Canadian Administrative Law

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irrelevant matters in arriving at its decision, if it has not allowed itself to be influenced by those matters, and if it may be appropriate to overlook a minor error of this kind even if it has affected an aspect of the decision.[94] Moreover, the fact that a decision was influenced by outside pressures does not necessarily invalidate the decision if the purposes or factors considered in the decision-making are relevant to the exercise of the discretion and are otherwise proper.[95]

1.3.4 FAILURE TO CONSIDER A RELEVANT GROUND

A decision maker must consider all relevant factors prior to making a decision. Failure to do so will lead a reviewing court to question the decision-making process and to possibly quash the decision.[96] The factor that the decision maker has failed to consider must be provided specifically under the enabling statute. Alternatively, the factor or ground that the decision maker failed to consider must have been implied in the enabling statute by necessary implication, by the purpose and context of the statute, or in a policy guideline issued by the public body[97] because of its importance to the attainment of the legislative purposes underlying the statutory scheme. The failure of an administrative decision maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration.[98]

Baker, as noted above, is a clear example of a decision where the discretion was exercised without consideration of a relevant ground. Again, in that case, the immigration officer refused an application for an exemption on humanitarian and

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[1995] 2 F.C. 73 at 99-103 (F.C.T.D.); *Padfield and Others v. Minister of Agriculture, Fisheries and Food*, [1986] A.C. 997 (H.L.).

[94] See, for example, *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] S.C.J. No. 14, [1994] 1 S.C.R. 202 (S.C.C.) and *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, [2013] F.C.J. No. 249, 2013 FCA 75 at paras. 24-26 (F.C.A.), in relation to procedural fairness. See also De Smith, Woolf & Jowell, *Principles of Judicial Review* (London: Sweet & Maxwell, 1999) at 210, citing *R. v. London (Bishop)* (1890), 24 QBD 213, 226-27; *Allcroft v. Bishop of London*, [1891] A.C. 666; *Ex p. Rice; Re Hawkins* (1957) 74 W.N. (N.S./W.) 7, 14; *Hanks v. Minister of Housing and Local Government*, [1963] 1 Q.B. 999, 1018-20; *Re Hurle-Hobbs' Decision*, [1944] 1 All E.R. 249; *Hounslow L.B.C. v. Twickenham Garden Developments Ltd.*, [1971] Ch. 233, 271.

[95] *Association des Gens de l'Air Québec Inc. v. Lang*, [1978] F.C.J. No. 35, [1978] 2 F.C. 371 at 378 (F.C.A.).

[96] *Penner v. Niagara (Regional Police Services Board)*, [2013] S.C.J. No. 19, 2013 SCC 19, [2013] 2 S.C.R. 125 at para. 27 (S.C.C.).

[97] *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28, [2003] 1 S.C.R. 539 at para. 29 (S.C.C.); *Oberlander v. Canada (Attorney General)*, [2004] F.C.J. No. 920, [2005] 1 F.C.R. 3, 241 D.L.R. (4th) 146 (F.C.A.).

[98] *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] 2 All E.R. 433, [1959] A.C. 663 at 693 (H.L.); *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, [1985] S.C.J. No. 49, [1985] 2 S.C.R. 164 (S.C.C.).

compassionate considerations from the requirement that an application for permanent residence be made from outside Canada. His decision rested on some evidence that the individual had eight children from different fathers, that she was on welfare and was paranoid schizophrenic. The SCC quashed the decision as the immigration officer failed to consider relevant grounds: the interests and needs of the children, some of whom had been born in Canada, and Canada's international obligations. In failing to consider these relevant grounds, the officer failed to implement one purpose of the *Immigration Act*, which was to grant exemptions for humanitarian and compassionate grounds.

In *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*,[99] the SCC held that the Minister's failure to grant the necessary permit to the hospital was patently unreasonable. In making the decision, the Minister had to consider the public interest. In that specific case, the Minister had encouraged the hospital to move to Montreal and the Minister led the Center to believe that he would grant a permit to the hospital to allow it to alter its services. After the hospital moved, the Minister refused to deliver the permit without giving the Center an opportunity to make submissions on the issue. In quashing the Minister's decision, the SCC held that the Minister exercised its discretion when promising the Center that it would receive the modified permit, encouraged the move to Montreal, and approved its financing. These gestures demonstrated that the Minister had already determined that this relocation was in the public's interest and thus had exercised his discretion. The permit had to be issued.

In *C.U.P.E. v. Ontario (Minister of Labour)*,[100] the Minister had the statutory discretion under the *Hospital Labour Disputes Arbitration Act*[101] to appoint labour arbitrators who, "in the opinion of the Minister", are "qualified to act". The SCC held that this discretion was circumscribed by the scheme and the object of the Act. Accordingly, the Minister must have regard to relevant labour relations expertise as well as independence, impartiality and general acceptability of candidates within the labour relations community as generally acceptable to both management and labour. The appointment of retired judges as labour arbitrators was held to be patently unreasonable since the Minister excluded key criteria (labour relations experience and broad acceptability) and substituted another criterion (judicial experience) that, while relevant, was not sufficient to comply with the legislative mandate. Notably, labour expertise, the factor that the Minister failed to consider, was not explicitly provided by the enabling statute.

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[99] *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] S.C.J. No. 43, [2001] 2 S.C.R. 281 (S.C.C.).

[100] *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28, [2003] 1 S.C.R. 539 (S.C.C.).

[101] *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14.

In *Arsenault-Cameron v. Prince Edward Island*[102] and in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,[103] francophone communities sought declarations directing their respective provinces to provide French schools to the minority French communities under section 23 of the *Charter*.[104] In both cases, the Minister had acknowledged the existence or content of the parents' rights but either failed to prioritize those rights, or delayed their implementation. In both cases, the SCC confirmed the rights of the parents to a school, and in *Doucet-Boudreau*, the trial judge even retained jurisdiction to hear reports on the status of the efforts. For the Court, the Ministers in question had failed to appropriately consider the remedial nature of section 23 of the Charter, and they failed to consider the negative effects on the French community caused by the denial of their rights. Moreover, the Ministers failed to give proper weight to the promotion and preservation of minority language and culture. This was essential, to give full regard to the remedial purpose of the right.

In *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*,[105] a development company bought land with the intent of subdividing and developing it. The lands were flood-prone and the municipality refused to consider remedies to the problem. The company sought review of the municipal decision. The SCC allowed the appeal, and held that the municipality had to consider all factors relevant to its statutory decision-making function. Thus, the municipality erred in failing to consider the possible solutions to the flooding problem. The municipality's obstinate refusal to consider whether or not the problem was remediable did not satisfy the requirement that all highly relevant considerations be taken into account. Council, therefore, did not take proper account of the factors relevant to its statutory mandate and did not exercise its discretion in accordance with proper principles.

In *Chamberlain v. Surrey School District No. 36*,[106] the issue was whether a school board had considered irrelevant grounds in refusing to approve three books for the education curriculum. In that case, a teacher asked the Surrey School Board to approve three books depicting families in which both parents were either women or men for use in teaching the family life education curriculum. The Board refused, alleging that the books would engender controversy in light of some parents' religious objections to the morality of same-sex relationships. In allowing the

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[102] *Arsenault-Cameron v. Prince Edward Island*, [1999] S.C.J. No. 75, [1999] 3 S.C.R. 851 (S.C.C.).

[103] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3 (S.C.C.) ["*Doucet-Boudreau*"].

[104] *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ["*Charter*"].

[105] *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, [1985] S.C.J. No. 49, [1985] 2 S.C.R. 164 (S.C.C.).

[106] *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (S.C.C.).

appeal, the SCC held that the Board could not base its decision entirely on religious grounds and when it did, the result had the effect of violating the principles of secularism and tolerance.

In *Chieu v. Canada (Minister of Citizenship and Immigration)*[107] and *Al Sagban v. Canada (Minister of Citizenship and Immigration)*,[108] the issue was whether the Immigration Appeal Division could consider potential foreign hardship when reviewing the removal order issued against permanent residents. In both cases, the SCC held that the phrase "having regard to all the circumstances of the case" in section 70(1)(b) of the *Immigration Act* meant that the Immigration Appeal Division was entitled to consider potential foreign hardship when deciding to quash or stay a removal order. Thus, prior to dismissing an appeal of a removal order, the Immigration Appeal Division had to consider the relevant ground of whether potential hardship is likely in the country of deportation.

1.3.5 FETTERING DISCRETION

Discretion must be exercised on an individual basis. While decision makers may take into account guidelines, general policies and rules,[109] or try to decide similar cases in a like manner, a decision maker cannot fetter its discretion in such way that it mechanically or blindly makes the determination without analyzing the particulars of the case and the relevant criteria.[110] There is some limit on the extent to which an administrative decision maker may be bound by precedent in the exercise of its discretionary power. As stated by Wade and Forsyth:

> An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance. It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear in every case: each one must be considered on its own merits and decided as the public interest requires at the time.[111]

The decision maker may not adopt inflexible policies, as the existence of discretion

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[107] *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 1, [2002] 1 S.C.R. 84 (S.C.C.).

[108] *Al Sagban v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 2, [2002] 1 S.C.R. 133 (S.C.C.).

[109] *Canada (Attorney General) v. Mavi*, [2011] S.C.J. No. 30, 2011 SCC 30, [2011] 2 S.C.R. 504 at para. 65 (S.C.C.); see also *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 60, 85, 98 (S.C.C.).

[110] *Maple Lodge Farms Ltd. v. Canada*, [1980] F.C.J. No. 171, 114 D.L.R. (3d) 634 at 645 (F.C.A.), affd [1982] S.C.J. No. 57, [1982] 2 S.C.R. 2, 44 N.R. 354 (S.C.C.); *Testa v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No. 665, 58 D.L.R. (4th) 676 (B.C.C.A.); *Walker v. Insurance Council of Manitoba*, [2020] M.J. No. 84, 2020 MBQB 54 at para. 12 (Man. Q.B.).

[111] H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 10th ed. (New York: Oxford University Press, 2009) at 270-71.