

ADMINISTRATIVE LAW IN CANADA

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Chapter 3

DISCRETION AND BIAS

3.1 DISCRETION

Many administrative decisions involve an element of discretion. Legislators cannot contemplate all of the circumstances and conduct to be regulated within a specific field of activity. Someone must be given the responsibility of applying the legislation to each situation as it arises. Also, legislation is ineffective if no one is appointed to ensure compliance. Such a person is granted discretion to determine whether a specific situation is covered by the legislation and whether some sort of compliance order or other remedy is warranted. Also, discretion is often conferred so that considerations of policy and the public interest can be taken into account.

The exercise of discretion involves choice from among options. Some tribunals are empowered to choose whether to grant or deny an application. Others may choose whether to exclude, from an activity, someone who has behaved improperly. Tribunals that have broad discretion to regulate a particular sphere of activity may choose how best to go about that task. This chapter discusses how discretion may properly be exercised and the criteria that may be taken into account.

1. Promote the Objects of the Statute

Discretion is not absolute or unfettered.¹ Decision makers cannot simply do as they please. All discretionary powers must be exercised within certain basic parameters. The primary rule is that discretion should be used to promote the policies and objects of the governing Act.² These are gleaned from a reading of the statute as a whole using ordinary methods of interpretation. Conversely, discretion may not be used to frustrate or

¹ *Multi-Malls Inc. v. Ont. (Minister of Transportation & Communications)* (1976), 73 D.L.R. (3d) 18 at 29 (Ont. C.A.).

² *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997 at 1030 (H.L.), applied in *Oakwood Developments Ltd. v. St. François Xavier (Rural Municipality)* (1985), 61 N.R. 321 at 331 (S.C.C.); *Doctors Hospital v. Ont. (Minister of Health)* (1976), 12 O.R. (2d) 164 at 175 (Div. Ct.).

thwart the intent of the statute.³ A discretionary power should not be used to achieve a purpose not contemplated by the Act that grants the power.⁴ This use is labelled as an "improper purpose".

All discretionary decisions must be based primarily upon a weighing of factors pertinent to the policy and objects of the governing statute.⁵ "A public authority in the exercise of its statutory powers may not act on extraneous, irrelevant and collateral considerations".⁶ Nor may the public authority ignore relevant considerations. It should consider all factors relevant to the proper fulfillment of its statutory decision-making duties.⁷

It of course follows that discretionary decisions should be based on evidence relevant to the powers to be exercised. Selective use of facts is unacceptable.⁸

Some tribunals have the power to make a decision where it is the tribunal's opinion that it would be in "the public interest" to do so. This is not an unfettered power. The decision must be based on facts proven in evidence and must serve the purposes of the statute granting the power.⁹

Some statutes grant broad authority to manage all aspects of a particular field of activity, conferring the widest possible authority to manoeuvre. Only actions that are clearly beyond the broad purposes of the statute may be questioned.¹⁰

2. Bad Faith

All decision makers are expected to act in good faith. Powers must not be abused and should not be exercised arbitrarily or dishonestly. The leading case on abuse of power is *Roncarelli v. Duplessis*.¹¹ In that case, a restaurant owner's liquor licence was revoked because he had posted bail for many Jehovah's Witnesses who were being prosecuted under municipal bylaws for distributing their publications without a peddler's licence. These reasons had nothing to do with liquor licensing. Mr. Justice Rand described the licence revocation as:

³ *Padfield v. Minister of Agriculture, Fisheries & Food*, *ibid.*, at 1030.

⁴ *Multi-Malls Inc. v. Ont. (Minister of Transportation & Communications)*, *supra*, note 1; *Fisheries Assn. of Newfoundland and Labrador Ltd. v. Newfoundland (Minister of Fisheries, Food & Agriculture)* (1996), 142 D.L.R. (4th) 732 (Nfld. C.A.).

⁵ *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140.

⁶ *Bareham v. London (Board of Education)* (1984), 46 O.R. (2d) 705 at 713 (C.A.).

⁷ *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, *supra*, note 2 at 332.

⁸ *Irving Oil Ltd. v. P.E.I. (Public Utilities Commission)* (1986), 34 D.L.R. (4th) 448 at 451 (P.E.I.C.A.), leave to appeal to S.C.C. refused (1987), 65 Nfld. & P.E.I.R. 270n (S.C.C.).

⁹ *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37; *Lindsay v. Man. (Motor Transport Board)* (1989), 62 D.L.R. (4th) 615 at 628 (Man. C.A.), leave to appeal to S.C.C. refused (1990), 39 Admin. L.R. xxxviii (S.C.C.); *Valières v. Courtiers J.D. & Associés Ltée* (1998), 9 Admin. L.R. (3d) 26 (Que. C.A.).

¹⁰ *Carpenter Fishing Corp. v. Canada* (1997), 155 D.L.R. (4th) 572 (F.C.A.), leave to appeal to S.C.C. refused October 14, 1999; *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247 (C.A.), leave to appeal to S.C.C. refused June 2, 1994.

¹¹ *Supra*, note 5.

a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. . . . That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.¹²

Evidence of bad faith is difficult to find. A decision maker who acts surreptitiously and without candour may be suspected of lacking good faith. A hasty decision pushed through without following the decision maker's usual practice of consultation and study may also be suspect. A decision that singles out one individual for different treatment may be questioned. A decision made for an improper purpose or on the basis of extraneous considerations may be evidence of bad faith. Although one of these factors alone may be insufficient, several factors together may indicate bad faith.¹³ Tribunal members, who have previously been admonished by a Superior Court for conducting hearings unfairly, may be acting in bad faith if they continue to follow similar unfair procedure.¹⁴

Since it is a serious accusation to allege bad faith, the onus is on the accuser to establish that the decision maker acted in bad faith. It is insufficient to allege only that the decision is adverse, that reasons were not given or that there exists a different opinion as to what constitutes the public interest. Innuendo is not evidence. Bad faith must be proven expressly and unequivocally.¹⁵

3. Discrimination

Discrimination contrary to the *Charter* is unacceptable.¹⁶ A decision should not be influenced by a party's race, colour, religion, sex, or other similarly irrelevant criteria.¹⁷

¹² *Ibid.*, at 141-42.

¹³ *Libbey Canada Inc. v. Ontario (Ministry of Labour)* (1999), 169 D.L.R. (4th) 416 (Ont. C.A.); *Hall v. Toronto (City)* (1979), 23 O.R. (2d) 86 (C.A.); *Buhler v. Stanley (Rural Municipality)* (1976), 69 D.L.R. (3d) 602 (Man. Q.B.), affirmed (1976), 72 D.L.R. (3d) 447 (Man. C.A.).

¹⁴ *Koehler v. Warkworth Institution* (1991), 45 F.T.R. 87.

¹⁵ *Carpenter Fishing Corp. v. Canada*, *supra*, note 10, at 582; *K & B Ambulance Ltd. v. Prince Albert (City)* (1977), 82 D.L.R. (3d) 202 at 204 (Sask. C.A.); *Sundance Beach (Summer Village) v. W.A.W. Holdings Ltd.* (1980), 117 D.L.R. (3d) 351 at 361 (Alta. C.A.).

¹⁶ *Charter*, s. 15.

¹⁷ *Roncarelli v. Duplessis*, *supra*, note 5; *H.G. Winton Ltd. v. North York (Borough)* (1978), 20 O.R. (2d) 737 (Div. Ct.); *Hutterian Brethren Church of Eagle Creek Inc. v. Eagle Creek (Rural Municipality No. 376)* (1982), 21 Sask. R. 361 at 373 (C.A.); *Bachmann v. St. James-Assiniboia School Div. No. 2*, [1984] 6 W.W.R. 25 (Man. C.A.).

4. Fettering Discretion

Discretion, once conferred, may not be restricted or fettered in scope.

Often, for ease of administration and in the interest of consistency, tribunals have issued guidelines indicating the considerations and criteria by which they will be guided in the exercise of their discretion. A policy may be issued to explain how a tribunal interprets a particular statutory provision. The publication of policies and guidelines is an admirable practice. It gives those in the industry advance knowledge of the tribunal's opinion on various subjects so that they may govern their affairs accordingly. Also, in the larger tribunals with many members presiding over a large number of proceedings, guidelines ensure a certain level of consistency and avoid a patchwork of arbitrary and haphazard decisions.¹⁸ Some tribunals publish proposed policies and invite comment from members of the public before the policies are adopted. This practice also is to be encouraged. Specific statutory authority to issue policy statements is not required.¹⁹

However, care must be taken so that guidelines formulated to structure the use of discretion do not crystallize into binding and conclusive rules. If discretion is too tightly circumscribed by guidelines, the flexibility and judgment that are an integral part of discretion may be lost.²⁰ A balance must be struck between ensuring uniformity and allowing flexibility in the exercise of discretion. The tribunal cannot fetter its discretion by treating the guidelines as binding rules and refuse to consider other valid and relevant criteria.²¹ "The discretion is given by statute and the formulation and adoption of general policy guidelines cannot confine it".²² In the circumstances of each individual case, the tribunal should consider whether the policy may be fairly applied.²³ A policy cannot contain mandatory rules that will result in the discipline of licensees for failure to comply.²⁴ Likewise, policies may not contradict the statute or regulation.²⁵ The guidelines should be disclosed to parties so that they may make representations regarding the application of the guidelines in

¹⁸ *Dawkins v. Canada (Minister of Employment & Immigration)*, [1992] 1 F.C. 639 (T.D.).

¹⁹ *Ainsley Financial Corporation v. Ont. (Securities Commission)* (1994), 21 O.R. (3d) 104 (C.A.).

²⁰ *Dawkins v. Canada (Minister of Employment & Immigration)*, *supra*, note 18.

²¹ *Maple Lodge Farms Ltd. v. Canada* (1980), 114 D.L.R. (3d) 634 at 645 (F.C.A.), affirmed (1982), 44 N.R. 354 (S.C.C.); *Testa v. B.C. (Workers' Compensation Board)* (1989), 58 D.L.R. (4th) 676 (B.C.C.A.); *Lewis v. B.C. (Superintendent of Motor Vehicles)* (1980), 108 D.L.R. (3d) 525 (B.C.S.C.); *Brown v. Alta.* (1991), 82 D.L.R. (4th) 96 (Alta. Q.B.).

²² *Maple Lodge Farms Ltd. v. Canada*, *ibid.*, at 358 (S.C.C.).

²³ *Carpenter Fishing Corp. v. Canada*, *supra* note 10, at 581.

²⁴ *Ainsley Financial Corp. v. Ont. (Securities Commission)*, *supra*, note 19.

²⁵ *Ibid.*; *Fairhaven Billiards Inc. v. Liquor & Gaming Authority (Sask.)* (1999), 177 Sask. R. 237 (C.A.).