PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

VOLUME 1

by

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and

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(c) meets other prescribed criteria.[4.2]

Parliament grants discretionary authority when its wishes to tap the knowledge, judgment or expertise of other persons to identify when and what to do better than could be done by it in legislation.[4.3] Or when it wishes to provide a means for legislation to be created or adjusted faster than statute can be done. Or when the need for, and the identification of, remedial action cannot adequately be done by Parliament in legislation. The value of discretion is that it allows changing or different circumstances to be judged according to their particularities and allows for action to be better tailored to the needs of the moment. Discretion allows Parliament to tap into the judgment of others.

5B.3 THE EXTENT OF DISCRETION

5B.3(a) Presumption in a Grant of Discretion

Having discretion does not mean that one can do whatever one wishes when and however one wishes to do it. Discretion is not a licence to act arbitrarily.[4.4]

4.2 The Court of Appeal stated that:

> Whether an applicant has "significantly impaired intellectual functioning" so as to have a "developmental disability" and therefore warrant "community living support" appears to be a discretionary decision. Application of the statutory criteria does not necessarily yield an incontrovertible result. CLBC's duty to satisfy itself as to the presence of a qualifying impairment is to be exercised on the facts of each case.

Fahlman (Guardian ad litem of) v. Community Living British Columbia, 2007 CarswellBC 22, 2007 BCCA 15 (B.C.C.A.).

4.3 See for example the following quotation from the B.C. Court of Appeal in *Fahlman (Guardian ad litem of) v. Community Living British Columbia*, 2006 CarswellBC 22, 2007 BCCA 15 (B.C.C.A.). That case involved the question whether Community Living British Columbia had fettered its discretion by adopting policy which operated to define those with "significantly impaired intellectual functioning" as being only those whose IQ fell below a set number. The Act in question had provided for the making of regulations by the Lt.-Gov. which could, among other things, prescribe criteria for eligibility but no IQ based regulations had been made. The Court noted that had the Legislature intended IQ to be partially determinative of "significant impaired intellectual functioning", and therefore, "developmental disability" regulations could have been made under the Act doing so.

> Instead, the legislature seemed reticent to impose rigid rules. Until the legislature decides to impose such rules, the Act as it currently reads confers discretion on CLBC to determine whether an applicant had 'significantly impaired intellectual functioning; so as to be developmentally disabled and thus eligible for 'community living support'. In exercising its discretion, CLBC is to consider fully the facts, circumstances and merits of each application. The IQ policy precludes such consideration and application thereof gives rise to a fettering of discretion.

4.4 See *Montréal (Ville) c. Administration portuaire de Montréal*, 2010 CarswellNat 838, 2010 SCC 14 (S.C.C.). That case dealt with the making of payments by federal Crown corporations to municipalities in lieu of paying municipal taxes. After finding that the PILT Act (*Payments in Lieu of Taxes Act*) granted federal Crown

In determining the extent of a grant of discretion there are presu

municipal tax rate to be applied in determining the payments which the corp to municipalities in lieu of municipal taxes, the Supreme Court of Canada does not equate with arbitrariness. The discretion is bound by and must b specific legal framework.

> 33 However, in a country founded on the rule of law and in a s principles of legality, discretion cannot be equated with arbitrariness. does of course exist, it must be exercised within a specific legal fram acts fall within a normative hierarchy. In the instant cases, an adn applies regulations that have been made under an enabling statute. T lations define the scope of the discretion and the principles governir discretion, and they make it possible to determine whether it has ir reasonably.

In the case in point the Court held that while the corporations have a disc the appropriate tax rate, under the legislation, they were required to do so existing tax rate and could not, therefore, base their decision on a wholly did not reflect the actual tax rates in existence.

> 40 . . . As I have indicated, the two corporations certainly have a c from the definition of "effective rate" that Crown corporations ha appropriate tax rate. However, they cannot base their calculations on a they themselves have created arbitrarily. On the contrary, those calcul on the tax system that actually exists at the place where the property i The *PILT Act* and the *Regulations* require that the tax rate be calcul property were taxable property belonging to a private owner. In s. 7 and the corresponding provision of the *PILT Act*, it is assumed that th by identifying the tax system that applies to taxable property in the r to establish the property value and effective rate of tax. They cannot a system that no longer exists.

The disagreement leading to the judicial resolution arose from a city's s taxes which only existed respecting some properties (which the two corpo required to take into account in the calculation of their payments in lieu) and th of new rates across the city which took into account the loss of revenue abolition of business taxes. The corporations refused to take into account th rate but instead, in calculating the relevant payment in lieu, excluded from they determined would have amounted to the old business tax. The Supreme was an unreasonable exercise of discretion as it amounted to employing s which did not in reality exist when the legislation directed that the discre which actually existed.

Similarly, see *Keeping v. Canada (Attorney General)*, 2003 CarswellN (4th) 295 (N.L.C.A.). In that case a Crown agent improperly measured a being smaller than it actually was. Had the boat been properly measured i within the department policy for the issuance of the appropriate fishing lic to the measurement error the Minister refused to licence the boat. When the e and the Crown sued for negligence the Crown raised the defence that since lay within the Minister's absolute discretion under the statute the Minister any liability. The Newfoundland and Labrador Court of Appeal disagreed s

> I return to the comments of Major J. in *Comeau's* at para. 36 . . . and Minister's discretion under s. 7 of the *Fisheries Act* is not absolute. I

ave been irresponsible in its exercise
uals of a collective decision-making
, reasons for the exercise of discretion

ised for Purpose for Which

apter 5B.3(b) "Discretion to be Used
exercise of discretion is bound by the
d in the form and for the purposes for

loucester (1909), 13 O.W.R. 661. But it is to
at Council acted unreasonably and arbitrarily
ess, and impartiality required of a municipal

, Laskin J.A. concluded that "[b]ad faith by a
nkness and impartiality", and that it "includes
power to serve private purposes at the expense
passage from *Winton* with approval.

pproach to bad faith as well, holding that the
d arbitrarily and without the degree of fairness,
cipal government". There was ample evidence

oked the statutory obligation of the municipality
users onto the landowners' adjoining property.
on solely to avoid its obligation to provide this
the municipality had delayed the landowners'
eviewers and had passed the by-law in question
the fenceviewers were to attend at the trailway.
.L.R. (2d) 689 (S.C.C.). In *Equity Waste Man-
vn)* (1997), 35 O.R. (3d) 321 (Ont. C.A.), the

candour, frankness and impartiality. It includes
f power to serve private purposes at the expense

"Discretion to be Used for Purposes of Enabling

hool Division No. 21 (1995), 107 Man. R. (2d)
(Attorney General) v. Purcell (1995), [1996] 1

ortation & Communications) (1977), 73 D.L.R.
stry of Highways), [1965] 2 O.R. 221 (C.A.);
12 O.R. (2d) 164, 1 C.P.C. 232, 68 D.L.R. (3d)
urcell (1995), [1996] 1 F.C. 644, 192 N.R. 148
. 629 (C.A.); *Reference Re. Canada Business
ies Assn. Of Newfoundland & Labrador Ltd. v.
griculture)* (1996), 142 D.L.R. (4th) 732 (Nfld.

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5B.5(f) Discretion Cannot Be Exercised in a Discriminatory Manner

Unless the enabling grant of power otherwise provides (and this can be either express or implied in the legislation), a discretion-holder cannot exercise his or her discretion in a discriminatory fashion or for the purpose of discriminating against a person or group of persons.[50]

In *R. v. Sharma*,[51] the Supreme Court of Canada quoted with approval its earlier statement in *City of Montréal v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368 that one cannot use one's discretion to make legislation to pass legislation that operates in a discriminatory fashion unless the grant of discretion allows it to be used in that manner.

> [D]iscrimination can only occur where the enabling legislation specifically so provides or where the discrimination is a necessary incident to exercising the power delegated by the province. . . .

This position was adopted again by the Court in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 CarswellQue 1268, 2001 SCC 40 (S.C.C.), where the Court found that discrimination was authorized by necessary implication.[51.1]

C.A.); *Lachine General Hospital Corp. v. Quebec (A.G.)* (1996), 142 D.L.R. (4th) 659 (Que. C.A.). See also *Ontario Mission for the Deaf v. Barrie (City)*, 2004 CarswellOnt 1199 (Ont. S.C.J.) (city cannot use authority to waive 3 meter reservation along highway for purposes unrelated to those for which it was originally given the 3 meter reservation power); *Great Lakes United v. Canada (Minister of Environment)*, 2009 CarswellNat 927, 2009 FC 408 (F.C.) (the discretion to determine the manner of publication did not serve as an authority to exclude information that otherwise was required to be published).

Frequently, the Legislature may direct that discretion is to be exercise "in the public interest"; see chapter 8 for a discussion of the concept of the "public interest". See also *Canada (Minister of Employment & Immigration) v. Han* (1984), 6 Admin. L.R. 25, 52 N.R. 274 (Fed. C.A.).

50 *R. v. Coventry Council, Ex p. Phoenix Aviation*, [1995] 3 All E.R. 37 (Q.B.); *Canada (Attorney General) v. Purcell* (1995), [1996] 1 F.C. 644, 192 N.R. 148 (C.A.); *Lachine General Hospital Corp. v. Quebec (A.G.)* (1996), 142 D.L.R. (4th) 659 (Que. C.A.); *Federated Anti-Poverty Groups of British Columbia v. British Columbia (Minister of Social Services)* (1996), 41 Admin. L.R. (2d) 158 (B.C. S.C.); *Montreal (Ville) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368; *R. v. Sharma*, [1993] 1 S.C.R. 650; *Dickie Dee Ice Cream Ltd. v. Winnipeg (City)* (1985), 40 Man. R. (2d) 72 (C.A.); *Oil Sands Hotel (1975) Ltd. v. Alberta (Gaming & Liquor Commission)* (1999), 18 Admin. L.R. (3d) 121 (Alta. Q.B.).

51 *R. v. Sharma*, [1993] 1 S.C.R. 650 (S.C.C.).

51.1 The admonition not to use discretion in a discriminatory fashion was repeated in *Ontario Mission for the Deaf v. Barrie (City)*, 2004 CarswellOnt 1199 (Ont. S.C.J.).

See also *Associated Cab Limousine Ltd. v. Calgary (City)*, 2009 CarswellAlta 720, 2009 ABCA 181 (Alta. C.A.) where the Alberta Court of Appeal, in the context of the exercise of legislative authority to make licensing by-laws, stated that such by-laws may discriminate between businesses, absent improper purpose or bad faith, provided it is authorized by the

5.5(c) Purposes For Which Authority May be Exercised

When an agency has been given authority it may use that authority only for the purposes for which the authority was given to it. An agency does not have the jurisdiction to use its powers for improper purposes. To do so constitutes acting without jurisdiction.[28.1]

Sometimes Parliament lays down express restrictions on the purposes for which an authority can be exercised. See for example, section 35(1) of the federal Nuclear Safety and Control Act which says that:

> An inspector may order that a licensee take any measure that the inspector considers necessary to protect the environment or the health or safety of persons or to maintain national security or compliance with international obligations to which Canada has agreed.

In section 35(1) Parliament has expressly set out the limitations upon the discretion of an inspector to issue an order. While the inspector is given great latitude as to what the order may require, the requirement ordered must be aimed at protecting the environment or the health or safety of persons or to maintain national security or compliance with international obligations to which Canada has agreed. Unless the inspector can tie his order to these purposes, she has not been given the power to issue an order.

Parliament does not always provide such guidance in the exercise of discretionary powers. Some discretionary powers are expressed in very broad words which will allow a person to act "as the Minister may deem necessary", or "where she is of the opinion that it is appropriate to do so" or when he "believes that it is in the public interest" to do so.

This may give the impression that the possessor of the discretion may do whatever she or he feels is appropriate to do whenever he or she feels that it should be done. However, the law does not recognize the concept of absolute discretion. If challenged, the courts will imply in a grant of discretion that Parliament only intended the discretionary power to be exercised in accordance with the purposes or the spirit and intent of the statute which granted it.[29]

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notice); the discussion of mandatory and directory provisions in c. 22; and c. 16.4(c) (which discusses breaches of the constitution in the context of the right to public access) and c. 23.

28.1 See the cases cited below respecting the use of discretionary powers. See also *TimberWest Forest Corp. v. Campbell River (City)*, 2009 CarswellBC 3573, 2009 BCSC 1804 (B.C. S.C.). In that case the B.C. Supreme Court held that whether a by-law was enacted for an improper purpose went to the authority of the city to pass the by-law. The Court concluded that the city had attempted to use a taxation power to effect zoning objective which constituted an improper purpose.

29 *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (S.C.C); *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997 (H.L.); *Doctors Hospital v. Ontatio (Minister of Health)* (1976)12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Div. Ct.); *Reference Re. Canada Business Corporations Act (1991)*, 49 O.A.C. 67; *Fisheries Assn. (Newfoundland & Labrador Ltd.) v.*

5.6 GRANTS OF DISCRETION

See Chapter 5B.

5.7 DECISIONS MADE WITHOUT JURISDICTION

Having said all of the foregoing, what is the status of decisions made without jurisdiction? Simply put, a decision made without jurisdiction is invalid or even void. However, it is not always the case that such decisions are without any impact.

5.7(a) The Rule Against Collateral Attacks

It is open to debate whether an order which is made without jurisdiction can simply be ignored or if it must be obeyed until set aside by some body with the authority to do so. The traditional view is that an order made without jurisdiction may be ignored and the lack of jurisdiction raised on any proceedings brought against one to enforce the order.[30] This is called bringing a collateral attack on the order sought to be enforced. There were, however, a growing number of cases to the effect that public order and security requires that orders of public authorities be obeyed until set aside by a body possessing the lawful authority to do so.[31] While it appears that it has at least now been settled that void order made without jurisdiction cannot simply be ignored but must be obeyed unless challenged.[32] What remains very unclear, however, is when the challenge must be brought. The Supreme Court of Canada has, more or less, stated that whether the individual must immediately bring a direct challenge to the impugned order or whether he or she can wait to raise the invalidity in a collateral attack as a defence in enforcement proceedings will depend on the intent of Parliament in each case.[33] If a court finds that one should have challenged directly, but did not, then the

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Newfoundland (Minister of Fisheries, Food & Agriculture) (1996), 142 D.L.R. (4th) 4th) 732 (Nfld. C.A.); *Lachine General Hospital Corp. v. Quebec (A.G.)* (1996), 142 D.L.R. (4th) 659 (Que. C.A.); *Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)* (1977), 73 D.L.R. (3d) 18 (Ont. C.A.); *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, 110 D.L.R. (4th) 1 (S.C.C.).

30 *McLeod v. Noble* (1897), 28 O.R. 529 (Div. Ct.); *R. v. Demark*, [1939] 2 W.W.R. 501 (Man. C.A.); *Standal Estate v. Swecan International Ltd.* (1904), 7 O.L.R. 451 (H.C.).

31 *Poje v. A.G.B.C.*, [1953] 1 D.L.R. 385 (B.C.C.A.), affirmed (1953) 105 C.C.C. 311 (S.C.C.). In affirming the B.C. Court of Appeal the Supreme Court did not deal with this aspect of the decision; *Croatian Peasant Party of Ontario* (1981), 38 O.R. (2d) 659 (H.C.); *Paul Magder Furs Ltd. v. Ontario (Attorney-General)* (1991), 85 D.L.R. (4th) 695 (Ont. C.A.); *R. v. Rent* (1989), 91 N.S.R. (2d) 112, 223 A.P.R. 112 (C.A.).

32 *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1996] 1 F.C. 787 (Fed. C.A.), affirmed [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385, 6 Admin. L.R. (3d) 1 (S.C.C.).

33 *Consolidated Maybrun Mines Ltd.* (1998), 158 D.L.R. (4th) 193 (S.C.C.); *R. v. Al KLippert Ltd.* [1998] 1 S.C.R. 737, (1998), 158 D.L.R. (4th) 219, 7 Admin. L.R. (3d) 1 (S.C.C.).