning and spirit.'"[40]

This approach to interpreting and constructing statutes is wholly incompatible, however, with reasonableness review's stated objective of ascertaining a range of possible, acceptable statutory interpretations. It should not come as a surprise that reviewing courts virtually always arrive at the oxymoronic "range of one" reasonable interpretation. The sin of "disguised correctness review" thus fails to capture the greater lie of reasonableness review, and the true legacy of *Dunsmuir*: It's correctness review all the way down!

[40] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 S.C.R. 27 at para. 21, citing the *Interpretation Act*, R.S.O. 1980, c. 219 at s. 10 [emphasis added].