

The Peter A. Allard School of Law

Allard Research Commons

Faculty Publications

Faculty Publications

2004

'Alert, Alive and Sensitive': Baker, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law

Mary Liston

Allard School of Law at the University of British Columbia, liston@allard.ubc.ca

Follow this and additional works at: https://commons.allard.ubc.ca/fac_pubs



Part of the [Administrative Law Commons](#), [Public Law and Legal Theory Commons](#), and the [Rule of Law Commons](#)

Citation Details

Mary Liston, "Alert, Alive and Sensitive': Baker, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law" in David Dyzenhaus ed, *The Unity Of Public Law* (Oxford: Hart Publishing [forthcoming in 2004]) 113.

This Working Paper is brought to you for free and open access by the Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons. For more information, please contact petrovic@allard.ubc.ca, elim.wong@ubc.ca.

5

*‘Alert, alive and sensitive’: Baker, the
Duty to Give Reasons, and the Ethos
of Justification in Canadian Law*

MARY LISTON*

It follows that I disagree with the Federal Court of Appeal’s holding ... that a section 114(2) decision is ‘wholly a matter of judgment and discretion’ ... The wording of section 114(2) and of the Regulations shows that the discretion granted is confined within certain boundaries. ... While deference should be given to immigration officers on section 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister’s guidelines themselves reflect this approach. ... The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider the children’s best interests as an important factor, give them substantial weight, and be *alert, alive and sensitive* to them (emphasis added).¹

INTRODUCTION

AN ADMINISTRATIVE DECISION was made in a manner that was not ‘alert, alive and sensitive’² to the interests of Mavis Baker’s Canadian-born children. L’Heureux-Dubé J’s remarkable phrase, I will argue, comports with an emergent understanding of Canadian public law as an ‘ethos of justification’³ where citizens and residents are

*I would like to thank Jennifer Nedelsky, Lorne Sossin and James Tully for their extremely helpful comments. Special thanks go to David Dyzenhaus for his encouragement and assistance—and for not ‘pulling any punches’ when reviewing an earlier draft. Finally, I wish to acknowledge the unstinting support given to me by my partner, David Duff.

¹L’Heureux-Dubé J writing for the Canadian Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at paras 74–75 (citations omitted) [hereinafter *Baker*]. Mavis Baker was an immigrant who overstayed her visa and became subject to a deportation order after 11 years of illegal residence as a live-in domestic worker in Canada. During this time, she had four Canadian children and at the later part of her residency suffered

114 *Mary Liston*

democratically and often constitutionally entitled to participate in decisions which affect their rights, interests and privileges as well as to have access to and understand the reasons for these decisions. Indeed, *Baker* has affirmed that any administrative decision which affects the rights, privileges or interests of an individual will trigger the application of a duty of fairness whose content may include the duty to give reasons.⁴ Within this ethos of justification, the legal relationship between the individual and the state rests on fundamental normative considerations of dignity, rationality and respect.

Throughout this chapter, I will use the weighty phrase ‘alert, alive and sensitive’ as a shorthand to describe the ethos of justification. I will consider both the characteristics of and values suggested by this ethos and discuss the methodology that has emerged to complement this mode of analysis and judgement. I will then explore its connection with the duty to give reasons. I want to suggest that this ethos can be used to inform other decision-making contexts than the judicial and that it will therefore have relevance to related domains of administrative decision-making and even community decision-making as an ethical framework for evaluating and arriving at good judgements about good administration.

The paper will first present and analyse the *Baker* methodology and what such a standard entails for decision-making. Then I will briefly describe how this ethical standard has appeared in pre-*Baker* caselaw before turning to examine several key post-*Baker* cases in section three. Section four conducts an assessment of the *Baker* landscape and discusses possible trends for Canadian administrative law. I will conclude by suggesting how the *Baker* ethos and its unified methodology complement and conform to a larger democratic, justificatory culture. The key claim that I make here is that this ethical standard functions to govern power relationships throughout the Canadian polity, a polity which has embraced

post-partum psychosis, went on welfare, and had her children removed from her care. She submitted a humanitarian and compassionate grounds application to remain in Canada which was denied without reasons until, at counsel’s request, she was provided with notes relevant to the decision which revealed inflammatory and impolitic language on the part of the investigating officer. S 114(2) was the relevant provision in the *Immigration Act*, RSC 1985, c I-2 (repealed, now article 25(1) of the *Immigration and Refugee Protection Act*, RSC 2001, c 27).

²See also *Baker* at para 73 which rephrases the introductory quote: ‘I conclude that because the reasons for this decision do not indicate that it was made in a manner which was *alive, attentive, or sensitive* to the interests of Ms Baker’s children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned’ (emphasis added).

³I have borrowed this phrase from Supreme Court Chief Justice Beverley McLachlin in her article ‘The Role of Administrative Tribunals and Courts in Maintaining the Rule of Law’ (1999) 12 *Canadian Journal of Administrative Law and Practice* 171–89 at 174. I owe a much larger debt to the work of David Dyzenhaus as found in ‘The Politics of Deference: Judicial Review and Democracy’ in M Taggart (ed), *The Province of Administrative Law* (Oxford, Hart Publishing, 1997) at 278–307 and ‘Law as Justification: Etienne Mureinik’s Conception of Legal Culture’ (1998) 14 *South African Journal of Human Rights* 11.

⁴*Baker*, n 1 at para 20.

Baker, the Duty to Give Reasons 115

constitutional democracy and the rule of law as permanent tenets of this ethos.

EMBODYING *BAKER*: THE ETHOS OF ALIVE,
ALERT AND SENSITIVE

The essence of the *Baker* decision, I claim, is the entrenchment of a unified methodological approach to the judicial review of discretionary decisions compatible with a notion of participatory democracy. In this section, I will explore two aspects of this methodological approach. First, I will describe the methods used in *Baker* for the review of discretionary decision-making and for the detection and protection of fundamental interests. Second, I will discuss the aims and concepts, the principles of reasoning, and the institutional relationships implicated in the *Baker* ethos.

1. The Methods Behind the Methodology, or, the Skeleton

From one perspective, it would seem that the Supreme Court in *Baker* used three different, distinct and unrelated methods to determine different aspects of the duty of fairness within the context of the case. From another perspective, and one that I advance, each is a particular application of a unified approach to reviewing discretionary decision-making in administrative law—an approach usually labelled ‘pragmatic and functional’.⁵ This section will set out the three methods within the overall methodology: determining the context of the procedural duty of fairness in an administrative context; selecting and applying a standard of review in an administrative context; and, discerning the presence of bias in an administrative decision.

(A) *The Content of the Duty of Fairness*

To understand the content of the procedural duty of fairness in *Baker*, the Supreme Court used the ‘pragmatic and functional analysis’ to outline five factors which assist in determining fairness in context⁶: 1) comparing how institutionally analogous the administrative process is to the judicial in order to determine how close the procedural protections are to those found in the trial model; 2) examining the statutory scheme to review potential violations of justice in administrative processes which have either no internal appeal procedures or where the decision is determinative; 3) ensuring that the procedural protections afforded conform to the importance of the

⁵ *Ibid* at paras 51–56.

⁶ *Ibid* at paras 21–27.

116 *Mary Liston*

decision to the person(s) affected and, where the impact is greater, more stringent procedural protections will be required; 4) attending to the legitimate expectations of the person challenging the decision and according substantive procedural protection where the claimant had a legitimate expectation that a certain result might have been reached when, for example, representations regarding procedures, regular practices, or substantive promises have been contravened without significant or sufficient procedural protections⁷; and, 5) acknowledging and respecting the procedures deemed appropriate by the administrative agency where the agency has the ability and the expertise to choose its own procedures.

These factors are not exhaustive and others may apply in contexts where the duty of fairness is not related to participatory rights. Of these factors at play in *Baker*, factor four, the doctrine of legitimate expectations, was rejected outright in the decision and therefore did not affect the content of the duty of fairness.⁸

(B) The Standard of Review

A comparable set of methodological guides governs the selection and application of the three standards of review for errors of law in discretionary administrative decisions. Here the pragmatic and functional approach requires the reviewer to consider: 1) the absence or presence of a privative clause; 2) the expertise of the decision-maker; 3) the purpose of the provision and the Act in which it is found and a) whether open-textured legal principles are at play as well as b) whether the interest involved is individual or polycentric; and, 4) whether the decision is highly discretionary and fact-based.⁹

Greater deference is shown in the choice of the standard of patently unreasonable while greater intervention is signalled in the choice of correctness review. Reasonableness, the intermediate standard, was used in *Baker* because of the nature of decision-making in the immigration context.

(C) The Test for the Reasonable Apprehension of Bias

Lastly, the Supreme Court employed a reasonable person standard in *Baker* to access the values underlying the duty of fairness in the context of a potentially biased discretionary decision putatively made on humanitarian grounds. Importantly, the standard itself was part of the set of guidelines issued by Citizenship and Immigration Canada for immigration officers.¹⁰

⁷ But, as L'Heureux-Dubé J hastened to affirm, legitimate expectations in Canadian jurisprudence 'cannot lead to substantive rights outside the procedural domain.' *Ibid* at para 26.

⁸ *Ibid* at para 29.

⁹ *Ibid* at paras 57–62.

¹⁰ *Ibid* at para 16.

Baker, the Duty to Give Reasons 117

As with the other two tests, the test for apprehension of bias will vary according to context and the type of function performed by the administrative decision-maker involved.¹¹

Employing this standard, the court examined whether or not the immigration officer's notes were biased and therefore disclosed an impartial or arbitrary decision. Looking to the form and content of the officer's notes, L'Heureux-Dubé J stated that his 'notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes.'¹² As a result, 'the well-informed member of the community would perceive bias when reading Officer Lorenz's comments.'¹³ The contextual nature of the methodology is important here for *Baker* not only subjects specific behaviour of the officials involved but the entire chain of reasoning to scrutiny.¹⁴

(D) The Unifying Proposition within these Three Methods

Each one of these tests aims to conform to an ideal of what the Supreme Court calls 'deference as respect,'¹⁵ meaning that courts will respect administrative autonomy where decisions affecting important interests are reasonable. If an agency exhibits competency and good reasoning concerning a procedural or substantive issue, the complementary institutional response from the judiciary is to respect that institutional capability. Several underlying methodological aims and principles need to be unpacked from the conception of deference as respect.

2. Methodological Aims, or the Vitals

The three tests discussed in subsection one above allude to substantive underlying values in the duty of procedural fairness in which the democratic right to participate in decisions and laws affecting one's rights and interests is paramount. On this point, L'Heureux-Dubé J writes:

I emphasize that underlying all these factors is the notion that the purpose of participatory rights contained within the duty of procedural fairness is to

¹¹ *Ibid* at para 47. However, this test is a bit 'looser,' more discretionary, than the two approaches discussed above since it is not directed by an explicit set of considerations but, rather, imaginatively guided by the abstract personification of the 'reasonable Canadian.'

¹² *Ibid* at para 48.

¹³ *Ibid*.

¹⁴ Indeed, on a more formalistic approach, these two developments—concluding that the notes counted as reasons and subjecting the chain of reasoning to scrutiny—might well have been obstructed.

¹⁵ *Baker* at para 65 quoting David Dyzenhaus's notion of deference as respect: deference 'requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.' Quote taken from D Dyzenhaus, 'The Politics of Deference,' n 3 at 286.

118 *Mary Liston*

ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.¹⁶

Given this language, there is an obvious and tight connection between the values contained in the duty of fairness, the duty to give reasons, and the idea of the rule of law. The nexus of values hinges on the insight that no one is infallible and that no power is or ought be unbounded; humans exist in a world of limitation, much of it self-created and self-imposed.¹⁷ ‘Second-guessers’¹⁸ are therefore necessary to scrutinise the content of and procedures used in discretionary decision in order to recognise and affirm whether or not fairness and reasonableness are sufficiently present.¹⁹

The kind of decision involved in *Baker* was one that required an ‘open mind’²⁰ due to its individualised nature, the humanitarian and compassionate requirements as stipulated in the department’s own guidelines, and its evocation of a disposition characterised by ‘special sensitivity’ and understanding which would recognise and attend to the importance of ethnocultural diversity—a diversity that is inseparable from the character of the Canadian political community. Finding bias in the notes meant that such a flaw or error tainted the entire process through which the final discretionary decision was made, ultimately by a superior in the department. The initial attitude, not corrected through the internal process, indicated that the approach taken was unreasonable as it was ‘completely dismissive’ of the children’s interests and failed to give these interests ‘serious weight.’²¹ Notwithstanding the deference generally shown to discretionary decisions of this kind, these reasons were held to be inconsistent with the values underlying the grant of discretion—Canadian values which include respect

¹⁶ *Ibid* at para 22. See also para 28.

¹⁷ As Rand J wrote in *Roncarelli*, in public administration there can be ‘no such thing as absolute and untrammelled “discretion”, that is that action can be taken on any ground or for any reasons that can be suggested to the mind of the administrator.’ Furthermore, no legislative Act can ‘without express language, be taken to contemplate an unlimited arbitrary power exercised for any purpose, however capricious or irrelevant, regardless of the nature and the purpose of the statute’ or the rule of law. *Roncarelli v Duplessis* [1959] SCR 121 at para 19.

¹⁸ I borrow this term from Charles Taylor’s essay ‘What’s wrong with negative liberty’. In *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge, Cambridge University Press, 1985) 211–229 at 228. The Canadian landscape has a co-ordinate system of second-guessing at the constitutional level since Courts and Parliament are allowed to trump each other respectively through constitutional remedies and a constitutionally-guaranteed legislative override of judicial decisions (s 33 of the *Canadian Charter of Rights and Freedoms*).

¹⁹ Second-guessing in the administrative context can happen internally within agencies or externally through judicial review.

²⁰ *Baker*, n 1 at para 48. This requirement links up with an earlier judgment, *RDS*, discussed in notes 37–39 below in subsection 1 of s III.

²¹ *Ibid* at para 65.

Baker, the Duty to Give Reasons 119

for diversity, family and children's rights and interests—and therefore did not meet the threshold of reasonableness which could command 'respect' from judicial review.²²

L'Heureux-Dubé J's judgment canvassed several interpretive aids such as the purposes of the *Immigration Act*, international law,²³ and the Minister's own guidelines. However, consideration of the ministerial guidelines provides the ethical moment and it is at this point in the judgment that the introductory quote can be located.²⁴ The ministerial guidelines affirm the kind of treatment persons affected by the immigration regime can legitimately expect from officers in the department—they represent, in a very loose sense, a code of conduct. The guidelines also embody one aspect of the character of the Canadian political community which is manifested through political commitments to diversity, fairness and good administration. The 'manner' in which the decision was made contradicted all of these commitments, summed up as 'humanitarian and compassionate values,' and therefore the decision stepped outside the boundaries of reasonableness.²⁵ In the *Baker* context, unreasonableness and dismissiveness in manner were originally signalled by the lack of reasons given to Baker and her counsel, a defect and a disrespect that the court's imposition of the duty to give reasons intended to remedy.

From *Baker*, it seems clear that reason-giving is valuable since such a practice may assist in determining when reviewable error exists. However reasons not only facilitate 'second-guessing' but also actualise several tenets of the rule of law in context.²⁶ Reason-giving may assist in ensuring fair and transparent decision-making as well as contribute to the guarantee of accuracy and accountability of decisions.²⁷ Reasons can satisfy the maxim

²² *Ibid* quoting Dyzenhaus's notion of deference as respect. On Canadian values, see para 67.

²³ It is this aspect of the judgment where the *Convention on the Rights of the Child* and the *Universal Declaration of Human Rights* were used that animated the dissent. Iacobucci and Cory JJ dissented on the use of the executively-ratified but domestically unincorporated international documents which they held to be merely of interpretive guidance in an administrative law decision. They stated that they felt the majority had violated the separation of powers doctrine through 'backdoor' incorporation via statutory interpretation. Without incorporation, and outside of the *Charter* which invites consideration of international law as influential authority since it bears such kinship with these kind of international documents, the *Convention* was rendered 'irrelevant' (at para 81) by the dissent for administrative law even in these circumstances. *Ibid* at paras 78–81.

²⁴ For an important discussion of the usefulness of such 'soft law' in the process of justification, see Lorne Sossin in this volume as well as L Sossin and CW Smith, 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2002) 40(4) *Alberta Law Review* 1–25.

²⁵ *Baker*, n 1 at para 74.

²⁶ I say the rule of law in context for, eg, transparency and consistency alone have no certain connection with either democratic legitimacy or a culture of justification since a totalitarian or authoritarian state can make 'mad' transparent rules consistently.

²⁷ *Baker*, n 1 at paras 35–39. On the importance of reasons, see generally: PP Craig, 'The Common Law, Reasons and Administrative Justice' (1994) 53 *Cambridge Law Journal*

120 *Mary Liston*

that justice is done and must be seen to be done and contribute to overall legitimacy through recognition by the claimant that a negative result is nevertheless fair and reasonable. Finally, reasons attend to the dignity interests that are at the heart of post-World War II jurisprudence, as decisions which have profound importance compel a requirement of reasons: 'It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.'²⁸ Within the framework I have proposed, then, reasons are essential for the realisation of the rule of law within a democracy and, furthermore, serve as a particular instantiation of the rule of law. The duty to give reasons, then, has both procedural and substantive value.

FROM SKELETAL TO FULL-BODIED:
A LIVING, BREATHING *BAKER*?

In this section, I will examine a selection of pre- and post-*Baker* jurisprudence in order to illustrate this ethos in jurisprudential action. First, I will very briefly allude to earlier jurisprudential links to the *Baker* approach, a background I argue provides a bridge from *Baker* to important subsequent caselaw. Three trajectories will then be plotted: the elaboration of the common law duty to give reasons (*Sheppard*); consideration of the proper attitude intrinsic to judgement (*Legault*) as well as the resultant quality of the given reasons (*Hawthorne*); and, the nexus between reasons, standards of behaviour involving promises, and the remedies available for holding public actors to account (*Mount Sinai*).

1. Anticipating *Baker*: Embryonic Manifestations

Though each of the terms, 'alive', 'alert' and 'sensitive' have appeared individually in a multitude of judgments as predicates of a proper judicial mentality and indicators of good judgment, *Baker* is the case that brings them all together methodologically and metaphorically. What this earlier caselaw discloses is a web of related concepts, including: vulnerability within rights to autonomy or self-determination, consent and trust, disclosure and context, deference and expertise, and equity and consistency. They suggest that the essence of judgement is to be alive, alert and sensitive and that deference, instead acting as a cover for formalism or non-justiciability, at heart means respect for human dignity and respect for the rule of law.

282–302 at 283–84. For the Canadian context, see D Mullan, *Administrative Law* (Toronto, Irwin Law, 2001) at 306–18.

²⁸ *Ibid* at para 43.

Baker, the Duty to Give Reasons 121

Alertness in the administrative law context originates from Dickson J's (as he then was) notable dictum from *CUPE*, a case that, along with *Nicholson*,²⁹ changed the face of Canadian administrative law. In *CUPE*, after considering the historical and political relationship between the courts and labour tribunals in Canada, Dickson J concluded that:

[t]he question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.³⁰

Sensitivity to context was deemed paramount, meaning that the court would not upset the delicate political balance that had been achieved in Canadian labour relations—this disposition was captured in Dickson J's phrase that the labour board was 'entitled to "err"'³¹ based on its comparative expertise and this created the foundation for the evolution of the pragmatic and functional approach in administrative law.³²

CUPE discloses one aspect of the methodological approach which *Baker* unifies: institutionalised practices of deference as respect. Outside of administrative law, criminal law illustrates the necessity of being alive and attentive to complex issues in conflicted evidentiary contexts.³³ And, as we will see

²⁹*Nicholson v Haldimand-Norfolk (Regional) Police Commissioners* [1979] 1 SCR 311. In addition to entrenching the duty to act fairly in Canadian administrative law, *Nicholson* dispensed with formalism in another guise as it found that 'at pleasure' dismissals were 'relics of Crown law' since there was more than one interest at play than the designated authority and such authority, despite its executive-like authority, needed to conform to procedural justice when dismissing an employee by providing a fair opportunity to be heard. *Nicholson* at para 15.

³⁰*Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp* [1979] 2 SCR 227 at para 10.

³¹*Ibid* at para 15. Though subsequent case law had to work through the legal tension between agency protection through statutory privative clauses, being entitled to err, and when intervention was necessary to correct error or to protect substantive interests that had been overridden.

³²This form of analysis was introduced in *UES, Local 298 v Bibeault* [1988] 2 SCR 1048.

³³See, eg: *R v Esau* [1997] 2 SCR 777 [hereinafter *Esau*]. The accused, a second-cousin of the complainant, had sexual intercourse with her after a party at her home. She was drunk and denied that she consented, saying that she had no memory of anything from the time she went to her bedroom until the next morning. She testified that she would never have had sex with a relative. The legal focus was on whether the trial judge erred in not putting the defence of mistaken belief about the complainant's consent to the jury because he held that there was no evidentiary basis for this defence. The appeal court found that the trial judge was correctly 'alive' to the issues raised by evidence. The Supreme Court divided along gender lines with the five male justices finding sufficient evidence to justify the defence while the two female justices dissented on the ground that there did not exist an 'air of reality' to the defence. McLachlin and L'Heureux-Dubé JJ's dissent demanded clear communication and explicit, not implied, consent and shifted the focus to the mens rea of the accused on whom the evidentiary burden rested. Increasingly, the accused must provide a good reason for his mistaken belief and show that he has taken reasonable steps to request and obtain actual consent from the complainant. The dissent's approach has since emerged as the standard. As an analogue for old-style

122 *Mary Liston*

below in the discussion of *Sheppard*, institutional parallels exist between deference as respect in administrative law between reviewers and decision-makers and in criminal law where deference as respect requires the reviewing court to defer to the competence of trial court judges' findings of fact in complex criminal cases. Being attentive to the autonomy and vulnerability of parties in power-dependent relations constitutes a third aspect of the *Baker* approach and the ethos here can be summarised as being alert, alive and sensitive to abuses of power.³⁴ As an analogue to administrative law, for example, the citizen's position in the citizen-state relationship³⁵ can mirror that of the vulnerable party in tort law cases involving fiduciary relations.³⁶ Finally, cases concerning the importance of justificatory practices or reason-giving and impartial judging in the judicial context can inform what it means to have an 'open mind' and, conversely bias in

administrative law, the mistaken belief defence can sanction the discretionary judgement of the accused, shifts the burden of proof onto the injured party, conceives of consent thinly and formally instead of as an on-going relational matter which can be revoked at any time, and may allow the accused to circumvent the provision of a good reason for his mistaken belief. As such, this defence should be as rare as untrammelled executive discretion in the new-style administrative law context.

³⁴See, eg: *Norberg v Wynrib* [1992] 2 SCR 226 at 228. This case hinged on consent and sexual conduct but this time within the context of a doctor-patient relationship. Here a doctor provided drugs to a drug-dependent woman in exchange for sex and, like *Esau*, the case revolved around whether the patient had consented to this arrangement and in what manner the doctor may have violated his duties by initiating and continuing to conduct this relationship. Grounds for liability included the tort of battery, breach of contract and breach of a fiduciary duty. As with sexual assault cases in the criminal context, a pragmatic and functional methodology is used to recognise individual autonomy and free will within the analysis of contexts involving 'power dependency' relationships where the distribution of power is unequal and one of the parties, as a result, is placed in a vulnerable position. The majority decided on the grounds of battery and used an equitably-derived community standards approach to find the doctor's conduct exploitative. Sopinka J located the liability in contract but, despite his finding of consent, concluded that the doctor's conduct was a contractual breach. L'Heureux-Dubé and McLachlin JJ's concurring judgment rested on breach of fiduciary duty. On their analysis, the foundation of the fiduciary obligation in the doctor-patient relationship is based on trust and this shifts the focus to the risks involved in the unequal distribution of power (notably power over another that is not inherently wrong), the rights and duties involved, and when an abuse of power has taken place.

³⁵For recent work on the concept of public authority as a form of public political trust, see L Sossin, 'Public Fiduciary Obligations, Political Trusts and the Evolving Duty of Reasonableness in Administrative Law' (2003) 66 *Saskatchewan Law Review* 101-55. My own take, which accords with the equitable and justificatory approach taken by Sossin, is that in contrast to the unilateral nature of the fiduciary relationship, I would instead construct an analogous relationship which de-emphasises vulnerability and re-emphasises a code of behaviour whose authoritative source lies in the extra-legal power vested in judging citizens.

³⁶Similar problems regarding autonomy, trust and consent carry over into public law where the courts have been loath to characterise the citizen-state relationship as fiduciary in nature. Canadian jurisprudence, with the notable exception of the fiduciary duty the Crown holds towards Aboriginal peoples, does not characterise the relationship between the state and its citizens in terms of trust and consent per se though an analogous framework, I claim, necessarily underpins any substantive conception of the basis of the political relationship between the state and the citizen and the circumscribed nature of political power in a liberal democracy.

Baker, the Duty to Give Reasons 123

decision-making contexts.³⁷ As discussed above, Officer Lorenz in *Baker* failed to appreciate Mavis Baker's circumstances by exhibiting a great degree of callousness in his notes. Moreover, he had inappropriately 'crossed the line' and made inappropriate use of the context to reach his conclusion; he had therefore unduly restricted his discretionary ambit. His judgement therefore manifested neither a 'conscious, contextual inquiry'³⁸ nor an open mind.³⁹

2. Reason-giving, or 'Sharing-the-World-with-Others'⁴⁰

The pre-*Baker* caselaw discloses several bases of the methodological approach which *Baker* unified including: contextualised and impartial judging, institutionalised practices of deference as respect, attention to the autonomy and vulnerability of parties in power-dependent relations, and

³⁷ See, eg: *R v RDS* [1997] 23 SCR 484 [hereinafter *RDS*]. In this case, a white police officer arrested RDS, an African-Canadian 15-year-old who had allegedly interfered with the arrest of another youth. The police officer and RDS were the only witnesses and their accounts of the events greatly differed from the other's. The Youth Court Judge, while delivering her oral reasons, responded to a rhetorical question put to her by the Crown—specifically, that there was no reason to question the credibility of the officer—by saying that police officers in Halifax had been known to mislead the court in the past and that they had been known to overreact particularly toward non-white groups. The trial judge therefore concluded that she was more likely to find the youth's version credible. All of the Supreme Court justices in *RDS* agreed that judges can at times make reference to prevailing social realities—such as the existence of racism in a particular community—as any reasonable person would. Judges, therefore, are not 'neutral ciphers.' Not only can judges not discount their life experiences, they ought not to according to the Supreme Court so long as these conclusions have been tested in the reasoning process. *Ibid* at para 38. Using the test for apprehension of bias discussed above in subsection 1c of s II, the majority concluded that judges should avoid making untested generalisations and here the judge's comments were 'close to the line' but acceptable. The dissent (Lamer CJ, Sopinka and Major JJ), however, found that the judge's comments were stereotypical concerning police officers and constituted an irreparable defect.

³⁸ *Ibid* at para 42. But, in contrast to *RDS* where much effort was devoted to inquiring into and evaluating the social context of Sparks J's judgment, the *Baker* court did not spend much time at all considering the social context of Officer Lorenz's notes. This would seem an important omission when determining reasonable apprehension of bias in context.

³⁹ McLachlin and L'Heureux-Dubé JJ (La Forest and Gonthier JJ concurring) approached the reasonable apprehension of bias test differently than the majority did and found that the judge's remarks were an 'entirely appropriate recognition of the facts ... and of the context.' The two justices provided a different characterisation of impartial judgment, suggesting that having an 'open mind' or the capacity for an 'enlargement of mind' is the essential precondition since it functions as a species of representative thinking which considers a multiplicity of standpoints about a certain issue. *Ibid* at paras 42–44 quoting J Nedelsky, 'Embodied Diversity and the Challenges to Law' (1997) 42 *McGill Law Journal* 91. Consequently, the judge's personal understanding of the factual and social context indicated that she was alive and alert to the context. *Ibid* at paras 57–59.

⁴⁰ This phrase originates with Hannah Arendt and her thoughts on the Kantian activity of judging in her essay 'The Crisis in Culture' in *Between Past and Future* (New York, Penguin, 1977) 173–226 at 221. See also 'Truth and Politics' 227–64. Arendt's work indirectly constituted a crucial source for the conception of impartial judgement in *RDS* as it was significantly relied on by Nedelsky in an article cited by the court in n 39.

124 *Mary Liston*

the importance of justificatory practices or reason-giving. The addition of the duty to give reasons to the content of the duty to act fairly, however, constitutes the crucial advance in Canadian administrative law brought about by *Baker*. Though the duty to give reasons is not yet a general duty imposed on all statutory and prerogative authorities in Canada, I will argue that reading *Baker* in conjunction with the explication of a duty to give reasons in the criminal case *Sheppard*,⁴¹ provides fruitful elaboration on the duty to give reasons in the administrative law context. Most importantly, *Sheppard* concerns a case where the reasons given by a trial judge failed to meet the obligation.⁴² Using the *Baker* ethos of alert, alive and sensitive, I will show how the *Sheppard* decision gives greater specificity to the content of the duty to give reasons.

(A) *The Bare Bones of Sheppard*

The facts behind *Sheppard* involve an accused, Colin Sheppard, whose at times violent ex-girlfriend, Sandra Noseworthy, vowed to ‘get him’ after the break-up of their tempestuous relationship. She informed the police that he had confessed to her that he had stolen two windows for his home renovation, windows which were later discovered to have disappeared from a supplier’s stock. No other evidence, verbal or physical, linked the accused to these missing windows; he had no prior criminal record or charges. Barnable J, the trial court judge, found the accused guilty based on the evidence and on the testimony of credible witnesses, including the ex-girlfriend as chief informant. His judgment, in its entirety, read:

‘Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged.’⁴³

According to the Court of Appeal of Newfoundland, Barnable J’s failure to provide reasons compelled intervention because he did not indicate that he was ‘alive’ to the issues and to let the judgment stand would ‘encourage trial judges to deliberately structure judgments to frustrate appellate review or to mask a lazy or inadequate analysis.’⁴⁴ The Supreme Court agreed with the Court of Appeal and provided a detailed framework outlining the requirement of reasons, the propositions of which will be outlined below.

⁴¹ *R v Sheppard* [2002] SCJ No 30, 2002 SCC 26 [hereinafter *Sheppard*]. Note that this judgment did not include Madame Justice L’Heureux-Dubé.

⁴² For a significant early article concerning civil, not criminal, cases, see M Taggart, ‘Should Canadian Judges be Legally Required to Give Reasoned Decisions in Civil Cases?’ (1983) 33 *University of Toronto Law Journal* 1.

⁴³ *Sheppard*, n 41 at para 10.

⁴⁴ *Ibid* at paras 11–12.

Baker, the Duty to Give Reasons 125*(B) Was the Reason-giver Alert and Attentive?*

Binnie J for the court in *Sheppard* considered that attentiveness to the context and the interests ensures some direction for the judicial mind about how the duty to give reasons ought to be fulfilled. Where it is plain why an accused has been acquitted or accused on the evidence, and where inadequate or absent reasons will not hinder the exercise of the right of appeal, the Supreme Court suggested that intervention with respect to reasons will not be required. However, where reasoning is murky or confused, where evidence is conflicting, where a variety of interpretations about the judge's reasons can be drawn, and where difficult areas of law were 'circumnavigated without explanation'⁴⁵ by the trial court judge, some or all of which might hinder appellate review, then deficiencies in reasons may be held an error of law.

Binnie J offered a ten-point framework outlining the duty of a trial judge to give reasons in the context of appellate intervention in a criminal case.⁴⁶ Briefly, he found that reasons satisfy demands for accountability, certainty and due process and that a decision which meets these demands provides assurance about the integrity of the appellate process. Reasons serve the purpose for the imposed duty within the particular context so that not every deficiency will provide a ground of appeal.⁴⁷ Reasons will also not be held to an abstract standard of perfection. However, judges are not infallible and especially in instances of unsettled law or evidentiary uncertainty, the presumption of competence is limited and justifies the role of appellate courts to 'cure' unintelligibility through substitution.

Significantly, Binnie J rejected 'floodgates' or efficiency-based arguments which suggest the duty to provide reasons significantly slows down the criminal justice system and imposes an onerous task on already overworked lower court judges. The response to this point was that if judges were alert during the trial process, then constructing reasons would not be so heavy a burden and therefore the arguments for reasons outweigh efficiency concerns:

⁴⁵ *Ibid* at para 46.

⁴⁶ *Ibid* at para 55.

⁴⁷ On this point, see *R v Zinck* [2003] SCJ No 5, 2003 SCC 6. The Supreme Court reviewed a trial judge's decisions to delay parole eligibility—a decision characterised as 'out of the ordinary' (at para 29)—and found that they did not breach the *Sheppard* standard despite being somewhat imprecise and curtailed. In contrast to *Baker*, though delayed parole is an extraordinary measure, the context did not require additional procedures apart from the sentencing decision and therefore the accused did not need any written notice that delayed parole would be applied for by the Crown. The offender, however, must be allowed to make submissions and introduce additional evidence in response, and is entitled to reasons (at paras 36–37). The court held that though a more detailed analysis 'should have been attempted,' the reasons read in context with the evidence and submissions made at the hearing, permitted an appellate court to understand and review the decision (at para 39).

126 *Mary Liston*

While, as suggested above, the act of formulating reasons may further focus and concentrate the judge's mind, and demands an additional effort of self-expression, the requirement of reasons as such is directed only to having the trial judge articulate the thinking process that it is presumed has already occurred in a fashion sufficient to satisfy the demand of appellate review.⁴⁸

The Supreme Court concluded that where deficient reasons implicate fundamental principles which protect the interests, rights and privileges of a citizen, and which prevent the appellate court from being satisfied that fundamental principles have been properly applied, then deficiency of reasons may be converted into an error of law in the criminal context⁴⁹—a proposition which I argue ought to extend to the administrative context. There exists, then, a 'necessary connection' between the failure to provide proper reasons and the frustration of rights of appeal in the appellate context rather than a more general duty to give reasons with a free-standing right of appeal.⁵⁰ Rights, however, must not be rendered 'illusory' or unexercisable which would make a sham of the system of justice within courts and, as I argue, within internal agency review.⁵¹

(C) *Was the Reason-giver Alive to the Issues?*

Barnable J in *Sheppard* erred in law by not providing sufficiently intelligible or adequate reasons in circumstances which 'cried out for some explanatory analysis' thereby substantially impeding appellate review.⁵² Though the Supreme Court stated that no general duty to give reasons rests on the trial judge 'in the abstract and divorced from the circumstances of the particular case,' nevertheless at the 'broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public.'⁵³ Accordingly, reasons facilitate public scrutiny of the evolving law in order to arrive at agreement or criticism about the rules of conduct applicable to their activities. Furthermore, if no reasons are given in the judicial context, judges are prevented from judging the judges—a violation of a 'broad principle of governance' which translates into a specific rule concerning appellate review.⁵⁴ The trial judge's one sentence 'skeletal' judgment, however, provided no toehold for review and was therefore unreasonable—to draw out the metaphor, both the legal body and mind were 'dead' and all that remained as evidence of a live process were reasons as vital as a pile of bones.

⁴⁸ *Sheppard*, n 41 at para 51.

⁴⁹ *Ibid* at para 43.

⁵⁰ *Ibid* at para 53.

⁵¹ *Ibid* at para 66.

⁵² *Ibid* at para 1.

⁵³ *Ibid* at paras 4–5.

⁵⁴ *Ibid* at para 5.

Baker, the Duty to Give Reasons 127

The starting point for the Supreme Court's analysis was the proposition that reasons are essential for judicial accountability because they are evidence that justice has been done and has been seen to be done.⁵⁵ For this proposition, the Supreme Court cited *Baker*, though hedged that the form and nature of the duty to give reasons conforms to each adjudicative setting and therefore must be understood as a spectrum of possibilities rather than one template.⁵⁶ Reasons are evidence the judicial mind has 'concentrated' on the problems in the case and show the path that explains and justifies the result.⁵⁷ Thus, the test is contextual, functional and pragmatic and the question to be asked becomes: does this particular decision provide sufficient reasoning or a rational basis to enable appellate review of the correctness of the decision? Any subsequent intervention is not based on the aesthetics of poor articulation per se.

In contrast, the companion case to *Sheppard, Braich*⁵⁸, also involved contradictory evidence and the credibility of witnesses. Here, however, the trial judge was 'alive' to one complexity—the possibility of collusion between key witnesses—but after due and articulated consideration, rejected this finding.⁵⁹ The trial judge's reasons were sufficient to meet the functional test of allowing the appeal court to review the correctness of the trial decision⁶⁰ and the Court chastised the appellate judge for holding the trial judge to 'an unjustifiably high standard of perfection.'⁶¹

The appellate court was not permitted to substitute its views for that of the trial judge who provided an 'intelligible pathway through his reasons.'⁶² In other words, the appellate court was not allowed to characterise the trial court judge's reasons as 'inadequate' in order to 'mask' what was, in effect, a disagreement about the result.⁶³ The institutional allocation of a decision

⁵⁵ *Ibid* at para 15.

⁵⁶ They cite the following passage: 'it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.' See *Baker*, n 1 at para 43.

⁵⁷ *Sheppard*, n 41 at paras 23–24.

⁵⁸ *R v Braich* [2002] SCJ No 29, 2002 SCC 27.

⁵⁹ *Ibid* at para 26.

⁶⁰ In an interesting aside, Binnie J writing for the Court observed that the appellate judge, McEachern CJ who found the trial judge's reasons deficient, himself engaged in skimpy reasoning when McEachern CJ thought certain applicable law was so well-known and superfluous that he did not propose to discuss it. Binnie J commented: 'As the Court of Appeal thought it superfluous to discuss the applicable law, it was prepared to extend the same dispensation to the trial judge.' *Ibid* at para 33.

⁶¹ *Ibid* at para 37.

⁶² *Ibid* at para 42.

⁶³ *Ibid* at para 39. Binnie J suggests that the appellate court was driven by the peculiarities of the facts rather than the deficiency of the reasons: 'The majority judgment simply took the view that if the trial judge had thought harder about the problems and written a more extensive analysis, he might have reached a different conclusion'. *Ibid* at para 41.

128 *Mary Liston*

about credibility that rests on findings of fact belongs to the trial court judge. As an analogue to administrative law, then, agencies and tribunals which exhibit competence in analysis and come to reasonable conclusions based on their understanding of the facts and context should be accorded the same measure of respect as a trial court judge is by a reviewing court. A similar scope of deference is accorded to a decision-maker's judgement of what the policy context requires in a particular matter.

(D) Was the Reason-giver Sensitive to the Context?

Barnable J's 'generic' reasons could 'apply with equal facility to almost any criminal case,' a result which not only indicates a lack of reasoning but a lack of respect for the particularity of the case before him and therefore he showed disrespect to the particular accused who appeared before him.⁶⁴ His reasons were so "generic" as to be no reasons at all' and provided no 'comfort' to the losing party concerning the fairness of the process.⁶⁵ However, brevity and efficiency in reason-giving were not held to be synonymous with bad reasons and the onus still remained on the appellant to show that a prejudicial deficiency in reasons impeded access to appellate review in the criminal context. While absent or inadequate reasons might support a conclusion of unreasonableness, that alone will not constitute a reviewable ground. Where law is unsettled, however, it would be 'wise'—albeit not obligatory—for a trial judge to provide reasons setting out the legal principles;⁶⁶ silence on settled points is acceptable but the absence of reasons in general was not 'blessed.'⁶⁷

Looking at Barnable J's decision, the Supreme Court admonished him for solipsistically 'reminding himself' of his reasoning without articulating the 'pathway' he had taken.⁶⁸ He failed to appreciate, perhaps even completely disregarded, the public nature of his obligation to three audiences: the accused, the appellate court and the general public. He also failed to provide 'clarity, transparency and accessibility' to intelligible reasoning and in so doing frustrated the contextualisation of the rule of law.⁶⁹

⁶⁴ *Sheppard*, n 41 at para 32.

⁶⁵ On this point, Binnie J quoted Green JA from the appellate level *Sheppard* decision: 'Particularly in a difficult case where hard choices have to be made, [reasons] may provide a modicum of comfort, especially to the losing party, that the process operated fairly ... It is cold comfort ... to an accused seeking an explanation for being convicted in a case where there was realistic chance of success, to be told he is not entitled to an explanation because judges are "too busy".' *Ibid* at para 60.

⁶⁶ *Ibid* at para 40.

⁶⁷ *Ibid* at para 37.

⁶⁸ *Ibid* at paras 59, 61.

⁶⁹ *Ibid* at para 63.

3. Sensitivity, or Reminding the Head about the Heart

After the *Baker* decision was handed down, a backlash from the bench occurred based on the belief that this judgment warranted too much judicial intervention into discretionary decision-making and therefore disturbed the Canadian version of the separation of powers.⁷⁰ A Federal Court of Appeal case of just such a backlash, *Legault*, focused on how decision-making ought to consider the children's best interests and whether these interests 'trumped' or took precedence over all other considerations in humanitarian and compassionate grounds applications.⁷¹ Décaré JA found the trial court judge's reading of *Baker* 'excessive.'⁷²

Looking to *Suresh*⁷³ and *Chieu*,⁷⁴ both of which 'clarified' *Baker* in light of this ambiguity, the appellate court affirmed that the weighing of relevant factors is the responsibility of the Minister or the Minister's delegate, not the court's responsibility. Procedural fairness in these circumstances does not dictate a particular outcome but includes the right to make written submissions to the immigration officer who actually makes the decision, a right to an unbiased decision-maker and a right to receive brief reasons for the decision. However, the officer must still illustrate that she is 'alert, alive and sensitive' to the various factors including the children's interests, but once she has identified and considered the facts, it is her judgement which then determines the weight accorded to each factor;⁷⁵ importantly, 'mere mention' of the children is not sufficient evidence of considered examination and weighing.⁷⁶ Here the immigration officer was found to have 'examined the interests of the children with a great deal of attention' and these were weighed against

⁷⁰ See n 23 and accompanying text.

⁷¹ *Legault v Canada (Minister of Citizenship and Immigration)* [2002] 4 FC 358, FCJ No 457, FCA 125 (CA) [hereinafter *Legault*]. The individual was an American citizen and had been living in Canada for 20 years. He had two families in Canada—7 children by 2 ex-wives—and was the sole supporter of these families. He was indicted on a number of fraud-related offences and, after negative results to applications to stay based on permanent residence and refugee status, filed a humanitarian and compassionate grounds application which was also denied.

⁷² Nadon J in the trial decision wrote: 'In conclusion, it is my view that the Supreme Court's decision in *Baker* ... calls for a certain result, and that result is that, save in exceptional cases, the children's best interests must prevail. ... As I have made it clear, I do not share the view expressed by the Supreme Court' *Legault v Canada (Minister of Citizenship and Immigration)* [2001] FCJ No 568, 2001 FCT 315 (FCTD) at paras 67–68.

⁷³ *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] SCJ No 3, 2002 SCC 1 at paras 35–38: 'If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold her decision. It cannot set it aside even if it would have weighted the factors differently and arrived at a different conclusion' (at para 38).

⁷⁴ *Chieu v Canada (Minister of Citizenship and Immigration)* [2002] SCJ No 1, 2002 SCC 3 at para 70 where the Supreme Court declared that *Baker* stands as 'an example of an instance where the Minister's decision was procedurally deficient' rather than entailing any substantive considerations.

⁷⁵ *Legault*, n 71 at para 12.

⁷⁶ *Ibid* at para 13.

130 *Mary Liston*

other factors in a reasonable decision. The Supreme Court denied leave to appeal.⁷⁷

In *Hawthorne*,⁷⁸ the ‘best interests of the child’ factor received greater articulation than the discussion in *Legault*. The baseline that the Federal Court of Appeal found was ‘absent exceptional circumstances ... the “child’s best interests” factor will play in favour of the non-removal of the parent.’⁷⁹ In the majority and concurring judgements, the court held that the immigration officer was not ‘alert, alive and sensitive’ to the child’s interests—a child who had permanent resident status—because the officer subsumed these particular interests under the separate category of inquiry around the hardship of removal of the parent on the child.⁸⁰ Moreover, the officer, in the written reasons to Ms Hawthorne outlining why her application was denied, clearly appeared quite heartless about the child’s concerns which were provided to the officer by Suzette in a formal statement.

The concurring decision by Evans JA elucidated the broader and explicitly normative perspective and provided guidance on how to interpret the degree of harm in this particular context.⁸¹ He too found that the officer provided insufficient treatment of the child’s interests, writing: ‘The summary, or less than responsive, treatment of the principal submissions made to the officer is indicative of a dismissive attitude towards her best interests.’⁸² And, importantly, although he noted that properly formulated reasons which ‘clearly demonstrate that the best interests of an affected child have received careful attention’ no doubt impose an administrative burden,

⁷⁷ *Legault v Canada (Minister of Citizenship and Immigration)* [2002] SCCA No 220—no reasons given.

⁷⁸ *Hawthorne v Canada (Minister of Citizenship and Immigration)* [2002] FCJ No 1687, 2002 FCA 475 (CA). Daphney Hawthorne left Jamaica to live with the father of her daughter Suzette in 1992. Ms Hawthorne and the father of Suzette had separated in 1994 after he abused her; he subsequently married another woman and had children. Suzette, the daughter, remained in Jamaica with her grandmothers until her father sponsored her in 1999; her mother sent her financial assistance throughout this period. After coming to Canada, Suzette lived with and was supported by her mother. Ms Hawthorne had no legal status in Canada and in the midst of a humanitarian and compassionate grounds application to regularise her immigration status, was ordered deported in 2000. At this time, Suzette was in her early teens, did not want to live with her father as he was suspected of abusing one of his children, had no other relatives in Canada, and was not old enough to live on her own.

⁷⁹ *Ibid* at para 5 in the majority judgment by Décarý and Rothstein JJA.

⁸⁰ *Ibid* at para 10.

⁸¹ For example, Evans JA took seriously the Immigration Manual guidelines, calling them the ‘normative framework’ within which humanitarian and compassionate grounds decisions are made. *Ibid* at para 30. Evans JA’s position on such ‘soft law’ accords with and supports that taken by Sossin and Smith: ‘As cases such as *Baker* ... illustrate, although courts have often been unwilling to treat guidelines and codes as law, soft law has significant potential to serve as a conduit for a judicial-executive dialogue concerning the nature and scope of bureaucratic decision-making.’ See Sossin and Smith, n 24 at 24.

⁸² *Ibid* at para 50. Evans JA stated that the immigration officer had failed to treat Suzette’s interests properly because an incorrect comparison was made. The relevant comparison ought to have been Suzette’s present life in Canada and the choice of either losing her mother or her residency, not what her life would be like in Jamaica if she ‘opted’ to leave with her mother.

Baker, the Duty to Give Reasons 131

this is as it should be. Rigorous process requirements are fully justified for the determination of subsection 114(2) applications that may adversely affect the welfare of children with the right to reside in Canada: vital interests of the vulnerable are at stake and opportunities for substantive review are limited.⁸³

Left for another day was the question of whether post-*Baker* cases like *Suresh* in fact preclude inquiry into the substantive unreasonableness⁸⁴ of the exercise of discretion when important individual interests are unreasonably or capriciously harmed—that is, interests that are either non-*Charter* or outside of traditional ultra vires categories.

4. Promises, or Footing the Remedy

The Mount Sinai hospital case provides a fascinating example of the murky line between the scope of discretion and the finality of a decision.⁸⁵ At play in this decision, were a wide variety of unusual factors including the inconsistent behaviour of a government official, an overt promise, judicial reconstruction of the public interest and a contextualised approach to the determination of an ongoing web of relationships—the combination of which led to a rare instance of *mandamus* as a remedy to compel issuance of an operating permit from the Crown.

Of the two judgments, judgments which agree regarding the result but not in the method, the minority judgment written by Binnie J with the concurrence of McLachlin CJ evokes the language of *Baker*.⁸⁶ This judgment

⁸³ *Ibid* at para 52.

⁸⁴ Evans JA suggested that '[d]iscretion is exercised unreasonably or capriciously when the damage to important individual interests is disproportionate to the benefit produced by the decision.' *Ibid* at para 35.

⁸⁵ *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] SCJ No 43, 2001 SCC 41 [hereinafter *Mount Sinai*]. Since the 1950s, Mount Sinai hospital had possessed an operating permit which did not reflect its mix of long-term and short-term facilities, a situation known to the provincial government all along. In the 1980s, Mount Sinai and the government began negotiations to move the Center to Montreal and the Minister promised the Center that it would alter the permit to reflect reality upon the move, a promise which was reaffirmed on many occasions. In 1991, the Center moved and applied to have its permit regularised but, without giving the Center an opportunity to respond, the Minister retracted the promise and said the Center would have to operate under the terms of the old permit.

⁸⁶ In contrast, the majority judgment written by Bastarache J found a particular 'moment' where the Minister had exercised his discretion—the 1991 move. This meant that the Minister's discretion was not under review, as in *Baker* and in Binnie J's judgment, because it was 'spent' in January 1991. In October the Center received a letter revoking the promise and reversing the discretion and the question became whether this decision constituted a valid reversal. In light of the Minister's subsequent inconsistent behaviour with this supposed reversal, Bastarache J found that a later letter was an invalid exercise of discretion: 'The Minister cannot promise the Center to issue the modified permit when the move to Montreal is made, refuse to issue that permit, and then continue to treat the Center as if the permit had in fact been issued.' *Ibid* at para 114.

132 *Mary Liston*

also illustrates an interesting nexus between public and private law in understanding a ‘web of understandings and incremental agreements’ on which the Center relied and which, over time, came to embody a specific public interest.⁸⁷ Binnie J reviewed the various grounds of appeal (eg, an acquired right, failure to observe procedural fairness, legitimate expectations, public promissory estoppel, and abuse of discretion) and considered failure to observe procedural fairness and abuse of discretion (citing *Baker*) as the appropriate grounds to find the Minister’s decision patently unreasonable.⁸⁸ On this standard, the Minister showed a ‘total lack of regard for the implications for the respondents of the Minister’s broken promises’ and the court was unable to mitigate this finding since the Minister offered no ‘serious policy reason’ for a redefinition of the public interest.⁸⁹ Indeed, the court suggested that it would have been ‘sensitive’ to any serious policy reason the Minister might have put forward.⁹⁰ As a result, 10 years after the broken promise and without any supporting reasons, the Minister was not allowed to advance a new vision of the public interest and the only option left open to him was to issue the modified permit.⁹¹

What is particularly novel and encouraging about the *Mount Sinai* decision is that the court undertook a probing review of an executive decision under the rubric of abuse of discretion *and* concluded that such an abuse demands a very intrusive remedy. But, as with *Baker*, the evidentiary requirements—the reasons—possess an air of contingency about them which makes assertion of an ethos a tenuous and variable claim for, as Binnie J states:

The communications from the Minister are not simply evidence of the state of the Minister’s minds, but are the source of the respondents’ entitlement. In other words, if the successive Ministers had gone through the same cogitations and deliberations as they did between 1984 and 1991, *but kept their thoughts to themselves*, I think it unlikely that the respondents would succeed in obtaining the order they seek (emphasis added).⁹²

In other words, if public officials keep their cogitations private and do not provide any evidence of reasoning, then the duty to give reasons can be no more than a sham.

⁸⁷ *Ibid* at para 8. Binnie J writes: ‘If this were a private law situation there would likely be a breach of contract. This is not, of course, a private law situation.’

⁸⁸ Unfortunately, this decision has set back the development of both legitimate expectations and public law estoppel for some time in Canada.

⁸⁹ *Ibid* at paras 64–65. Bastarache J also held that the ‘Minister cannot now invoke a vague and ungrounded funding concern as a reason for reversing a prior exercise of discretion in these circumstances.’ *Ibid* at para 109.

⁹⁰ *Ibid* at para 65.

⁹¹ *Ibid* at para 67.

⁹² *Ibid* at para 4.

SEVERAL IMPLICATIONS OF THE *BAKER* ETHOS FOR
CANADIAN ADMINISTRATIVE LAW

Binnie J's statement directly above regarding the contingent evidentiary foundation in the *Mount Sinai* case sounds a necessary cautionary note about the potential sanguinity of my approach to *Baker*. In this section, I hope to flesh out the argument against the possibility that *Baker* can provide no purchase regarding the quality of the reason-giving exercise and therefore may further a substandard relationship between the administrative decision-maker and the affected individuals or citizens, particularly vulnerable persons.⁹³

1. Fleshing Out the Reasons Requirement

Critics of the duty to provide reasons usually warn that reasons may do very little to facilitate the free and fair exchange of information in the administrative setting. They may also do very little to produce accountability, transparency, or legitimacy in either the administrative or judicial spheres. Indeed, Lorne Sossin goes so far as to suggest that *Baker* may act as a disincentive as decision-makers may perversely use reasons to circumvent judicial review of the decision.⁹⁴ Cursory, formulaic, vague, unclear, uninformative, inauthentic—'boilerplate' or bureaucratic—reasons could emerge as a standard and, in some administrative contexts, be held acceptable by a reviewer based on functional grounds alone—that is to say, that a lack of reasons would not frustrate review of the decision. Lastly, the absence of reasons and the inadequacy of reasons are also not free-standing grounds of appeal—in this respect both *Baker* and *Sheppard* represent the failings of law for some.

Nevertheless, review for the reasonableness of decisions has expanded and I suggest that the absence or inadequacy of reasons may no longer be acceptable.⁹⁵ Fairness considerations could and should be used to challenge this outcome and I argue that where reasons are deficient and

⁹³ See, eg: L Sossin, 'An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law' (2002) 27 *Queen's Law Journal* 809–858. In his article, Sossin suggests replacing the current fairness model with a proposed 'framework of intimacy' which conceives of the exchange of knowledge as the basis for justifying decisions to the affected parties and the public, not as the means to legitimating adverse decisions. *Ibid* at 826–27. Such a framework would include a standard on which to assess and evaluate reasons in order to spur the production of 'fuller, clearer, more comprehensive, genuine reasons.' Sossin, however, does not disclose what this standard of meaningfulness looks like or how this it will operate. *Ibid* at 837–38.

⁹⁴ As Sossin notes, fairness depends on the disclosure of knowledge by both parties where the decision-maker is obliged to provide some information to the individual and the affected party has the right to have certain information considered by the decision-maker. *Ibid* at 824 and 836.

⁹⁵ On the desirability of a general duty of to give reasons at common law, see Craig, n 27 at 301–02.

134 *Mary Liston*

reveal an inattentive or arbitrary disposition, or where insupportable and unsupported conclusions are drawn, such deficiencies will provide a justification for greater scrutiny and a demand for reasons.

(A) Absent Reasons

Reading *Baker* through *Sheppard* tells us that not every administrative law decision will attract the duty to give reasons nor in the same way. However, where significant interests and rights are at play, it would be prudent public policy for the decision-maker to provide an intelligible rationale in order to satisfy the individual, the reviewer (either agency or judicial), and the general public. Determining evidence and weighing relevant factors will, in general, be the domain of the decision-maker who has first-hand knowledge of the context.

The absence of reasons could evoke a continuum of responses on the pragmatic and functional approach ranging from undeferential suspicion, to a probing examination, to soliciting respectful attention from the reviewer, and all the way to—though I would argue almost never—endorsement and full deference. *Mount Sinai*, for example, provided an example where the Supreme Court engaged in a respectful examination of the policy context while *Sheppard* stood somewhere between undeferential suspicion and a probing examination.

Outside of the criminal law context, the Montfort Hospital decision, *Lalonde*,⁹⁶ illustrates greater scrutiny of a discretionary decision. The Ontario Court of Appeal in *Lalonde* reviewed a discretionary decision to close the sole francophone hospital in Ontario, a decision purporting to be made in the public interest. Looking to the context and approaching language rights purposively in the pragmatic and functional approach,⁹⁷ the Ontario court identified several underlying constitutional principles and used these principles to interpret the statutory boundaries within which the Ontario government could act. Here the court used *Baker* for the proposition that the ‘the review of discretionary decisions on the basis of fundamental Canadian constitutional and societal values’ is possible and, despite being accorded deference, are not immune.⁹⁸ The statute required that a

⁹⁶ *Lalonde v Ontario (Commission de restructuration des services de santé)* [2001] OJ No 4767, 56 OR (3d) 505 (OCA) [hereinafter *Lalonde*]. The Ontario Court of Appeal found that a fundamental unwritten principle of the constitutional order, protection of minorities, served to protect Ontario’s sole francophone hospital from both closure and substantial reduction in services. The Minister’s directions were quashed because they failed to take into account the importance of francophone institutions and the preservation of the Franco-Ontarian culture.

⁹⁷ Weiler and Sharpe JJA approvingly cite Supreme Court jurisprudence which states that language rights ‘must be given a purposive interpretation, taking into account the historical and social context, past injustices, and the importance of rights and institutions to the minority language community affected.’ *Ibid* at para 138.

⁹⁸ *Ibid* at para 177.

Baker, the Duty to Give Reasons 135

right to receive French language services existed and could only be limited if all reasonable and necessary measures to comply with the statute had been exhausted. Montfort was explicitly designated as a francophone hospital for the Ottawa-Carleton community and the decision to restructure was a shift in policy for which no explanation was given. Given this absence, the court was compelled to scrutinise the gap:

Although it is impossible to specify precisely what is encompassed by the words ‘reasonable and necessary’ and ‘all reasonable measures,’ at a minimum they require some justification or explanation for the directions limiting the rights of francophones to benefit from Montfort as a community hospital.⁹⁹

While the Minister could exercise discretion to change and even limit the provision of these services, ‘it cannot simply invoke administrative convenience and vague funding concerns as the reasons for doing so ...’¹⁰⁰ The Health Services Commission forfeited its entitlement to deference by providing no justificatory policy for impinging on fundamental constitutional values and its decision would have been found, on *any* standard of review, incorrect or unreasonable.¹⁰¹

(B) Inadequate Reasons

The adequacy of reasons is an area demanding greater jurisprudential elaboration as well. In the criminal case *Braich* discussed in subsection 2c of part III, what remained unresolved was the on-going puzzle of when a lack of genuine ‘hard thought’ on the part of the original decision-maker will constitute an improper or unreasonable step in the margin of discretionary manoeuvrability so that a reviewer can say with legitimacy and certainty that a different conclusion ought to have been reached in the context of a particular case. Whether such occurrences remain the exception remains to be charted.

*Gray v Ontario*¹⁰² is a case that grapples with the fairness dimension of reasons in an examination of the ‘quality’ of reasons in the statutory context.

⁹⁹ *Ibid* at para 166.

¹⁰⁰ *Ibid* at 168. This language concerning the nature of the governmental justification strongly echoes that found in the *Mount Sinai* case above. See n 89 above and text therein.

¹⁰¹ *Ibid* at 186.

¹⁰² *Gray v Ontario (Disability Support Program, Director)* [2002] OJ No 1531 (CA) [hereinafter *Gray*]. The appellant claimed disability benefits on the basis that migraines and other ailments precluded her from holding down any form of employment. The Social Benefits Tribunal found that, although the appellant was credible in her testimony about her condition, she could cope on a day-to-day basis, was not substantially impaired, and therefore was not a person with a disability. It was unclear on what evidence the Tribunal relied in reaching this conclusion.

136 *Mary Liston*

McMurtry CJO affirmed an earlier dictum that the duty to give reasons is ‘only fulfilled if the reasons provided are adequate ... [and] serve the functions for which the duty to provide them was imposed.’¹⁰³ The Ontario Court of Appeal unanimously held that a decision-maker must set out findings of fact as well as the principal evidence upon which the findings are based—particularly when the statutory regime implicates vulnerable persons such as people with disabilities. Not only did the tribunal provide ‘little or no explanation of the reasoning process,’¹⁰⁴ the tribunal asked itself the wrong question.¹⁰⁵ Mirroring *Sheppard, Gray* stands for the proposition in the administrative context that when a tribunal ‘asks itself the wrong question’ and fails to give reasons that are statutorily required, both of these flaws will be considered a reviewable error of law—errors which do not entitle a tribunal to deference.¹⁰⁶

(C) Conclusions and Further Problems

Post-*Baker* caselaw suggests that the absence or inadequacy of reasons will not serve as complete bars to a demand for justification. They point to a baseline that where an important interest has been negatively affected by a discretionary decision, justification is required.¹⁰⁷ Indeed, caselaw suggests that absence or inadequacy of reasons can inform grounds for review under the duty of fairness and its contents. Finally, *Baker* and its progeny tell us that a variety of authorities can be used to call the decision-maker to account including international law, fundamental norms both written and unwritten, and policy guidelines. Several problems, however, remain unresolved and I will mention a few here.

First, given the balance of power between the discretionary decision-maker and the affected individual(s), and as Binnie J alluded to in *Mount Sinai*, the element of contingency will almost certainly remain an evidentiary challenge for administrative law cases. Second, save legislative amendment or further judicial extension, these cases do not address the concern left open by *Baker* that reasons need not be contemporaneous with the decision

¹⁰³ *Ibid* at para 22 quoting *VIA Rail Canada Inc v Canada (National Transportation Agency)* [2001] 2 FC 25 (FCA).

¹⁰⁴ *Ibid* at para 24.

¹⁰⁵ The Court of Appeal stated that the question was not whether the appellant could cope on a day-to-day basis but whether or not she could function in the workplace and the community or attend to her personal care. *Ibid* at para 25.

¹⁰⁶ *Ibid* at paras 25–26. This would suggest that the appropriate standard of review on these issues, depending on the context, is correctness or reasonableness.

¹⁰⁷ See R Macdonald and D Lametti, ‘Reasons for Decisions in Administrative Law’ (1990) 3 *Canadian Journal of Law and Administrative Practice* 123 at 151–58 and MH Morris, ‘Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate’ (1998) 11 *Canadian Journal of Law and Administrative Practice* 155 at 177–78.

Baker, the Duty to Give Reasons 137

but may be obtained after the fact and upon request.¹⁰⁸ Third, despite the guidance provided by the pragmatic and functional approach, these cases do not yet adequately address the problem of the appropriate standard of review of substantively unreasonable discretionary decisions that different decision-makers might reach.¹⁰⁹ And fourth, the caselaw has not yet resolved the underlying problem of when the courts will intervene in substantively unreasonable discretionary decisions and how they might remedy such decisions. For different reasons, both *Braich* and *Suresh* suggest that reweighing and resort to substantive remedies will occur infrequently.

Nevertheless, *Baker*, *Sheppard*, *Mount Sinai*, *Lalonde*, *Hawthorne* and *Gray* together suggest that deference will not be granted to a public body if it appears that not all the evidence was considered, if the court cannot determine how or if fair decision-making was engaged, or if reasons are sparse, incoherent and otherwise indefensible.¹¹⁰ And, it is clear that a variety of remedies exist including *mandamus*, which can be used to order the issuance of reasons, and *certiorari* to quash a decision which failed to meet the common law requirement to give reasons and remit it for reconsideration.¹¹¹ For now, *Mount Sinai* stands as a rare example of a more substantive remedy—the direct grant of the benefit sought.¹¹²

¹⁰⁸ Thanks to Lorne Sossin for alerting me to this point—as he suggests, the line between justification as transparency and justification as immunity from accountability is a thin one.

¹⁰⁹ On this last point, see David Mullan's chapter in this volume. He argues that the courts, using *Baker*, have confirmed and increased deference to discretionary and executive decision-making, particularly with respect to the national security concerns including access to sensitive information. In administrative law in general and national security contexts in particular, Mullan argues that what has not yet resulted is optimal coherence within administrative law jurisprudence around standards of review. The courts have not calibrated deference so that it is most intense where it is most needed and there remains a persistent tendency to revert to categorical labelling as a solution when confronted by difficult conflicts of fact and law.

¹¹⁰ See *Canada (Director of Investigation & Research) v Southam Inc* [1997] 1 SCR 748 on expertise at para 62: 'Expertise loses a right to deference when it is not defensible.' Iacobucci J for the court suggested that expertise is demonstrated in an administrative decision through well-informed, rational, cogent, and coherent conclusions.

¹¹¹ See J LH Sprague, 'Remedies for the Failure to Provide Reasons' (2000) 13 *Canadian Journal of Administrative Law and Practice* 209–23. Sprague argues that the proper remedy for a failure to give reasons should be *mandamus* whereas *certiorari* should be reserved for the rare cases when it is impossible to provide reasons and 'even then only when such action is justified by the role played by the reasons in the particular scheme.' On Sprague's account, reasons do not go to the correctness/validity of the decision or its fairness. *Ibid* at 222–23. In contrast, David Mullan suggests that no hard and fast rule regarding the appropriate remedy exists. However, quashing and remission may be the most appropriate response to the failure to provide reasons while ordering the provision of reasons may satisfy the functional concern regarding effective review or appeal. He recommends that the substantive approach—the grant or a direction to grant the benefit the applicant is seeking—remain a reserve possibility.' Mullan, *Administrative Law*, n 27 at 317–18.

¹¹² Both decisions employed *mandamus* to compel the issuance of the permit, albeit for different reasons. The remedy is all the more extraordinary since it was used against the Crown and the court specifically rejected the argument put forward that the Crown should retain immunity from this writ (*Mount Sinai*, n 85 at para 117).

THE *BAKER* ETHOS: THE AORTA OF CANADIAN LAW?

Many commentators would concur in the assessment that *Baker* is one of the 'most significant administrative law judgements ever delivered by the Supreme Court of Canada'.¹¹³ *Baker* confirms the existence of a unified methodology: a pragmatic and contextual application of three standards of review revealing an overall 'deference as respect' approach to the administrative state, combined with a framework deeply evocative of a substantive conception of the rule of law. The 'bottom line' significance is that discretionary decisions must be exercised in accordance with the 'boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*'¹¹⁴; otherwise, they will not be respected by either the courts or the general public.

In this concluding section, however, I will assert that *Baker* is more important than even initially thought for three reasons. First, the duty to give reasons stands as a substantive instantiation of the rule of law.¹¹⁵ Therefore, what many judges labelled a 'substantive' as opposed to a purely procedural approach was the correct characterisation of the *Baker* ethos.¹¹⁶ However, I do not agree that such an approach always intrudes on the merits of the initial decision or that it always guarantees the result that the claimant would like. As I have argued, a competent and fair decision-making process combined with a decision that recognises individual rights and interests and provides adequate reasons should usually command respect from a reviewer.

Second, *Baker*'s unified approach may inform the legal order as a whole. Looking at the pre- and post-*Baker* landscape illustrates that this methodology is not only confined to *Baker* and administrative law, but is pertinent for all public law¹¹⁷ and perhaps beyond to specific

¹¹³D Mullan, '*Baker v Canada (Minister of Citizenship and Immigration)*—A Defining Moment in Canadian Administrative Law' (1999) 7 *Reid's Administrative Law* 145 at 146. See also L Sossin, 'Developments in Administrative Law: The 1998–99 Term' (2000) 11 *Supreme Court Law Review* (2d) 37 at 99.

¹¹⁴*Baker* at para 56.

¹¹⁵David Dyzenhaus and Evan Fox-Decent suggest that *Baker* exemplifies the principle of legality. See 'Rethinking the Process/Substance Distinction' (2001) 51 *University of Toronto Law Journal* 193–242 at 238–42.

¹¹⁶Here I disagree with Binnie J in *Mount Sinai* in his discussion about why the doctrine of legitimate expectations is limited to procedural rather than substantive relief. He uses this discussion to affirm the distinction between the procedural and the substantive though he acknowledges that 'in some cases it is difficult to distinguish the procedural from the substantive' (n 85 at para 35). At least with respect to reasons and reasonableness, I concur with Dyzenhaus and Fox-Decent that *Baker* fuses them. See above n 115.

¹¹⁷Analogous approaches can be found in *Charter* cases both in approaches to analysing rights in context and in relation to the specific provisions in the *Charter*, in s 1, and in the standard technique of statutory interpretation. See also D Mullan in *Administrative Law*, n 27 at 108, characterising *Baker*'s extension of the pragmatic and functional approach to abuse of discretion

Baker, the Duty to Give Reasons 139

instances of private law¹¹⁸. Indeed, equitable concerns about standards and proper behaviour inform both private and public law.¹¹⁹ Such an approach avoids formalism and positivism in order to ground a decision in the substantive context and enables the judicial decision-maker to call into play many kinds of authority.¹²⁰ One interesting nexus concerning fairness between the private and the public has occurred in cases involving mistreatment of individuals within certain corporate communal organisations such as religious colonies.¹²¹ It would seem that a modified version of the body of public law regarding procedural justice I have outlined here could apply to decisions made that impinge on individual rights and interests within such communities. In contrast to private law, however, the standard used to judge behaviour in administration and governance is constitutive of the character of the polity—in Canada, then, a liberal and constitutional democracy combined with a rule-of-law state.

Finally, the *Baker* ethos provides the strongest jurisprudential link between the rule of law and democracy. The idea of the justificatory democratic state may be best exemplified in the finding of the duty to give reasons in public law and coheres with the substantive understanding of the rule of law the Supreme Court has recently articulated in

as the provision of ‘an overarching or unifying theory for review of the substantive decision of all manner of statutory and prerogative decision makers.’

¹¹⁸ For a decision that applies *Sheppard* to the family law context, see *CAS v Alberta (Director of Child Welfare)* [2002] AJ No 895, 2002 ABQB 631.

¹¹⁹ Equity has often supervised economic relations to impose standards of behaviour. See Sossin for an argument why the duty to give reasons in administrative law is equitable and that equitable principles inform public law duties based on a reconception of the fiduciary model in public law relationships and of authority as political trust. See ‘Public Fiduciary Obligations,’ n 35.

¹²⁰ According to Jeffery Berryman, the methodology employed in courts of equity did not distinguish between fact and law resulting in an approach characterised as ‘pragmatic, robust, and highly contextualized.’ J Berryman, *The Law of Equitable Remedies* (Toronto, Irwin Law, 2000) at 2.

¹²¹ See most recently *Waldner v Ponderosa Hutterian Brethren* [2003] AJ No 7, 2003 ABQB 6 which is a subsidiary case to a larger claim about procedural impropriety. This case concerns whether several members were improperly expelled from a Hutterian religious community because they were not afforded proper notice of the proposed expulsion nor were they given explicit reasons for such expulsion; significant property interests were at play as property is held in common in these communities and members are cared for until death. In an interesting link to *Baker*, the member who brought forward the suit was expelled but his wife was allowed to remain in the community. As with *Mount Sinai*, this case provides an example of overlapping public and private law doctrines as expulsion here could be thought analogous to wrongful dismissal. The Alberta court declared that the expulsion was invalid and granted an interim injunction to require reinstatement to his status before expulsion pending completion of the action regarding the evidence about procedural merits of the expulsion. The court would not interfere with what sanctions the community imposed prior to the wrongful expulsion and cautioned that the final determination of appropriate discipline rested in the decision-making body of the community. Other cases of this type include *Hofer v Wollman*, [1992] 3 SCR 165 and several early cases concerning memberships in associations.

140 *Mary Liston*

the *Secession Reference*.¹²² In this new understanding, administrative tribunals remain the 'front-line embodiments of the Rule of Law'¹²³ while the courts' participation in democratic governance actualises the rule of law norms of accountability and transparency. The view that I advance complements the picture of the rule of law outlined by Chief Justice Beverley McLachlin:

Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness*. Arbitrary decision and rules are seen as illegitimate ... most importantly, the ability to call for such a justification as a precondition to the legitimate exercise of public power is regarded by citizens as their *right*, a right which only illegitimate institutions and laws venture to infringe. The prevalence of such a cultural expectation is, in my view, the definitive marker of a mature Rule of Law.¹²⁴

Rather than a standard account of the court's role which might focus, for example, on the counter-majoritarian principle, the *Baker* ethos presents a different and deeper explanation and justification, tapping into an ethical framework where the courts evaluate and legitimate a democratically originating, rule-governed way of life. The exercise of public power that affects individual rights must be justified to citizens on the bases of fairness, rationality, and reasonableness. Skeletal, generic, boilerplate, formulaic reasons cannot serve the function of reminding the political, social and legal order of the rules of conduct we believe are necessary to regulate our activities.

The rule of law therefore necessitates the multiple supervision of the exercise of public power between the executive, the legislative, the administrative state, the judiciary and the citizenry.¹²⁵ Determining the scope of duties owed by government officials in a decision-making context is a joint task shared between the legislatures which elaborate public purposes, the executive which animates these purposes and the courts which ensure reasonableness of government action.¹²⁶ But rather than a contest with only one winner, the object of the game of public law is for the players to better understand the rules of the game through their mutual participation

¹²²In the *Secession Reference*, the Supreme Court suggested that: 'A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle.' *Reference re Secession of Quebec* [1998] 2 SCR 217 at para 67.

¹²³McLachlin, n 3 at 189.

¹²⁴*Ibid* at 174.

¹²⁵D Dyzenhaus, 'Constituting the Rule of Law: Fundamental Values in Administrative Law,' (2002) 27 *Queen's Law Journal* 445–509 at 501–02. See also K Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto, Irwin Law, 2001).

¹²⁶*Ibid* at 175.

Baker, the Duty to Give Reasons 141

in the process of challenging, explaining, and applying these rules in concrete situations.¹²⁷ Courts and tribunals should be co-operative players in the game of administrative justice. Deference as respect ought then to facilitate power-sharing and aim to foster institutional respect for other bodies' competencies—this is the type of co-ordination intended by *Baker*.¹²⁸

It is, of course, the affected individual or individuals, citizen or non-citizen, who provide the participatory stamp because they themselves have engaged the process. The procedural protection afforded by the duty to give reasons accords with a view of democracy that is participatory and therefore respects individual agency by facilitating the exercise of moral responsibility and by providing fair procedures that treat the individual as a whole person thereby respecting human dignity.¹²⁹ The *Baker* ethos manifests a sophisticated conception of participation in legal processes which complements democratic participation in political processes. I have argued that the *Baker* ethos embeds this conception in the duty to give reasons.

¹²⁷ For a brief analysis of this 'activity-oriented' view of democracy and constitutionalism, see J Tully, 'The Unattained Yet Attainable Democracy: Canada and Quebec Face the New Century' (Montréal, Programme d'études sur le Québec de L'Université McGill, 2000). In this essay, he writes: that '[c]onstitutional democracy must thus be seen as an activity, a system of discursive practices of rule following and rule modifying in which diversity is reconciled with unity through the continuous exchange of public reasons.' *Ibid* at 17.

¹²⁸ Genevieve Cartier calls this the '*Baker* effect,' a term that she unpacks in her paper in this volume.

¹²⁹ See DJ Galligan, *Due Process and Fair Procedures A Study of Administrative Procedures* (Oxford, Clarendon Press, 1996), TRS Allan's review of this book, 'Procedural Fairness and the Duty of Respect' (1998) 18 *Oxford Journal of Legal Studies* 497–515, and P Craig, 'Public Law, Political Theory and Legal Theory' (2000) *Public Law* 211–39.

