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Article

Proportionality and the Public Law

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This paper traces the emergence of proportionality as the animating feature of Charter *rights and* Charter *values analysis as well as its emergence in Aboriginal law. It then argues, with reference to developments in Canadian administrative law jurisprudence and the jurisprudence that had developed in other jurisdictions, that the same principle should drive administrative legal analysis either by weaving the principle of proportionality into existing administrative law doctrines or, better yet, as a new stand-alone doctrine of proportionality as the fundamental norm in judicial review of administrative action.*

1. INTRODUCTION

Public law is preoccupied with ensuring that the state treats the public appropriately. In the past twenty years, proportionality has slowly revealed itself as the golden thread woven through much of the fabric of public law. The time has come to explicitly embrace proportionality as the underlying logic of administrative law doctrines as well.

This paper traces the emergence of proportionality as the animating feature of *Charter* rights and *Charter* values analysis as well as its emergence in Aboriginal law. It then argues, with reference to developments in Canadian administrative law jurisprudence and the jurisprudence that had developed in other jurisdictions, that the same principle should drive administrative legal analysis either by weaving the principle of proportionality into existing administrative law doctrines or, better yet, as a new stand-alone doctrine of ***24** proportionality as the fundamental norm in judicial review of administrative action.

2. *CHARTER* LAW

In its seminal judgment in *R. v. Oakes*, [1] the Supreme Court of Canada ensured that the concept of proportionality would be an animating principle in all *Charter* litigation when it held that analysis of whether an infringement is "reasonably and demonstrably justified" as required by the constitutional text involves an inquiry into whether the state action in question was *proportional*, not only to the important state objectives but also to the individual *Charter* rights in question.

The *Oakes* test, of course, is concerned with justification for breach of *Charter* rights. The well-known test is engaged when a *Charter* right is infringed and the infringement is "prescribed by law". The analysis begins by identifying the objective of the legislation and ensuring that the objective is pressing and substantial. The courts then measure proportionality against both the objective and the individual interests at stake. They do so by ensuring, first, that the means chosen are rationally connected to the objective. Although the rational connection stage of the test has been described as "not particularly onerous", the court must consider whether "the measures adopted [are] carefully designed to achieve the objective in question". In other words, "they must not be arbitrary, unfair or based on irrational considerations". Rather, "they must be rationally connected to the objective". [2] Next, the Crown must demonstrate that there are not alternative, less drastic means of achieving the objective in a real and substantial manner. [3] Finally, courts move to a consideration, not only of proportionality to the objective, but also proportionality to the interests affected. At this final stage, the Crown must show that the deleterious effects of the law are outweighed by its salutary effects. It is at this final stage that the courts take full account of the "severity of the deleterious effects of a measure on individuals or groups". [4]

More recently in *Doré c. Québec (Tribunal des professions),*[5] the Supreme Court of Canada refined and adapted this proportionality test to better accommodate adjudicative administrative settings engaging *Charter* values. In *Doré*, the Court noted that in assessing whether an adjudicated decision violates the *Charter*, Courts are "engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore ***25** unreasonably, limited a *Charter* right".[6] In both cases, Courts look to see "whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited".[7] In the adjudicative administrative context, the Supreme Court of Canada found that the *Oakes* test was a somewhat awkward fit, in part because it was not always clear that the *Charter* infringement was prescribed by law, nor was it clear what "pressing and substantial" objective to measure the infringement against, nor who would have the burden of defending it.[8] Therefore, the Supreme Court of Canada embraced "a richer conception of administrative law, under which discretion is exercised "in light of constitutional guarantees and the values they reflect".[9] This administrative law approach was said to be consistent with strong protection of *Charter* guarantees and values. It requires administrative decision-makers to balance *Charter* values against statutory objectives by asking how the *Charter* value at issue will best be protected in light of those objectives. On judicial review, the question is whether, in light of the impact on the *Charter* value and the context of the decision, statutory and other circumstances, the decision reflects a proportionate balancing of the *Charter* rights and values at play. While the Supreme Court of Canada did not require that the *Oakes* analysis be used to ground this inquiry, the Court has stressed that this approach centres very much, again, on proportionality and that it is conceptually harmonious with the *Oakes* test.

Thus proportionality is the animating norm when considering state conduct engaging either *Charter* rights or *Charter* values. No matter which framework of analysis is used *(Oakes* or the administrative framework propounded in *Doré),* the principle of proportionality should lead to the same result. As a matter of principle, the individual's right to rely on strong *Charter* protection should not depend upon the form of the legislation the state enacts. A government that decides to enact a generally worded statute (which therefore gives a broader measure of discretion to administrative decision-makers and would be analysed under *Doré)* should be neither worse nor better off when faced with a *Charter* challenge than a specifically worded statute (which directly infringes the *Charter* and would therefore be analysed under *Oakes*).[10] Therefore the principle of proportionality ensures the approach is harmonized and this harmonization furthers proportionality in terms of parity of treatment. This is a boon for good public administration because it furthers the goals of consistency and certainty.

***26 3. ABORIGINAL LAW**

Proportionality has also been a mainstay in the area of Aboriginal law. For example, in *Delgamuukw v. British Columbia* the Supreme Court of Canada discussed Aboriginal title and found that infringements of Aboriginal title can be justified and that this was part of reconciling Aboriginal interests with "the broader political community of which they are part".[11] Thus the Court required proportionality between pressing and substantial public goals, the goal of reconciliation, and the Aboriginal interests at stake.[12]

Later in *Haida Nation v. British Columbia (Minister of Forests),* the Court required that in circumstances where a First Nation claimed, but had not yet proven, Aboriginal rights or title, the Crown was required to consult the First Nation in decisions that would negatively impact the asserted interests. Specifically, the Supreme Court of Canada stated that the Crown's duty to consult and accommodate "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed".[13] Thus, "the idea of proportionate balancing implicit in *Delgamuukw* reappears in *Haida".*[14]

In light of this line of jurisprudence, perhaps emboldened by its growing experience with proportionality, the Court in *Xeni Gwet'in First Nations* quietly imported what is essentially the *Oakes* test to a non-*Charter* dispute. Specifically, the dispute concerned a claim for Aboriginal title under s. 35 of the *Constitution Act, 1982*--a provision which is outside of the *Charter* and therefore not subject to s. 1.

The Court nevertheless concluded that where Aboriginal title has been established, this important interest is still not absolute. Instead, the Crown may justify incursions on Aboriginal title lands by demonstrating a compelling and substantial government objective consistent with the Crown's fiduciary obligation to the group. The Court elaborated:

First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.

***27** Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida*'s insistence that the Crown's duty to consult and accommodate at the claims stage "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (para. 39). [15]

Thus it appears that whether the important interest is a *Charter* right, a *Charter* value or an Aboriginal right, the Supreme Court of Canada has recognized that the demand of good administration is that incursions on such rights be proportionate.

4. ADMINISTRATIVE LAW

The question, then, is whether there is any principled reason to refuse to treat other important interests in a like manner. And this is the question that animates the discussion which follows and that is focused on non-constitutional administrative law.

The recent decisions in *Malcolm v. Canada (Fisheries and Oceans)*, a case before the Federal Courts, provide a useful springboard for this discussion. [16] In that case, the Federal Courts found that the Minister of Fisheries and Oceans, with minimal explanation and against staff advice, had reversed a long-standing, oft-repeated promise that the allocation of Pacific halibut quota as between the commercial and recreational fishing sectors would not be changed without using a "market-based mechanism". A market-based mechanism is a process which would result in compensation to either sector for a reallocation of their fishing opportunity. The Minister's promises had been relied on by commercial fisherman to their great detriment. Instead of using a market-based mechanism as promised, the Minister simply took 3% of the halibut quota from the commercial fishing sector and gave it to the recreational sector for free.

***28** *Malcolm* engaged the doctrines of legitimate expectations, public law promissory estoppel and substantive reasonableness. The very same three doctrines were before the Supreme Court of Canada thirteen years earlier in *Centre hospitaller Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*. [17] In that case, the Minister of Health and Social Services had repeatedly made a commitment to the hospital to reissue a permit specifying that it could operate short-term beds, something that it had been doing with the government's knowledge for years. When the permit reissuance was later denied, the hospital sought review under the doctrines of promissory estoppel, legitimate expectations and substantive reasonableness.

Both cases raise the question: When should public officials be held to their promises? In *Mt. Sinai*, Bastarache J.'s majority decision held that, as a result of the prior Ministerial promises, the Minister had effectively already made the decision to reissue the hospital permit so it was unnecessary to consider whether the legitimate expectations that had arisen could result in a substantive, and not merely procedural remedy. In holding that the Ministerial discretion had been exhausted notwithstanding that the permit had not actually been reissued, the majority decision side-stepped the difficult issue of whether broad Ministerial discretion could be fettered by earlier promises to exercise discretion in a certain way.

Binnie J.'s concurring decision (for himself and McLachlin C.J.) did not agree that a decision had already been made and considered the application of the three doctrines. Binnie J. held that because the relevant statute required the Minister to issue permits “if he considers that it is in the public interest”, a court should not estop the Minister from doing what he considers to be in the public interest. [18] He considered whether legitimate expectations could lead to substantive remedies. He noted this had occurred in England and a number of other jurisdictions. Binnie J. declined to follow these developments noting that unlike Canada, England had unified its doctrines of administrative law under the banner of “fairness” and the doctrine of legitimate expectations had developed into a “comprehensive code that embraces the full gamut of administrative relief from procedural fairness at the low end through ‘enhanced’ procedural fairness based on conduct, thence onwards to estoppel”. [19] He noted that the Canadian cases kept the doctrines distinct and substantive relief was available under different doctrines. As such, Binnie J. decided that the traditional rule should be maintained that only procedural remedies could flow from a breach of legitimate expectations. [20] However, he held that the prior Ministerial representations were ***29** nevertheless relevant in the analysis of substantive reasonableness and held that the refusal to issue the permit for the hospital was patently unreasonable. [21]

While the Supreme Court of Canada declined to expand the Canadian doctrine of legitimate expectations so as to include substantive relief in *Mt. Sinai,* some have suggested that the approach of both the majority and minority judges adhered to the same underlying values. [22] Both judgments took into account, on the one hand, the history of representations made by the Minister and the impact of the reversal on the claimant and those he represents, and on the other, the weight of the policy reasons. [23] The majority did so in the context of considering whether the original exercise of discretion was validly reversed. Binnie J. did so under the banner of “reasonableness”. Thus both judgments in *Mt. Sinai* reflect an appreciation and weighing of the *proportionality* of the interests at stake.

The result flowing from the reasoning in *Mt. Sinai* is that the failure of a Minister to keep past promises is relevant in the analysis of: (a) whether a decision has been made; (b) whether estoppel applies; (c) whether a legitimate expectation arose; (d) whether there has been procedural fairness; and (e) whether the test of substantive reasonableness is met.

In *Malcolm,* [24] the claimant argued that they should have succeeded on all of these grounds: (a) a decision to use a market-based mechanism had already been made, (b) all of the indicia of promissory estoppel were met, and unlike *Mt. Sinai,* there was no explicit statutory duty to make a decision or take action in the public interest, (c) and (d) all of the indicia of legitimate expectations were met and the relief sought was procedural, and (e) the test for substantive reasonableness was also met.

But the judgments from the Federal Courts declined the claim and demonstrate that the time has come for a fresh approach to administrative law and one which would reformulate these doctrines so as to ensure good public administration in Canada. [25] Although public law promissory estoppel was recognized as available in Canadian law by Binnie J. in *Mount Sinai,* it has rarely been successfully invoked. The time has come for the courts to clarify and ***30** confirm whether this doctrine has a practical role to play in Canadian jurisprudence. The doctrine of legitimate expectations, at present, excludes recovery for substantive relief, but it has been acknowledged that it is often difficult to differentiate between substantive and procedural relief. As such it is an adjunct to the doctrine of procedural fairness. The time has come for the courts to determine whether the developments in the United Kingdom and elsewhere to extend this doctrine to provide substantive relief should apply in Canada. Or whether it is the law, as suggested by Binnie J.'s decision in *Mt. Sinai,* that broken promises should lead to substantive results only but at least within the substantive reasonableness analysis. Indeed, it is our view, as developed below, that the time has come for a more harmonious approach to administrative law and one that weaves the *principle of proportionality* into each of these doctrines or better yet allows for a new stand-alone doctrine of proportionality as the fundamental norm in judicial review of administrative action.

What would such an approach look like? If courts were to adopt the first approach and weave the principle of proportionality into the existing doctrines, it would have the salutary impact of ensuring that the legal analysis was not aborted the moment it is recognized that a public official must act in the public interest, as it was in *Malcolm.* Instead, courts would first establish the first elements of public law promissory estoppel or legitimate expectations being the factual findings that the Minster made

clear, unambiguous and unqualified promises and assurances and, for estoppel, that these promises were intended to affect legal relationships and to be acted on, and were acted upon in reliance of those representations. Secondly, courts would ensure there was no express statutory provision preventing the public official from keeping his or her promise. If there was simply a broad statutory duty to act in the public interest, a *proportionality analysis* would be used to give real content to this doctrine and the principles behind it including, but not overwhelmed by, respect for the discretionary, policy making prerogatives of the Minister. This analysis would weigh the individual interest on the one hand, and the statutory objectives on the other. It would include consideration of the actual effect of the decision not only on the individual but more broadly as well.

If, on the other hand, courts were inclined to adopt the second approach, they could fundamentally realign Canadian judicial review of administrative action by articulating a principled and unified approach grounded in the principle of "proportionality". In our view, such an approach is beneficial in that it provides structure to judicial review, maintains appropriate deference to the legislature, and promotes discipline in decision-making by providing closer and context-sensitive elaboration of the indicia of proportionality.[26] It enables judicial review to be a means of ensuring public accountability by allowing courts ***31** to address real issues rather than focusing on compartmentalized doctrines and disputable distinctions and definitions.

Each of these administrative doctrines is grounded in concerns of fairness and the requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. Yet the present formalistic dichotomy between procedure (legitimate expectations and procedural fairness) and substance (promissory estoppel and substantive reasonableness) has nothing to say about the reach of the duty of good administration as good administration requires both fair processes and reasonable outcomes.[27] This latter point appears to have been recognized by the Supreme Court of Canada in both *New Brunswick (Board of Management) v. Dunsmuir*[28] and *N.L.N. U. v. Newfoundland & Labrador (Treasury Board)*[29] when the Court noted that review for reasonableness or for adequacy of reasons encompassed both process and substantive outcomes. Thus under this unified approach the distinction between substantive and procedural reasonableness, while contextually relevant, is not determinative of the resolution. Both interests may be legitimate and weighty in a given situation.

What is at stake in a judicial review on any of these grounds are the claimant's interests (and the interest of those he represents) on the one hand (which interests may be either procedural or substantive) and often a public interest on the other. Reviewing courts would proceed by considering the nature of the interest affected first, in light of all of the circumstances. The factors described above, in the context of the discussion of promissory estoppel are illustrative but not exhaustive of factors which might give weight to the claimant's interests. Next the Court would consider the statutory objectives pursuant to which the statutory authority acted. A consideration of statutory objectives, rather than the objectives of the decision-maker, would be consistent with the approach articulated by the Court in its analysis of reasonableness in light of *Charter* values in *Doré*.[30] The statutory objectives are ascertainable on the public record. Further, statutory objectives may attract deference from a court (because they reflect the will of the elected representatives) whereas there is arguably less deference owed to the motivations of an individual actor. Having identified the statutory objectives, the courts would then consider how the interests at issue will best be protected in view of the statutory objectives. The approach (whether undertaken under reasonableness or legitimate expectations or a stand-alone doctrine) contemplates giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing important ***32** individual interests against broader objectives.[31] While it is not necessary to formalistically import the *Oakes* analysis into this consideration of proportionality, considerations about whether the action taken is rationally connected to the statutory objectives,[32] whether the action taken is minimally impairing of the claimant's interests, and whether the salutary effects of the action outweigh the deleterious effects may usefully inform the proportionality analysis in an administrative law setting.

This approach finds support in the international jurisprudence where a number of jurisdictions have adopted a more robust approach to the doctrine of legitimate expectations. In England, because of the growth of the English doctrine of legitimate expectations (which differs substantially from the Canadian doctrine of the same name), the concept of public law estoppel has largely been rendered redundant. In *East Sussex County Council, R v. Ex Parte Reprotech (Pebsham) Ltd. and One Other Action*,[33] the House of Lords observed that there was an analogy between private law estoppel and the concept of a legitimate

expectation created by a public authority, the denial of which may amount to an abuse of power. [34] However, in light of *inter alia* the difficulty of taking into account the interests of the general public under the doctrine of estoppel, [35] the House of Lords found that "public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for [the doctrine of legitimate expectation] to stand upon its own two feet". [36]

As a result of this coming of age of the English public law, the doctrine of legitimate expectations has been expanded to include substantive outcomes. The English Court of Appeal has noted that "the dichotomy between procedure and substance has nothing to say about the reach of the duty of good administration", [37] although the Court acknowledged that "[s]tatutory duty may perhaps more often dictate the frustration of a substantive expectation". [38] Where the court considers that a lawful promise or practice has induced a legitimate expectation even of a benefit that is substantive, not simply procedural, the court will decide whether to frustrate the expectation would be so unfair that to take a new and different course will amount to an "abuse of power", a concept that is broadly construed. Once the legitimacy of the expectation is established, the departure must be a "proportionate response" and ***33** the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy. [39] Where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure. On the other hand, where the government decision-maker is concerned to raise wide-ranging or "macro-political" issues of policy, the expectation's enforcement in the courts will encounter a steeper climb. All these considerations, whatever their direction, are merely factors not rules. [40]

Likewise, both India and Hong Kong have expanded the doctrine of legitimate expectations to include substantive outcomes. [41]

In both South Africa and New Zealand, the question of whether the doctrine of legitimate expectations should be expanded to include substantive outcomes has been expressly left open. [42]

An approach that provides for substantive relief for broken promises *guided* by a principle of proportionality would be a salutary development in administrative law because on the current state of the law the *effect* of the state action on the injured party is relevant only in the procedural analysis (as one of the factors identified for determining the degree of fairness owed in *Baker*) [43] and not at all in the substantive analysis. As Professor Lorne Sossin has noted, there is no principled basis why such impacts should not be considered within the substantive reasonableness analysis. [44]

5. CONCLUSIONS

For the past decade, Canadian public law has seen an acceleration in the harmonization of public law around the principle of proportionality. The time ***34** has come to complete this evolution and recognize proportionality as the principle underlying all public law. Without such a development, courts risk incentivizing opacity in decision-making, incongruent results, and risk erasing from consideration the real harms done to real people by poor public administration--all in the name of an amorphous and ill-defined public interest.

As Professor David Mullan has noted, courts and academics alike are struggling with articulation of a substantive conception of reasonableness. [45] Review informed by proportionality is a good fit for Canadian law and one that could provide a more concrete basis for evaluating whether a decision comes within the range of reasonably acceptable alternatives or responses. [46] A move to proportionality as the underlying logic of judicial review would also rid the law of the undesirable and unprincipled "stark cleavage in Canadian judicial review between review based on the *Charter* and review based on other common law principles". [47] The courts are institutionally competent to measure proportionality in this manner and do so in many other contexts. [48] As Professor Mullan notes: "recognition that elements of proportionality are already explicitly or implicitly part of Canadian law should point in the direction of that concept being one of the organizing principles around which the parameters of unreasonableness review can be built". [49]

A proportionality analysis, whether under the umbrella of reasonableness, promissory estoppel/legitimate expectations or as a stand-alone doctrine, is a principled and structured basis for judicial review that will lead to predictable and just outcomes. Indeed, an assessment of proportionality appears to be the underlying logic of modern public law. Such an approach elides the formalistic distinctions between substantive and procedural relief yet maintains appropriate deference for public decision makers by paying careful attention to whether the decision is a proportionate response in all the circumstances.

Footnotes

a1 Joseph J. Arvay, Q.C. and Sean Hern are partners at Farris, Vaughan, Wills & Murphy LLP. Alison M. Latimer is an associate at the same firm. The authors are grateful for the constructive feedback they received on the substance of this paper from Professor David Mullan and Professor Lorne Sossin.

1 1986 CarswellOnt 1001, 1986 CarswellOnt 95, [1986] S.C.J. No. 7 (S.C.C.) [*Oakes*].

2 *Oakes*, *supra*, note 1, at para. 139.

3 *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 CarswellAlta 1094, 2009 CarswellAlta 1095, [2009] S.C.J. No. 37 (S.C.C.) [*Hutterian Brethren*] at para. 55.

4 *Ibid.*, at para. 76.

5 2012 CarswellQue 2048, 2012 CarswellQue 2049, [2012] S.C.J. No. 12 (S.C.C.) [*Doré*].

6 *Ibid.*, at para. 6.

7 *Ibid.*

8 *Ibid.*, at para. 38.

9 *Ibid.*, at para. 35.

10 For a similar analysis in the federalism context see Robin Elliot, "Interjurisdictional Immunity after *Canadian Western Bank* and *Lafarge Canada Inc.*: The Supreme Court Muddies the Doctrinal Waters--Again" (2008) 43 SCLR 433 at 493-494.

11 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1997] S.C.J. No. 108 (S.C.C.) [*Delgamuukw*] at para. 161.

12 See discussion in *Xeni Gwet'in First Nations v. British Columbia*, 2014 CarswellBC 1814, 2014 CarswellBC 1815, 2014 SCC 44 (S.C.C.) [*Xeni Gwet'in First Nations*] at para. 82.

13 2004 CarswellBC 2656, 2004 CarswellBC 2657, [2004] S.C.J. No. 70 (S.C.C.) [*Haida*] at para. 24.

14 *Xeni Gwet'in First Nations*, *supra*, note 12, at para. 17.

15 *Xeni Gwet'in First Nations*, *supra*, paras. 86-87.

16 *Malcolm v. Canada (Minister of Fisheries and Oceans)*, 2013 CarswellNat 2399, 2013 CarswellNat 882, [2013] F.C.J. No. 379 (F.C.), affirmed 2014 CarswellNat 1590 (F.C.A.). The Supreme Court of Canada missed the opportunity to consider the issues raised in this paper when it refused leave to appeal: 2014 CarswellNat 4634 (S.C.C.) [collectively, *Malcolm*]. The authors acted as counsel for the claimant/appellant/ applicant in *Malcolm*.

17 2001 CarswellQue 1272, 2001 CarswellQue 1273, [2001] S.C.J. No. 43 (S.C.C.) [*Mt. Sinai*].

18 *Ibid.*, at paras. 7, 48.

19 *Ibid.*, at para. 26.

20 *Ibid.*, at paras. 22-38.

21 *Ibid.*, at paras. 52-65.

22 Genevieve Carter, "A Mullanian Approach to the Doctrine of Legitimate Expectations", in Grant Huscroft and Michael Taggar, eds., *Inside and Outside Canadian Administration: Essays in Honour of David Mullan* (Toronto; Buffalo, NY: University of Toronto Press, 2006) [Carter] at 200.

23 *Ibid.*, at 201-202. The majority noted, for example, that the basis was a "vague and ungrounded funding concern": *Mt. Sinai*, *supra*, note 17, at para. 109. The minority noted it was not supported by any serious policy reasons: *Mt. Sinai*, *supra*, note 17, at para. 65.

24 *Supra*, note 16.

25 Rennie J. for instance seemed to agree with the applicants that little, if anything, could be said in support of the reasonableness of the Minister's decision and on the contrary a great number of considerations pointed in the opposite direction: *Malcolm v. Canada (Minister of Fisheries and Oceans)*, 2013 CarswellNat 2399, 2013 CarswellNat 882, [2013] F.C.J. No. 379 (F.C.) at para. 72.

26 For a discussion of the potential of proportionality to ameliorate judicial review of administrative action see David Mullan, "Proportionality--A Proportionate Response to an Emerging Crisis in Canadian Judicial Review Law?" [2010] NZLR 233 [Mullan].

27 *R. (Nadarajah) v. Secretary of State for the home Department*, [2005] EWCA Civ 1363 [*Nadarajah*] at para. 69.

28 2008 CarswellNB 124, 2008 CarswellNB 125, [2008] S.C.J. No. 9 (S.C.C.) [*Dunsmuir*] at para. 47.

29 2011 CarswellNfld 414, 2011 CarswellNfld 415, [2011] S.C.J. No. 62 (S.C.C.) [*Newfoundland Nurses*] at para. 14.

30 *Doré*, *supra*, note 5, at paras. 4, 55.

31 *Ibid.*, at para. 57.

32 See e.g. *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 CarswellOnt 1770, 2003 CarswellOnt 1803, [2003] S.C.J. No. 28 (S.C.C.) at para. 184.

33 [2002] UKHL 8 (Eng. H.L.) [*East Sussex*].

34 *Ibid.*, at para. 34.

35 *Ibid.*

36 *Ibid.*, at para. 35.

37 *Nadarajah*, *supra*, note 27, at para. 69.

38 *Ibid.*

39 *R. v. North & East Devon Health Authority*, [2001] QB 213 at 242 (C.A.).

40 *Ibid.*, at paras. 68-69. But see *R. (On the Application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] UKHL 61 (U.K. H.L.) [*Bancoult No. 2*] at para. 135 where the House of Lords, by a 3-2 majority, held that evidence of detrimental reliance was necessary to ground a legitimate expectation. The dissent in *Bancoult No. 2* instead relied on *Nadarajah*, which held that detrimental reliance was but one of many factors to consider.

41 India: *Monnet Ispat and Energy Ltd v. Union of India* (2012), 11 SCC 1 at para. 153; Hong Kong: *Ng Siu Tung and Others v. The Director of Immigration*, [2002] 1 HKLRD 561 at paras. 91-92.

42 South Africa: *KwaZulu-Natal Joint Liaison Committee v. MEC Department of Education, Kwazulu-Natal and Others*, [2013] ZACC 10 at n 7; New Zealand: *Back Country Helicopters Ltd. & Ors v. The Minister of Conservation*, [2013] NZHC 982 at para. 184; *New Zealand Maori Council v. Attorney-General*, [1994] 1 NZLR 513 cited in *Aoraki Water Trust v. Meridian Energy Ltd.*, [2004] NZHC 820 at para. 40.

43 *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124, 1999 CarswellNat 1125, [1999] S.C.J. No. 39 (S.C.C.) [*Baker*].

44 L. Sossin and C. Flood “Contextual Snakes and Ladders: Iacobucci's Legacy and the Standard of Review in Administrative Law” (2007) UTLJ 581-606.

45 Mullan, *supra*, note 26, at 251 -254.

46 *Ibid.*, at 255.

47 *Ibid.*, at 258-264.

48 See for example, *Hutterian Brethren*, *supra*, note 3, at paras. 35-104, *Xeni Gwet'in First Nations*, *supra*, note 12, at paras. 80-87 and *Doré*, *supra*, note 5, at paras. 55-58.

49 Mullan, *supra*, note 26, at 262.

28 CJALP 23