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mcmillan litigation bulletin

please don't copy this reasoning

The recent unanimous decision of the Supreme Court of Canada in *Cojocaru v B.C. Women's Hospital*[1] [*Cojocaru*] suggests that copying may be an acceptable form of flattery in judicial decision writing.

judicial independence and impartiality

In *Cojocaru*, the Court held that a judge's copying of portions of parties' submissions in his or her judgment, without more, is not enough to substantiate an appeal. This is true even if the judge has failed to attribute that material to its original author.

The Court's decision was founded on presumptions of judicial integrity and impartiality.[2] Indeed, in order to rebut these presumptions, a judge's copying must be of such a character that "a reasonable person would conclude that the decision-making process was fundamentally unfair in the sense that the judge did not put his or her mind to the facts, the argument and the issues and decide them impartially and independently".[3]

To determine whether copying rises to the level of creating unfairness, the court should consider the nature or complexity of

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[1] *Cojocaru v B.C. Women's Hospital*, 2013 SCC 30 ["*Cojocaru*"].

[2] *Ibid*. at para. 31.

[3] *Ibid*. at para. 13.

the case, what was copied, the extent of the copying and how it functions in the reasons as a whole, among other relevant factors.[4]

That the threshold for rebutting the presumption of judicial integrity and impartiality is high[5] is clearly demonstrated by the facts in *Cojocaru*. The decision in question was 368 paragraphs in length, 321 of which were copied nearly word-for-word from the plaintiffs' submissions. Those original paragraphs that the judge did write mostly laid out uncontroversial facts. One portion of the copied submissions even contained an error related to the date of a document that the judge himself had previously pointed out in court.[6]

The Court's finding that the trial judge put his mind to the issues appears to turn on the fact that the judge did not accept all of, and made some findings contrary to, the plaintiffs' submissions.[7] The Court viewed this as a sufficient indicator of judicial impartiality and independence.

While acknowledging that "the best practice is [for the judge] to discuss the issues, the evidence and the judge's conclusions in the judge's own words", the Court held that a judge's failure to adhere to best practices does not, without more, permit the judge's decision to be overturned on appeal.[8] Cogent evidence is required to demonstrate that a judge did not decide issues impartially and independently.

no standalone sufficiency review for administrative decisions

The Court's decision in *Cojocaru* comes just over a year and a half after the decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador* (*Treasury Board*) [*Newfoundland*

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[4] *Ibid*. at para. 51.

[5] *Ibid*. at para. 20.

[6] *Ibid*. at para. 57.

[7] *Ibid*. at para. 6.

[8] *Ibid*. at para. 50.

Nurses].[9] *Newfoundland Nurses* considered the standards of review to be applied to the decisions of administrative decision-makers.

In the wake of the Court's 1999 decision in *Baker v. Canada*,[10] attacks on the quality of reasons of administrative decision-makers were sometimes argued as questions of procedural fairness. However, in *Newfoundland Nurses*, the Court referred to it as "an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review".[11]

The Court maintained that procedural fairness may not exist if reasons are withheld altogether. However, where reasons are provided by administrative actors, any challenge of reasoning or result should not consider issues of procedural fairness, but instead whether the decision was reasonable. Reviews of reasonableness should include requisite deference toward the related administrative tribunal.[12] It is in this "context" that decisions should be understood to have "justification, transparency and intelligibility".[13]

The decision in *Cojocaru* confirmed that *Newfoundland Nurses* eliminated an independent form of complaint about the adequacy of reasons of administrative actors. The Court held, "[i]n the administrative law context [,] challenges to the reasoning or result of a decision do not attract an independent sufficiency analysis and should be dealt with within the overall reasonableness analysis".

judges vs. tribunals: different reasoning, the same result?

In both *Cojocaru* and *Newfoundland Nurses*, the Court therefore appears to be signalling that as long as some forms of reasons are

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[9] 2011 SCC 62, [2011] 3 S.C.R. 708 ["*Newfoundland Nurses*"].

[10] [1999] 2 S.C.R. 817

[11] *Newfoundland Nurses* at para. 21.

[12] *Ibid*. at para. 13.

[13] *Ibid*.

provided, leeway will be given if decisions are at least partially copied. However, the forms of challenge to the decisions of judges and administrative actors will differ, as will the standards that are applied. Challenges to judicial reasoning on appeal will invoke presumptions of judicial impartiality and independence. Parties seeking review of administrative tribunal decisions will be faced with deference afforded to the tribunal decision-maker.

While the Court did not agree that the quality of the reasons in *Cojocaru* was the basis for an appeal, the door remains narrowly open for cogent rebuttal of the presumption of independence or impartiality. In the wake of *Newfoundland Nurses*, parties have already had success arguing that insufficient reasons of administrative actors are unreasonable.[14] Only time will tell, after the decision in *Cojocaru*, whether the courts will find a way to be similarly fair to litigants.

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a cautionary note

[14] See e.g. *Petrowski v Horse Racing Alberta*, 2013 ABQB 267 and *De Coito v. Canada* (*Citizenship and Immigration*), 2013 FC 482 where decisions copied from previous tribunal decisions were held to be unreasonable.