

Legal Limits on the Exercise of Discretion

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1. INTRODUCTION

Some types of decisions are not readily characterized, as they involve the consideration of various issues leading to a wide range of possible outcomes valid under the enabling statute.¹ The legal concept of discretion implies the power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion, but the performance of a duty.² A decision maker has discretion whenever the effective limits on its power leave it free to make a choice among possible courses of action or inaction.³ These may be classified as “discretionary” in nature and involve, in essence, an active choice on the part of the decision maker to choose one course of action over another in light of all the circumstances. The concept of discretion refers to decisions where the law does not dictate a specific outcome or where the tribunal is given a choice of options within a statutorily imposed set of boundaries.⁴ Most decisions incorporate some degree of discretion to arrive at the appropriate remedy or the weight to be attributed to a particular item of

¹ *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 90 (S.C.C.).

² De Smith, Woolf & Jowell, *Principles of Judicial Review* (London: Sweet & Maxwell, 1999) at 296, J.H. Gray “Discretion in Administrative Law” (1979) 17 *Osgoode Hall L.J.* 107-31.

³ K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 4. See also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 at para. 52 (S.C.C.).

⁴ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 at para. 52 (S.C.C.).

evidence.⁵ On the other hand, where a decision maker refuses to exercise a discretionary power, the decision maker abdicates its powers. The same can be said if the decision is the result of directives or guidelines that the decision maker has previously enacted and that are observed without flexibility.⁶

With this in mind, and as discussed in the chapter on jurisdiction, every delegation of power, or every enabling statute, may be segmented into different parts. This has been illustrated by professor Craig in his formula: if X1, X2 and X3 are present, then the decision maker shall/may do Y1, Y2 and/or Y3.⁷ As previously discussed, whereas the term “jurisdiction” normally refers to the conditions precedent (or the “Xs”), the question of discretion relates to the remedial function, or the “may” do “Y”.⁸

Discretion essentially means that the decision maker is not bound by a specific result in a specific case, but is explicitly given a choice as to outcomes, which includes the possibility of inaction.⁹ The discretion may be exercisable from time to time, and the power to authorize a practice may include the discretion to revoke the authorization.¹⁰ Therefore, the exercise of discretion grants the decision maker a right to choose between more than one outcome or possible course of action where different decision makers, perhaps even within the same administrative body,

⁵ Many of the decisions that are classified as “purely discretionary” are in the nature of ministerial discretion: see, for example, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.); *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.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 (S.C.C.); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 1, [2002] 1 S.C.R. 84 (S.C.C.).

⁶ *Capital Cities Communications Inc. v. Canadian Radio-Television and Telecommunications Commission*, [1977] S.C.J. No. 119, [1978] 2 S.C.R. 141 at 171 (S.C.C.).

⁷ See Paul P. Craig, *Administrative Law*, 7th ed. (London: Sweet & Maxwell, 2003) at 475-78.

⁸ See, for example, *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] S.C.J. No. 10, 2012 SCC 10, [2012] 1 S.C.R. 364 at para. 25 (S.C.C.); *Canada (Attorney General) v. Mavi*, [2011] S.C.J. No. 30, 2011 SCC 30, [2011] 2 S.C.R. 504 at paras. 26, 54 (S.C.C.).

⁹ It is important to note that the refusal to exercise discretion may lead to an order for *mandamus*. See also K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 4: “A public officer has discretion whenever the effective limits of his power leave him free to make a choice among possible courses of action or inaction.”; J.M. Evans *et al.*, *Administrative Law* (Toronto: Emond Montgomery Publications, 1989) at 14-91, citing *e.g.*, *R. v. Ontario (Milk Marketing Board)*, [1969] O.J. No. 887, [1969] 2 O.R. 121 (Ont. C.A.).

¹⁰ *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans)*, [1997] S.C.J. No. 5, [1997] 1 S.C.R. 12 (S.C.C.).

may have differing opinions as to the remedy to be accorded. All those specific remedies, if properly within the boundaries of the discretion, are valuable or “reasonable” decisions, as there is no unique right answer to a problem.¹¹ This being said, as held by the Supreme Court of Canada (“SCC”): “in exercising discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority.”¹²

Discretionary powers are never absolute. In Canadian law, they are, among others, limited by the Constitution. One of the most famous authors on administrative law, Lord Coke, defined discretion as “a science or understanding to discern between falsity and truth, between right or wrong, between shadows and substance, between equity and colourable glosses and pretences, and not according to their wills and private affections”.¹³

Discretion therefore means that the decision maker, when properly habilitated to make the decision (when it has properly considered and applied the conditions precedent to the exercise of discretion), may choose between different options (all of which must be open to it), and if the decision is within those possible under the enabling statute, the decision may not be reviewed by the courts, unless they are unreasonable.¹⁴ The term “may” is the key word in any enabling statute, and normally intends to grant a discretionary power.¹⁵

While discretion normally refers to the remedial powers of a public body, discretion may also be present in the determination of the conditions precedent to the exercise of the decision-making (the determination of the “X”).¹⁶ Sometimes, those conditions are so wide that only experts

¹¹ De Smith, Woolf & Jowell, *Principles of Judicial Review* (London: Sweet & Maxwell, 1999) at 152; *Secretary of State for Education and Science v. Metropolitan Borough of Thameside*, [1976] 3 All E.R. 665, [1977] A.C. 1014 at 1064 (Eng. C.A.), affd (1976), [1977] A.C. 1014 at 1036 (H.L.).

¹² *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4, [2006] 1 S.C.R. 140 at para. 2 (S.C.C.); *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] S.C.J. No. 29, 2012 SCC 29, [2012] 2 S.C.R. 108 (S.C.C.); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.).

¹³ *Rooke's case* (1598) 5 Co.Rep. 99b, 100a.

¹⁴ See Chapter VII.

¹⁵ See *Forget v. Quebec (Attorney General)*, [1988] S.C.J. No. 68, [1988] 2 S.C.R. 90 (S.C.C.); *Maple Lodge Farms Ltd. v. Canada*, [1982] S.C.J. No. 57, [1982] 2 S.C.R. 2 (S.C.C.); *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] S.C.J. No. 10, 2012 SCC 10, [2012] 1 S.C.R. 364 at para. 25 (S.C.C.); *Canada (Attorney General) v. Mavi*, [2011] S.C.J. No. 30, 2011 SCC 30, [2011] 2 S.C.R. 504 at paras. 26, 54 (S.C.C.).

¹⁶ For an example of a case involving this point, see *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] S.C.J. No. 27, [2003] 1 S.C.R. 476 (S.C.C.). In the

in the area may be able to properly define them.¹⁷ In those specific cases, courts will normally grant some deference to the decision maker's considerations, notwithstanding the fact that those factors are conditions precedent to the determination whether a remedy is even possible. In other words, discretion may exist even within the "jurisdictional question"¹⁸ and, unfortunately, no satisfactory test (including the doctrine of "preliminary and collateral" questions) has ever been devised to distinguish between those errors which constitute jurisdictional defects and those that are intra-jurisdictional in nature.

1.1 REVIEW OF DISCRETION

Lord Greene, in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*,¹⁹ wrote his now famous reasons on the determination of the proper exercise of discretion, or for the proper exercise of the "Y" factors:

When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court.

What, then, are those principles? They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that

United States, deference may be shown to the interpretation of a statute by an administrative body where the statute is ambiguous under the *Chevron* doctrine (*Chevron v. Natural Resources Defense Council* (1984) 467 U.S. 837, 1984 U.S. LEXIS 118 (S.C.)). The court then only interferes where the body's interpretation was not "rational" but *Chevron* may be losing its force. See T.W. Merrill, "Judicial Deference to Executive Precedent" 101 Yale L.J. 969. See De Smith, Woolf & Jowell, *Principles of Judicial Review* (London: Sweet & Maxwell, 1999) at 168-73. See Paul P. Craig, *Administrative Law*, 7th ed. (London: Sweet & Maxwell, 2012) at 502-503.

¹⁷ *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] S.C.J. No. 58, [1994] 2 S.C.R. 557 (S.C.C.) and *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1996] S.C.J. No. 116, [1997] 1 S.C.R. 748 (S.C.C.); *Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*, [2008] S.C.J. No. 32, 2008 SCC 32 (S.C.C.).

¹⁸ As discussed in Chapter IV.

¹⁹ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680, [1948] 1 K.B. 223 (C.A.) ["*Wednesbury*"].

may give rise to interference by the court. Bad faith, dishonesty -those, of course, stand by themselves- unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word 'unreasonable.' It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and is often said, to be acting 'unreasonably.' Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington, L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense he is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head.²⁰

Because proper delegation of power means that Parliament has delegated an authority to a specific decision maker, sometimes experts in the area, courts may not intervene simply because they believe they would have made a different decision, would have considered or weighed contextual elements differently, or exercised their discretion differently or even more "reasonably" than that chosen by the decision maker.²¹ Therefore, intervention of courts has to be grounded in theoretical and conceptual alternatives, which may allow intervention. Historically, these grounds were: bad faith, consideration of an irrelevant ground or improper purpose, failure to consider a relevant ground, patent unreasonableness, fettering discretion, and discrimination,²² on the ground that Parliamentary supremacy and the *rule of law* preclude any presence of bad faith or corruption in decision-making. Classical constitutional doctrine once advocated that wide discretionary power was incompatible with the *rule of law*,²³ but this has now been repudiated by the possibility of judicial re-

²⁰ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680, [1948] 1 K.B. 223 at 228-30, 233-34 (C.A.) [emphasis added].

²¹ See *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. 90-91 (S.C.C.).

²² See, for example, *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.), later discussed and developed in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1973] S.C.J. No. 148, [1975] 1 S.C.R. 382 (S.C.C.); *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] S.C.J. No. 45, [1979] 2 S.C.R. 227 (S.C.C.); and *Maple Lodge Farms Ltd. v. Canada*, [1982] S.C.J. No. 57, [1982] 2 S.C.R. 2 (S.C.C.).

²³ Albert V. Dicey, *Law of the Constitution*, 9th ed. (London: Macmillan, 1950) at 202.

view by courts of inherent jurisdiction.²⁴ Hence, courts have continuously affirmed their inherent right as protectors of the intent of Parliament and the *rule of law* in controlling any decision maker's exercise of discretion for a wide range of abuses. In Lord Coke's words:

[N]otwithstanding the words of the commission give authority to the commissioners to do according to their discretion, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, *talis discretio discretio men confundit*.²⁵

H.W.R. Wade, in *Administrative Law*, opined that:

For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. These limitations are expressed in a variety of different ways, as by saying that discretion must be exercised reasonably and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious.²⁶

Also, the grounds of judicial review of discretion were reviewed for "correctness". As noted above, the rationale for this standard of review was that the enabling statute conferred a specific power, and the administrative action had to be confined within that power. Moreover, the discretion had to be exercised according to the object of the enabling statute, and implement the mandate delegated upon the administrative decision maker. Thus, where factors irrelevant to the constituting statute were considered, or if there was bad faith, the court could intervene, and such assessment had to be made for "correctness". This was similar to judicial review for failure to allow adequate procedural protection. Judicial review of discretion, like that of jurisdiction, has now been collapsed with the doctrine of the "jurisdictional question", into the standard of review analysis.²⁷

²⁴ *Régie des rentes du Québec v. Canada Bread Company Ltd.*, [2013] S.C.J. No. 46, 2013 SCC 46, [2013] 3 S.C.R. 125 at para. 50 (S.C.C.); H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 10th ed. (New York: Oxford University Press, 2009) at 286.

²⁵ *Rooke's Case* (1598) 5 Co. Rep. 99b; where the Commissioners of Sewers levied charges for the repair of a river bank but imposed the whole charge on one owner rather than on all owners that benefited.

²⁶ H.W.R. Wade, *Administrative Law*, 4th ed. (Oxford: Clarendon Press, 1977) at 336-37; see also *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.).

²⁷ *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9 at para. 63 (S.C.C.); see also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.). See the decisions in *Syndicat des employés de*

By characterizing their intervention using the standard of review analysis or the other grounds of review,²⁸ courts are reviewing discretion by essentially performing an exercise of statutory interpretation, in determining whether the ultimate decision made was within the remedial powers of the decision maker.²⁹ The same can be said of the control of the conditions precedent, but they normally delineate the boundaries (or jurisdiction) of the decision maker's authority.

However, judicial review or appeal of a discretionary decision has always been conceptually difficult because if the decision maker is within its assigned area, or if the power was properly delegated and exercised, then the legislature's intent was to grant the exclusive decision-making authority to the decision maker, as opposed to the courts. The issue now becomes the rationale for judicial control over such exercise of discretion. The traditional theory of that rationale was explained by Professor Craig, who linked the principles of Parliamentary sovereignty with the *ultra vires* doctrine in the following manner: Parliament only intended that such discretion should be exercised on relevant and not irrelevant considerations, or to achieve proper and not improper purposes. Any exercise of discretion that contravened those limits is *ultra vires*.³⁰

In the end, courts may identify the boundaries of the exercise of discretion but they may not use their powers of judicial review over discretion as they wish. In that sense, it is *not* for the courts to *substitute their choice* as to how the discretion ought to have been exercised for that of the administrative authority. Their role is not, therefore, to re-weigh or

production du Québec & de l'Acadie v. Canada (Labour Relations Board), [1984] S.C.J. No. 49, [1984] 2 S.C.R. 412 (S.C.C.); *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] S.C.J. No. 101, [1988] 2 S.C.R. 1048 (S.C.C.); *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] S.C.J. No. 19, [1991] 1 S.C.R. 614 (S.C.C.); *Pushpanathan v. Canada (Minister of Citizenship & Immigration)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982 (S.C.C.) ["Pushpanathan"].

²⁸ See Chapter VIII.

²⁹ *C.U.P.E., Local 301 v. Montreal (City)*, [1997] S.C.J. No. 39, [1997] 1 S.C.R. 793 (S.C.C.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.); *Gendron v. Baie-James (Municipalité St-Arnaud)*, [1986] S.C.J. No. 23, [1986] 1 S.C.R. 401 (S.C.C.); *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] S.C.J. No. 49, [1984] 2 S.C.R. 412 (S.C.C.); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.); see J.M. Evans *et al.*, *Administrative Law* (Toronto: Emond Montgomery, 1989) at 14-41 and 14-89.

³⁰ Paul P. Craig, *Administrative Law*, 7th ed. (London: Sweet & Maxwell, 2012) at 534.

reassess the evidence adduced before the decision maker.³¹ For the courts to do otherwise would thwart the intent of the legislator, and move the decision-making power from the legislature and public body to the courts. In other words, on judicial review it is not the role of the court to review the merits of the decision or to determine whether the decision was right or wrong. Rather, the reviewing court must only be concerned with the question of whether the decision maker acted in accordance with the enabling statute,³² and on the basis of considerations relevant to the decision-making function that the administrative body is charged.³³

1.2 EXERCISE OF DISCRETION

A discretionary authority does not mean that the decision maker may make any decision. There is no such thing as an unfettered or untrammelled discretion,³⁴ even where the specific enabling provision grants an “absolute discretion”.³⁵

A grant of discretion is normally constrained by the enabling statute, in that the remedy must be within the power of the decision maker. Thus, the discussion reverts back to the determination of the “power” of the decision maker, or its jurisdiction.³⁶ As held by Lord Upjohn in *Padfield*, even if a statute were to confer upon a decision maker an “unfettered discretion”:

[T]he use of that adjective [unfettered], even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely,

³¹ *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 91 (S.C.C.); *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 (S.C.C.); see also *Maple Lodge Farms Ltd. v. Canada*, [1982] S.C.J. No. 57, [1982] 2 S.C.R. 2 at 7-8 (S.C.C.).

³² *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. 90-91 (S.C.C.); *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] S.C.J. No. 29, 2012 SCC 29, [2012] 2 S.C.R. 108 at para. 43 (S.C.C.); *Cantwell v. Canada (Minister of the Environment)*, [1991] F.C.J. No. 27 (F.C.T.D.), affd in F.C.A. Court File No.: A-124-91; *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1989] F.C.J. No. 1058, [1990] 1 F.C. 595 (F.C.T.D.), affd [1990] F.C.J. No. 1137, [1991] 1 F.C. 641 at 661 (F.C.A.).

³³ *Oakwood Development v. St. Francois Xavier (Rural Municipality)*, [1985] S.C.J. No. 49, [1985] 6 W.W.R. 147 at 157 (S.C.C.), per Wilson J.

³⁴ *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 at 140 (S.C.C.).

³⁵ *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] S.C.J. No. 5, [1997] 1 S.C.R. 12 (S.C.C.).

³⁶ *C.U.P.E., Local 301 v. Montreal (City)*, [1997] S.C.J. No. 39, [1997] 1 S.C.R. 793 (S.C.C.).

that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives.³⁷

Discretionary power normally ranges from a very constrained and limited power (normally considered to be an administrative or ministerial power that may be sub-delegated),³⁸ to a very wide power where there are very few boundaries except for the need to implement the objects and purposes of the enabling statute. There are thus degrees of discretion and, where only one course can lawfully be adopted, the decision taken is said to be not one of discretion, but the performance of a duty.³⁹ This performance of a duty must be exercised by that decision maker to which it is delegated.⁴⁰ Absent an express possibility to sub-delegate the duty or discretion, the general rule is that no one else may exercise it, except in cases where it may reasonably be inferred that the power was intended to be delegable.⁴¹

In a country founded on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness. Thus, discretion must be exercised within a specific legal framework. Discretion conferred by statute must be exercised consistently with the purposes and policies underlying its grant. The statute and regulations pursuant to which the decision is being made define the scope of the discretion and the principles governing the exercise of the discretion, and make it possible to determine whether it has in fact been exercised reasonably.⁴² The requirement to exercise

³⁷ *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] 1 All E.R. 694, [1968] A.C. 997 at 1060 (H.L.) [*“Padfield”*].

³⁸ See Chapter III on delegation of power.

³⁹ De Smith, Woolf & Jowell, *Principles of Judicial Review* (London: Sweet & Maxwell, 1999) at 152; De Smith proposes also to examine the writings of Ronald Dworkin, *Taking Rights Seriously*, (1977); D.J. Galligan, *Discretionary Powers* (1986); K. Hawkins (ed.) *The Uses of Discretion* (1992); D. Feldman, “Discretion, choices and Values” [1994] P.L. 279.

⁴⁰ *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] 1 All E.R. 694, [1968] A.C. 997 (H.L.). In the United States, deference may be shown to the interpretation of a statute by an administrative body where the statute is ambiguous under the *Chevron* doctrine (*Chevron v. Natural Resources Defense Council* (1984) 467 U.S. 837, 1984 U.S. LEXIS 118 (S.C.)). The court then only interferes where the body’s interpretation was not “rational” but *Chevron* may be losing its force. See T.W. Merrill, “Judicial Deference to Executive Precedent” 101 Yale L.J. 969.

⁴¹ This rule is somewhat relaxed by the *Carltona* principle. See Chapter III.

⁴² *Montréal (City) v. Montreal Port Authority*, [2010] S.C.J. No. 14, [2010] 1 S.C.R. 427 at para. 33 (S.C.C.); *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] S.C.J. No. 10, [2012] 1 S.C.R. 364 (S.C.C.). See also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39,

discretion is to act consistently with the values underlying the grant of discretion, including *Charter* values.⁴³

In the absence of a statutorily mandated standard of review, courts will presume that the administrative decision maker has a discretion to grant or withhold relief. Such presumption is based on the requirement of restraint in judicial intervention in administrative matters and other factors, including delay on the part of the applicant, failure to exhaust adequate alternate remedies, mootness, prematurity and bad faith.⁴⁴

Some enabling statutes do, however, grant extreme powers. They confer on ministers the authority to exercise wide ranging powers (“if the minister is satisfied that..., he/she may do...”). Nevertheless, even these powers are not entirely shielded from review by the courts. All powers, discretionary or otherwise, have legal limits. Those limits are provided by the enabling statute, which grants the authority to the appropriate decision maker to entertain an inquiry and to make a decision. In doing so, the enabling statute provides for the objectives to be implemented, the factors to be considered, and the procedure to be followed. Once these factors have been properly executed, the enabling statute then grants discretion to determine the appropriate decision, and to grant a remedy which is usually within a specific range of allowable options.⁴⁵

When a decision maker exercises discretion and grants a specific remedy, the courts will not intervene even if the decision maker did not provide specific reasons on the remedy granted or the outcome of the decision. In conducting a reasonableness review of the discretionary decision, it is sufficient for a reviewing court to be able to imply the reasons for the specific order from the other reasons offered by the decision maker on the case.⁴⁶ For example, in *Agraira v. Canada (Public*

[1999] 2 S.C.R. 817 at para. 65 (S.C.C.); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] S.C.J. No. 23, [2010] 1 S.C.R. 815 at para. 46 (S.C.C.).

⁴³ *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395 (S.C.C.).

⁴⁴ *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.); *Canada (Citizenship and Immigration) v. Khosa*, [2009] S.C.J. No. 12, [2009] 1 S.C.R. 339 at para. 51 (S.C.C.); *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] S.C.J. No. 10, [2012] 1 S.C.R. 364 (S.C.C.).

⁴⁵ *Canada (Justice) v. Fischbacher*, [2009] S.C.J. No. 46, 2009 SCC 46, [2009] 3 S.C.R. 170 (S.C.C.); *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] S.C.J. No. 29, 2012 SCC 29, [2012] 2 S.C.R. 108 (S.C.C.); *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. 90-91 (S.C.C.).

⁴⁶ *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.); *Alberta (Information and Priva-*

Safety and Emergency Preparedness), the SCC was able to determine the Minister's interpretation of the term "national interest" from the Minister's reasons in the case as well as the ministerial guidelines.⁴⁷

1.3 TRADITIONAL GROUNDS OF REVIEW

The following is by no means an exhaustive discussion of each traditional ground of review of discretion. Moreover, while these grounds continue to exist today, judicial review of discretion, like that of jurisdiction, is normally considered under the standard of reasonableness, following the assessment of the standard of review analysis.

1.3.1 ERROR OF LAW

The exercise of discretion may be reviewed if the decision maker did not comply with the enabling statute or with the legal test applicable to the decision-making process.⁴⁸ So long as the decision maker applies the correct legal test, its exercise of discretion will normally be subject to the standard of reasonableness.⁴⁹

In *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, the Minister of Public Works and Government Services had to determine the nominal value of the Halifax Citadel, for the purposes of municipal taxation. In that case, the SCC held the exercise of the Minister's discretion was unreasonable because the exercise of discretion frustrated the object and purpose of the enabling statute, and was inconsistent with his obligation under the Act. The SCC held that:

The Minister's decision under the Act is discretionary within the legal framework provided by the legislation, as explained in *Montreal Port Authority*: see paras. 32-38. Provided that the Minister applies the correct legal test, his or her exercise of discretion is judicially reviewed for reasonableness: see *Montreal Port Authority*, at paras. 33-36; and *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 41. The exercise of discretion must be consistent with the principles governing the application of the Act and with the Act's purposes: *Montreal Port Authority*, at para. 47. As LeBel J. said in *Lake* in the context of ministerial discretion in relation to extradition, 'The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however,

cy Commissioner) v. Alberta Teachers' Association, [2011] S.C.J. No. 61, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.).

⁴⁷ *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. 56-58, 62-64, 85-87 (S.C.C.).

⁴⁸ *Canada (Justice) v. Fischbacher*, [2009] S.C.J. No. 46, 2009 SCC 46, [2009] 3 S.C.R. 170 at paras. 6, 25 (S.C.C.).

⁴⁹ *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] S.C.J. No. 29, 2012 SCC 29, [2012] 2 S.C.R. 108 at paras. 43, 47, 56 (S.C.C.).

the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable': para. 41.⁵⁰

In *Agraira v. Canada (Public Safety and Emergency Preparedness)*,⁵¹ the Minister of Public Safety and Emergency Preparedness denied ministerial relief to a citizen of Libya who had been living in Canada since 1997 because he had been found inadmissible on the ground that he was a member of a terrorist organization. The SCC held that the Minister's interpretation of the term "national interest" was reasonable. Having applied the proper legal test, judicial review was denied.

1.3.2 BAD FAITH

Discretion cannot, obviously, be conducted in bad faith, arbitrarily, or dishonestly. Bad faith has always been a ground for judicial review of discretionary decision-making. Although very rarely used, Reid and Hillel have observed that while bad faith is vitiating, not many cases have been vitiated on this ground.⁵² Any decision proven to have been made in bad faith will be quashed, and may open the possibility for other causes of action and remedies in damages. Moreover, this ground of review is often confused with an improper purpose because, normally, if a decision maker abuses its discretion in bad faith, it also acts for an improper purpose.

Even if it is difficult to distinguish bad faith from other grounds, those differences are not necessarily useful. As held by Lord Green in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*:

I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find the series of grounds set out. Bad faith, dishonesty, those of course, stand by themselves. Unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all be referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they are at any rate, I think, overlapping to a very great extent.⁵³

The result has been that some authors have classified bad faith as being an element attached to another head of review. For example, De Smith has classified bad faith as being within the category of improper purpose:

⁵⁰ *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] S.C.J. No. 29, 2012 SCC 29, [2012] 2 S.C.R. 108 at para. 43 (S.C.C.).

⁵¹ *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. 86-87 (S.C.C.).

⁵² Robert F. Reid and David Hillel, *Administrative Law and Practice*, 2d ed. (Toronto: Butterworths, 1978) at 279.

⁵³ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1947] 2 All E.R. 680, [1948] 1 K.B. 223 at 229 (C.A.).

A discretionary power may be used in good faith or in bad faith. Bad faith is often referred to as a ground of invalidity generous, but it can also be regarded as a quality which brings the exercise of the power within the end of one of the other recognized categories of invalidity. The relevant category will usually be the exercise of a power for an improper purpose.⁵⁴

This ground of review is very difficult to prove, and should not be pleaded unless it can be demonstrated expressly and unequivocally.⁵⁵ The party that alleges bad faith has the burden of proof. As held by the SCC in *St. Laurent (Ville) v. Marien* “good faith is always presumed and it is the person that alleges it that must prove it.”⁵⁶ This has also been held by the SCC in *Moore v. MMI* where the Court held that: “The onus of proving that a deportation order valid on its face is in fact a sham, or not made *bona fide*, is on the party who alleges it, ‘however difficult it may be for him to discharge the onus’.”⁵⁷ In *Montréal (City) v. Arcade Amusements*, Beetz J., held that regulations are always presumed to have been adopted in good faith and in the public’s interests.⁵⁸

The burden of proof is also very heavy. As held by the SCC in *Landreville v. Boucherville (Town)*:

The burden of proof is a heavy one when it involves establishing the commission of an ‘abuse of power equivalent to fraud’ and ‘resulting in a flagrant injustice’.⁵⁹

However, there seems to be an exception to the rule that the applicant must always have the burden of proof for bad faith. As held by the SCC in *City of Ottawa v. Boyd Builders*:

[W]here the applicant seeks a *mandamus* to which he has a *prima facie* right and the municipality seeking to defeat that *prima facie* right, alleges, *inter alia*, its good faith the onus should be on it to establish such good faith.⁶⁰

⁵⁴ De Smith, Woolf & Jowell, *Principles of Judicial Review* (London: Sweet & Maxwell, 1999) at 374.

⁵⁵ Sara Blake, *Administrative Law in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2011) at 101, citing *Carpenter Fishing Corp. v. Canada*, [1997] F.C.J. No. 1811, 155 D.L.R. (4th) 572 at 582 (F.C.A.), leave to appeal to S.C.C. dismissed [1999] S.C.C.A. No. 349 (S.C.C.); *K & B Ambulance Ltd. v. Prince Albert (City)*, [1977] S.J. No. 414, 82 D.L.R. (3d) 202 at 204 (Sask. C.A.).

⁵⁶ *St. Laurent (Ville) v. Marien*, [1962] S.C.J. No. 39, [1962] S.C.R. 580 at 585 (S.C.C.).

⁵⁷ *Moore v. Canada (Minister of Manpower and Immigration)*, [1968] S.C.J. No. 65, [1968] S.C.R. 839 at 843 (S.C.C.).

⁵⁸ *Montréal (City) v. Arcade Amusements Inc.*, [1985] S.C.J. No. 16, [1985] 1 S.C.R. 368 at 395 (S.C.C.).

⁵⁹ *Landreville v. Boucherville (Town)*, [1978] S.C.J. No. 34, [1978] 2 S.C.R. 801 at 809 (S.C.C.); see also *Sillery (City) v. Sun Oil Co.*, [1964] S.C.J. No. 30, [1964] S.C.R. 552 at 557 (S.C.C.).

⁶⁰ *Ottawa (City) v. Boyd Builders*, [1965] S.C.J. No. 13, [1965] S.C.R. 408 at 413 (S.C.C.).

Consequently, it appears that in some circumstances, in the municipal context particularly, the applicant needs only to establish a *prima facie* right to the relief requested. This exception applies only where the applicant has an apparent right to what he or she seeks and that right has been denied by a public authority. Normally, however, in the majority of situations, the burden of proof is on the applicant to establish the alleged bad faith.

One of the most famous cases in Canadian administrative law rests on that ground. In *Roncarelli v. Duplessis*, the Attorney General of Quebec, who was also the Premier, influenced the Liquor Control Board to revoke the liquor permit of Roncarelli for having posted the bond of many individuals who were Jehovah's Witnesses, and who had been accused of distributing pamphlets contrary to a municipal by-law. In quashing the decision, Rand J. held:

In public regulation of this sort there is 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; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. 'Discretion' necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

.....

'Good faith' in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purpose of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.⁶¹

In *Finney v. Barreau du Québec*,⁶² the SCC also held that gross negligence may lead to an inference of bad faith. In that case, the Barreau's Committee on Discipline failed to provisionally strike off the Roll an incompetent lawyer, thereby breaching its obligation to protect the public. The Court held that the very serious carelessness that the Barreau displayed amounted to bad faith, and the Barreau was held to be civilly liable. As noted by LeBel J.:

Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Roncarelli v. Duplessis*, [1959] S.C.R. 121. Such conduct is an abuse of power for which the

⁶¹ *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 at 140-43 (S.C.C.) ["*Roncarelli*"].

⁶² *Finney v. Barreau du Québec*, [2004] S.C.J. No. 31, [2004] 2 S.C.R. 17 (S.C.C.).

State, or sometimes a public servant, may be held liable. However, recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised.⁶³

In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*,⁶⁴ a bookstore was targeted by Canada Customs officials because it was importing gay and lesbian literature, travel information, general interest periodicals, academic studies related to homosexuality, AIDS/HIV safe-sex advisory material, and gay and lesbian erotica. In that case, the minority of the Court held that the “systemic targeting” of the officials was caused by bad faith and maladministration of Canada Customs.

In the case where bad faith has been proven, the administrative action is null and void. As affirmed by the SCC in *Kuchma*: “A by-law passed by a municipality, if not passed in good faith and in the public interest, is a nullity, and is not made otherwise by a lapse of time, approval, registration or promulgation.”⁶⁵

Normally, when an administrative decision may be quashed for bad faith, it can also be quashed for an improper purpose, for the consideration of an irrelevant ground, or for unreasonableness. Therefore, these grounds are usually preferred by litigants because they are easier to demonstrate. In *Roncarelli*, it was possible to demonstrate bad faith because Premier Duplessis took the stand and stated his motivations. Obviously, his intent was to punish Mr. Roncarelli, which was an improper purpose and an abuse of power.

1.3.3 IRRELEVANT GROUND OR IMPROPER PURPOSE

A discretionary decision may also be quashed if the decision maker has considered irrelevant grounds in the decision making process, or made the decision for a purpose other than that delegated by the enabling statute. An irrelevant ground is one that is wholly outside the policy or intention of the enabling statute. As held by the SCC in *Prince George (City)*

⁶³ *Finney v. Barreau du Québec*, [2004] S.C.J. No. 31, [2004] 2 S.C.R. 17 at para. 39 (S.C.C.).

⁶⁴ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 (S.C.C.).

⁶⁵ *Kuchma v. Tache (Rural Municipality)*, [1945] S.C.J. No. 9, [1945] S.C.R. 234 at 239 (S.C.C.) [“*Kuchma*”]; see also *Canada Atlantic Railway Co. v. Cambridge (Township)*, [1888] S.C.J. No. 11, 15 S.C.R. 219 (S.C.C.).

v. *Payne*:⁶⁶ “[b]asing a decision on irrelevant considerations, this is not the judicial exercise of a discretionary power”.⁶⁷

Discretion should be used to promote the policies and object of the constituting statute.⁶⁸ Conversely, discretion may not be used to frustrate or thwart the intent of the Act,⁶⁹ or to achieve a purpose not contemplated by the Act.⁷⁰ A decision maker may not act on extraneous, irrelevant and collateral considerations;⁷¹ it must consider all relevant factors as mandated by the enabling statute to fulfil its statutory duties.⁷²

Courts have always reviewed the exercise of discretion for an improper purpose. Courts have always felt authorized to verify if the objective or the goal pursued by an administrative decision maker was compatible with the legislator’s intent in enacting those powers. If an applicant can prove that the administrative decision maker acted for an improper purpose, that decision may be quashed.⁷³ As held by the SCC:

I wish to guard myself against being supposed to say that if the facts were found to be as suggested by Mr. Chernos (counsel of the appellants) the courts would be powerless to intervene and declare that an act having the appearance of being done under the authority of the *Immigration Act* and in accordance with its provisions is *ultra vires* because in reality done for a purpose other than that specified by the statute.⁷⁴

In such cases, the decision maker has the jurisdiction to make the decision, but essentially considers circumstances that are not relevant in mak-

⁶⁶ *Prince George (City) v. Payne*, [1977] S.C.J. No. 53, [1978] 1 S.C.R. 458 at 463 (S.C.C.).

⁶⁷ *Prince George (City) v. Payne*, [1977] S.C.J. No. 53, [1978] 1 S.C.R. 458 at 463 (S.C.C.).

⁶⁸ *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] 1 All E.R. 694, [1968] A.C. 997 at 1030 (H.L.), applied in *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, [1985] S.C.J. No. 49, [1985] 2 S.C.R. 164, 61 N.R. 321 at 331 (S.C.C.); Sara Blake, *Administrative Law in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2011) at 99-100.

⁶⁹ *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] 1 All E.R. 694, [1968] A.C. 997 at 1030 (H.L.).

⁷⁰ *Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)*, [1976] O.J. No. 2288, 14 O.R. (2d) 49 (Ont. C.A.).

⁷¹ *Bareham v. London (City) Board of Education*, [1984] O.J. No. 3252, 46 O.R. (2d) 705 at 713 (Ont. C.A.).

⁷² *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, 226 D.L.R. (4th) 193 at 253-55 (S.C.C.); *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, [1985] S.C.J. No. 49, [1985] 2 S.C.R. 164 at 332 (S.C.C.); see Sara Blake, *Administrative Law in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2011) at 99-100.

⁷³ *Métis Nation (Saskatchewan Secretariat Inc.) v. Royal Bank of Canada*, [2013] S.J. No. 426, 2013 SKQB 257 at para. 28 (Sask. Q.B.).

⁷⁴ *Moore v. Canada (Minister of Manpower and Immigration)*, [1968] S.C.J. No. 65, [1968] S.C.R. 839 at 849 (S.C.C.). See also *Guerin v. The Queen*, [1984] S.C.J. No. 45, [1984] 2 S.C.R. 335 (S.C.C.).

ing the determination. In those cases, the decision maker has considered an “X” factor that was not to be considered at all pursuant to the enabling statute. Thus, the decision maker did not implement the objective and purposes of the constituting Act. If this is the case, the power has not been validly exercised, and is thus *ultra vires*.

The case law is replete with examples of erroneous use of discretion. In fact, most of the administrative decisions that are quashed for unreasonableness are somehow related to this head of review. For example, in *R. v. Smith & Rhuland Ltd.*,⁷⁵ the Labour Relations Board rejected an application for certification of a union as a bargaining unit because its secretary-treasurer was a communist. This decision was quashed by the SCC as this was not a relevant consideration in certifying a union. Justice Rand held that he was not of the view that:

The Board has been empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization. Regardless of the strength and character of the influence of such a person, there must be some evidence that, with the acquiescence of the members, it has been directed to ends destructive of the legitimate purposes of the union, before that association can justify the exclusion of employees from the rights and privileges of a statute designed primarily for their benefit.⁷⁶

Obviously, the fact that the secretary-treasurer had communist leanings was an irrelevant ground upon which to exercise discretion. The enabling statute could not have granted the right to the decision maker to limit fundamental liberties, such as the freedom of speech and association.

In *Prince George (City) v. Payne*,⁷⁷ the SCC affirmed the principle that a municipality may not use its regulatory power of zoning for the purposes of regulating public morality. The purpose of the delegated authority concerned hygiene, security, and public good. The enabling statute did not authorize municipal councils to enact regulations governing public morality.

In *Shell Canada Products Ltd. v. Vancouver (City)*,⁷⁸ municipal council passed two resolutions that the City would not do business with Shell Canada until it withdrew from South Africa. Vancouver essentially boycotted Shell products because of Apartheid. The majority of the SCC invalidated the resolution and held that it was an ulterior purpose to

⁷⁵ *R. v. Smith & Rhuland Ltd.*, [1953] S.C.J. No. 33, [1953] 2 S.C.R. 95 (S.C.C.).

⁷⁶ *R. v. Smith & Rhuland Ltd.*, [1953] S.C.J. No. 33, [1953] 2 S.C.R. 95 at 100 (S.C.C.).

⁷⁷ *Prince George (City) v. Payne*, [1977] S.C.J. No. 53, [1978] 1 S.C.R. 458 (S.C.C.). See also, *Texaco Canada Ltd. v. Vanier (City)*, [1981] S.C.J. No. 23, [1981] 1 S.C.R. 254 (S.C.C.); and *Nova, An Alberta Corp. v. Amoco Canada Petroleum Co.*, [1981] S.C.J. No. 92, [1981] 2 S.C.R. 437 (S.C.C.).

⁷⁸ *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] S.C.J. No. 15, [1994] 1 S.C.R. 231 (S.C.C.).

the *Municipal Act* and the *Vancouver Charter*. Vancouver council was purporting to use its powers to affect matters in another part of the world when its powers were restricted to matters within the City's territorial limits.

In *Baker v. Canada (Minister of Citizenship and Immigration)*,⁷⁹ an immigration officer refused an application made on humanitarian and compassionate grounds for an exemption from the requirement that an application for permanent residence be made from outside Canada. While the decision was unreasonable on multiple grounds, the officer's notes also showed the decision rested on irrelevant considerations:

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.⁸⁰

Clearly, those specific considerations are outside the objects of the enabling statute and the decision could have been quashed on this ground. Rather, it was quashed for the officer having failed to consider adequately the interests and needs of the children.

It remains questionable whether, where it is possible to demonstrate that a decision maker has been influenced by extraneous factors, it is necessary to prove that they were the sole or even the dominant influence in the decision-making. Some have argued that only a material or substantial reliance is sufficient,⁸¹ while it has been held in some cases that it was only where a decision was based entirely or predominately on irrelevant factors that it was impeachable.⁸²

Nevertheless, it may be immaterial whether the authority has considered irrelevant matters in arriving at its decision, if it has not allowed

⁷⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

⁸⁰ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 at para. 5 (S.C.C.) ["*Baker*"].

⁸¹ De Smith, Woolf & Jowell, *Principles of Judicial Review* (London: Sweet & Maxwell, 1999) at 211.

⁸² *National Anti-Poverty Organization v. Canada (Attorney General)*, [1989] F.C.J. No. 433, [1989] 3 F.C. 684 at 706-708 (F.C.A.); *Canadian Association of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247 at 260 (F.C.A.); *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, [1995] F.C.J. No. 7, [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.).

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.⁸³ 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.⁸⁴

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.⁸⁵ 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 body⁸⁶ 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.⁸⁷

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 compassionate considerations from the re-

⁸³ 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.

⁸⁴ *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.).

⁸⁵ *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.).

⁸⁶ *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.).

⁸⁷ *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.).

quirement 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)*,⁸⁸ 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)*,⁸⁹ the Minister had the statutory discretion under the *Hospital Labour Disputes Arbitration Act*⁹⁰ 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) which, while relevant, was not suffi-

⁸⁸ *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.).

⁸⁹ *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28, [2003] 1 S.C.R. 539 (S.C.C.).

⁹⁰ *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14.

cient 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.

In *Arsenault-Cameron v. Prince Edward Island*⁹¹ and in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,⁹² francophone communities sought declarations directing their respective provinces to provide French schools to the minority French communities under section 23 of the *Charter*.⁹³ 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 Court 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 courts, 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)*,⁹⁴ 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.

⁹¹ *Arsenault-Cameron v. Prince Edward Island*, [1999] S.C.J. No. 75, [1999] 3 S.C.R. 851 (S.C.C.).

⁹² *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*"].

⁹³ *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*"].

⁹⁴ *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, [1985] S.C.J. No. 49, [1985] 2 S.C.R. 164 (S.C.C.).

In *Chamberlain v. Surrey School District No. 36*,⁹⁵ 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 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)*⁹⁶ and *Al Sagban v. Canada (Minister of Citizenship and Immigration)*,⁹⁷ 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 has 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,⁹⁸ 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.⁹⁹ There is some limit on the extent to which an administra-

⁹⁵ *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (S.C.C.).

⁹⁶ *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 1, [2002] 1 S.C.R. 84 (S.C.C.).

⁹⁷ *Al Sagban v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 2, [2002] 1 S.C.R. 133 (S.C.C.).

⁹⁸ *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.).

⁹⁹ *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.); *Tes-*

tive 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.¹⁰⁰

The decision maker may not adopt inflexible policies, as the existence of discretion inherently means that there can be no rule dictating a specific result in each case, and the flexibility and judgment that are an integral part of discretion may be lost.¹⁰¹ Discretion, by its nature, can lead to different results in similar or different cases, and every individual may expect an independent assessment of their situation. Failure to do so may lead to judicial review of the decision maker's decision for failure to exercise discretion, which is akin to a jurisdictional error.

Nevertheless, the adoption of general policies may be encouraged, for better administration, efficiency, and consistency in the delivery and implementation of the objects of the enabling statute.¹⁰² Their creation may even be authorized by the enabling statute, and mandatory and legally binding.¹⁰³ Those pre-existing policies may not however, operate as formal rules that govern particular cases.

These policies are often in the form of guidelines adopted by administrative decision makers that will guide the exercise of their discretion. Guidelines are particularly helpful when they state how to interpret the enabling statute, and how to adjudicate particular situations. Moreover, knowing the tribunal's opinion on various subjects allows the industry to govern their affairs accordingly. Consequently, as opined by Sara Blake:

ta v. British Columbia (Workers' Compensation Board), [1989] B.C.J. No. 665, 58 D.L.R. (4th) 676 (B.C.C.A.).

¹⁰⁰ H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 10th ed. (New York: Oxford University Press, 2009) at 270-71.

¹⁰¹ Sara Blake, *Administrative Law in Canada*, 5th ed. (Toronto: Butterworths, 2011) at 102, citing *Dawkins v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 505, [1992] 1 F.C. 639 (F.C.T.D.).

¹⁰² *Canada (Attorney General) v. Mavi*, [2011] S.C.J. No. 30, 2011 SCC 30, [2011] 2 S.C.R. 504 at para. 66 (S.C.C.); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 98 (S.C.C.). For an example of a situation where a policy was even encouraged absent legislative sanction, see the judgment of Laskin C.J. in *Capital Cities Communications Inc. v. Canadian Radio-Television and Telecommunications Commission*, [1977] S.C.J. No. 119, [1978] 2 S.C.R. 141 (S.C.C.).

¹⁰³ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3 (S.C.C.).

balance must be struck between ensuring uniformity and allowing flexibility in the exercise of discretion. The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it.¹⁰⁴

In *Maple Lodge Farms v. Canada*,¹⁰⁵ the SCC affirmed this principle and held that the Minister could properly and lawfully formulate a general requirement for the gaining of import permits, but the guidelines could not confine the discretion by refusing to consider other relevant factors. In that case, the Minister, in the policy guidelines that were issued in the Notice to Importers stated: “if Canadian products are not offered at the market price, a permit will normally be issued...”. The Court found that this statement did not fetter the exercise of the Minister’s discretion. If, however, the effect of the guideline was that the permit “will necessarily” be issued as opposed to “will normally”, then the guideline would have been elevated to a direction or to the level of law, and then the discretion would have been fettered. To exercise discretion properly, the decision maker will have to consider the circumstances of each case, and consider cases which are contrary to the policy with fairness.

For example, in *Innisfil (Township) v. Vespra (Township)*,¹⁰⁶ the issue was whether the Ontario Municipal Board could consider the policy of another governmental agency as stated in a letter sent by the Minister of Treasury, Economics and Intergovernmental Affairs. At issue was the forecast of the population of the Barrie region following annexation. The Board declared itself bound by the governmental policy, and refused to allow any cross-examination on the letter or any evidence to contest the governmental policy. The SCC held that while it was possible to consider policies established by other governmental agencies when exercising its discretion, such policy must be relevant to the issue at hand. In this case, the Board had erred in refusing to allow any evidence against the policy, and its decision was quashed.

The adoption of guidelines and policies have also been considered in other courts. It has been held that the use of guidelines and policies is not unlawful, but a decision maker may improperly fetter his or her discretion by following them without proper consideration of the individual facts of the situation. For example, treating guidelines as determinative in denying funding to assist with the needs of an autistic child is a failure to

¹⁰⁴ Sara Blake, *Administrative Law in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2011) at 102, citing *Maple Lodge Farms Ltd. v. Canada*, [1982] S.C.J. No. 57, [1982] 2 S.C.R. 2 at 6 (S.C.C.).

¹⁰⁵ *Maple Lodge Farms v. Canada*, [1982] S.C.J. No. 57, [1982] 2 S.C.R. 2 (S.C.C.).

¹⁰⁶ *Innisfil (Township) v. Vespra (Township)*, [1981] S.C.J. No. 73, [1981] 2 S.C.R. 145 (S.C.C.).

exercise discretion.¹⁰⁷ Similarly, the cost awards of the Canadian International Trade Tribunal were reviewed, and the Tribunal's practice of always denying the successful Crown its costs as a matter of policy was unreasonable and amounted to a fettering of the Tribunal's discretion.¹⁰⁸

The Court of Appeal of Alberta held that the Crimes Compensation Board had fettered its discretion by always predetermining that claims for loss of wages, prescription drug expenses and medical expenses could never be linked directly to the crime.¹⁰⁹ The Court of Appeal of Alberta held against the same Board that it also fettered its discretion by failing to evaluate each case on its merits when it adopted a rigid policy which limited compensation for counselling in cases of sexual abuse to \$2,000.¹¹⁰

Finally, consistent with the rule that discretion must be exercised in each case having regard to the merits and evidence, the administrative decision maker is free to depart from its own prior decisions. *Stare decisis* does not apply to administrative tribunals.¹¹¹ A tribunal is not bound to follow its previous decisions on similar issues, but it may consider earlier decisions as persuasive and find them of assistance in deciding the issue before it.¹¹² However, where general statements of principle are set forth in its decisions, the decision maker should adhere to these principles in subsequent cases.¹¹³

1.3.6 DISCRIMINATION

A decision maker may not exercise its discretion and refuse the benefits of the enabling statute for discriminatory purposes. Obviously, discrimination could be considered to be a subset of other grounds, such as bad faith, improper purpose, and the consideration of an irrelevant ground.

¹⁰⁷ *Dassonville-Trudel (Guardian ad litem of) v. Halifax Regional School Board*, [2004] N.S.J. No. 241, 224 N.S.R. (2d) 294 (N.S.C.A.).

¹⁰⁸ *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, [2003] F.C.J. No. 801, 228 D.L.R. (4th) 201, 305 N.R. 275 (F.C.A.).

¹⁰⁹ *S. (M.) v. Alberta (Crimes Compensation Board)*, [1998] A.J. No. 499, 160 D.L.R. (4th) 567 (Alta. C.A.).

¹¹⁰ *S. (M.) v. Alberta (Crimes Compensation Board)*, [1998] A.J. No. 499, 160 D.L.R. (4th) 567 (Alta. C.A.).

¹¹¹ *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] S.C.J. No. 34, 2013 SCC 34, [2013] 2 S.C.R. 458 at paras. 78-79 (S.C.C.); see also *Weber v. Ontario Hydro*, [1995] S.C.J. No. 59, [1995] 2 S.C.R. 929 at 940-41 (S.C.C.), per Iacobucci J., dissenting.

¹¹² *Transcanada Pipelines Ltd. v. Beardmore (Township)*, [2000] O.J. No. 1066, 186 D.L.R. (4th) 403, 137 O.A.C. 201 (Ont. C.A.).

¹¹³ *J.D. Irving Ltd. v. I.L.A., Local 273*, [2003] F.C.J. No. 951, 228 D.L.R. (4th) 620 (F.C.A.).

Discrimination is very difficult to prove, but has been done in the municipal context.¹¹⁴ For example, in *R. v. Sharma*¹¹⁵ and *R. v. Greenbaum*,¹¹⁶ the SCC held that discrimination was possible only where the enabling statute explicitly provided so. In *Montréal (City) v. Arcade Amusements Inc.*,¹¹⁷ amusement machine owners challenged by-laws limiting the operation of amusement halls through a by-law on zoning and commercial regulation. The SCC annulled a part of the by-law, as it was discriminatory based on age. The Court held that the power to pass municipal by-laws does not entail that of enacting discriminatory provisions unless the enabling legislation provides for the contrary.¹¹⁸ There can be distinctions, however, where the enabling legislation specifically so provides, or where the distinction is a necessary incident to exercising the power delegated by the legislature.¹¹⁹

In *R. v. Sharma*,¹²⁰ the municipality of Toronto had passed a by-law allowing owners or occupants of abutting lands to apply for a licence to use the sidewalk for commercial purposes. The Respondent, not being an owner or occupant, was accused of exposing goods for commercial purposes, contrary to the by-law. Applying its decision in *Arcade Amusement*, the SCC held that that the power to pass

municipal by-laws does not entail that of enacting discriminatory provisions unless the enabling legislation authorizes such discriminatory treatment. Here, the distinctions between free-standing street vendors and owner/occupant vendors contained in the by-law was not authorized by the *Municipal Act* and it was accordingly *ultra vires* the municipality.

In *Shell Canada Products Ltd. v. Vancouver (City)*,¹²¹ the municipal council passed two resolutions that the City would not do business with Shell Canada until it withdrew from South Africa, thereby boycotting Shell for its dealings with South Africa during Apartheid. The SCC held

¹¹⁴ See Chapter III.

¹¹⁵ *R. v. Sharma*, [1993] S.C.J. No. 18, [1993] 1 S.C.R. 650 at 666 (S.C.C.).

¹¹⁶ *R. v. Greenbaum*, [1993] S.C.J. No. 24, [1993] 1 S.C.R. 674 (S.C.C.).

¹¹⁷ *Montréal (City) v. Arcade Amusements Inc.*, [1985] S.C.J. No. 16, [1985] 1 S.C.R. 368 (S.C.C.).

¹¹⁸ *Montréal (City) v. Arcade Amusements Inc.*, [1985] S.C.J. No. 16, [1985] 1 S.C.R. 368 at 404 (S.C.C.).

¹¹⁹ *Montréal (City) v. Arcade Amusements Inc.*, [1985] S.C.J. No. 16, [1985] 1 S.C.R. 368 at 404-406 (S.C.C.).

¹²⁰ *R. v. Sharma*, [1993] S.C.J. No. 18, [1993] 1 S.C.R. 650 (S.C.C.); see also *R. v. Greenbaum*, [1993] S.C.J. No. 24, [1993] 1 S.C.R. 674 (S.C.C.).

¹²¹ *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] S.C.J. No. 15, [1994] 1 S.C.R. 231 (S.C.C.).

that the resolutions were discriminatory and, applying the decision in *Arcade Amusement*, held that while discrimination for commercial or business reasons is a power that is incidental to carrying on business or acquiring property, considerations relating to the political situation of a foreign state are not so essential to the exercise of municipal powers as to be implied from the enabling statute. Therefore the type of discrimination involved in the case was not authorized by the *Vancouver Charter*.

Other than in the context of municipal by-laws and resolutions, administrative decisions may also be reviewed for discrimination. In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*,¹²² a bookstore was targeted by Canada Customs officials because it was importing homosexual erotica. In that case, the SCC applied the *Charter* and held that the “systemic targeting” of the officials and the implementation of the legislation, rather than the legislation, itself was discriminatory on the ground of sexual orientation.

In *Chamberlain v. Surrey School District No. 36*,¹²³ 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 appeal, the SCC held that the Board, instead of proceeding on the basis of respect for all types of families, it proceeded on an exclusionary philosophy. It based its decision entirely on religious grounds and breached the requirements of secularism and tolerance in its enabling statute.

Therefore, it could not be said that its decision was based on two of the fundamental pillars of the *School Act*, which are secularism and non-discrimination.

1.3.7 DISCRETION EXERCISED ACCORDING TO *CHARTER*

As discussed in further detail in the chapter on the relationship between constitutional law and administrative law,¹²⁴ the *Charter* applies to administrative and executive actions taken under statutory authority pursuant to section 32 of the *Charter*. Section 32 provides that the *Charter* applies to any statutory authority, including regulations, by-laws, orders,

¹²² *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, 2000 SCC 69, [2000] 2 S.C.R. 1120 (S.C.C.).

¹²³ *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (S.C.C.).

¹²⁴ See Chapter II.

decisions and all other actions (whether legislative, administrative or judicial) taken pursuant to statutory authority.¹²⁵ It is a basic principle of constitutional theory that since Parliament and the provincial legislatures may not enact laws that infringe the *Charter*, they cannot authorize, empower, or confer discretion to another decision maker or public body to do so. Such would be possible only where the power is expressly conferred or necessarily implied and, notwithstanding a *prima facie* breach of the *Charter*, it is justifiable under section 1.¹²⁶

It is settled law that the *Charter* also applies to the legislative, executive and administrative branches of government.¹²⁷ Moreover, when the executive or administrative branches of government rely for authority or justification on a rule of common law, rather than an enabling statute, the *Charter* will apply to such actions and they will be unconstitutional if they constitute or create an infringement of a *Charter* right or freedom. Therefore, the *Charter* will apply to all delegated decisions of a governmental entity and to decisions of administrative decision makers, taken pursuant to an enabling statute. Any Minister or other administrative decision maker has a duty to exercise discretion in accordance with the dictates of the *Charter*.¹²⁸ The executive branch of the government is also bound by the same requirement.¹²⁹

¹²⁵ *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 at 1078-79 (S.C.C.); *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229 at 264 (S.C.C.).

¹²⁶ *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 at 1078 (S.C.C.). See also *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 at para. 22 (S.C.C.); *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44, [2011] 3 S.C.R. 134 at para. 117 (S.C.C.).

¹²⁷ *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 at 598 (S.C.C.); the *Charter* applies to enabling statutes, delegated legislation, regulations, orders in council, and municipal by-laws. See *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 at 602 (S.C.C.); *Ramsden v. Peterborough (City)*, [1993] S.C.J. No. 87, [1993] 2 S.C.R. 1084 (S.C.C.); *Godbout c. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 (S.C.C.).

¹²⁸ See *Operation Dismantle Inc. v. The Queen*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 (S.C.C.); *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.); *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1 at para. 30, [2000] 1 S.C.R. 3 (S.C.C.); *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, 2000 SCC 69, [2000] 2 S.C.R. 1120 (S.C.C.); *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44, [2011] 3 S.C.R. 134 (S.C.C.); *Canada (Justice) v. Fischbacher*, [2009] S.C.J. No. 46, 2009 SCC 46, [2009] 3 S.C.R. 170 at para. 36 (S.C.C.).

¹²⁹ *Operation Dismantle Inc. v. The Queen*, [1985] S.C.J. No. 22 at para. 28, [1985] 1 S.C.R. 441 (S.C.C.).

Case law is replete with examples of discretionary administrative decisions quashed for breaching the *Charter*. In deciding the appropriate remedy, a decision maker must now first determine whether it has the power to grant that specific remedy (or whether the particular “Y” it would like to grant is open to it under the enabling statute) and second, determine whether that decision is consistent with the *Charter*.¹³⁰ In *Slaight Communications Inc. v. Davidson*,¹³¹ the order of an adjudicator appointed by the Minister of Labour pursuant to the *Canada Labour Code* was held to fall within the ambit of the *Charter*. In that case, it was alleged that the order of the adjudicator, which imposed on the employer an obligation to give a letter of recommendation, infringed the employer’s *Charter* right to freedom of expression. Since this remedy was allowed by the enabling statute (the order was within the remedial jurisdiction of the adjudicator), the SCC held that the arbitrator was part of the government for the purposes of section 32 of the *Charter*. In the end, the Court held that the order was a *prima facie* breach of section 2(b) of the *Charter*, but that the violation was justifiable under section 1. The administrative decision was therefore upheld.

In *Eldridge*, the discretionary decision at issue made by the Medical Services Commission was constitutionally suspect. The Commission had been granted the power to determine whether a service qualified as a benefit and thus had to be funded by the government. The Commission decided that sign language interpretation was not a “medically required service”.¹³² The SCC held that the *Hospital Insurance Act* did not breach section 15, but the implementation of the Act did. The Court also held that the Commission’s discretionary decision was subject to the *Charter* because the Medical Services Commission implemented a government policy. The failure of the Medical Services Commission, and also the hospitals for that matter, to provide sign language interpretation where it was necessary for effective communication between a doctor and a patient, constituted a *prima facie* violation of the section 15(1) rights of deaf persons.¹³³ The SCC thus ordered the govern-

¹³⁰ See *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.). It was also discussed in Chapter II that administrative tribunals that had the power to determine questions of law could make decision on the *Charter*; *Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur*, [2003] S.C.J. No. 54, 2003 SCC 54, [2003] 2 S.C.R. 504 (S.C.C.).

¹³¹ *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.).

¹³² *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 at paras. 19-24 (S.C.C.).

¹³³ *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 at para. 80 (S.C.C.).

ment of British Columbia to administer the *Medical and Health Care Services Act* (now the *Medicare Protection Act*) and the *Hospital Insurance Act* in a manner consistent with the requirements of section 15(1).¹³⁴

In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*,¹³⁵ the issue was whether the *Customs Act* violated the appellants' section 2(b) and section 15 rights. The bookstore had a specialized inventory catering to the gay and lesbian community. Customs inspectors confiscated and destroyed numerous books and other literature that they considered obscene. After concluding that the *Customs Act* did not breach the right to freedom of expression, the SCC found that the *Charter* violation was at the administrative level in the implementation of the Customs legislation.¹³⁶ Therefore, it was the implementation, or the administration of the Act that was problematic, and the Customs officials could not "systematically" target the bookstore for discriminatory reasons. Such administrative implementation of the objects of the Act breached the *Charter*.

In *Rocket v. Royal College of Dental Surgeons of Ontario*,¹³⁷ two dentists were charged with violating Regulations made by the College pursuant to the *Health Disciplines Act*. The Regulations restricted dentists' advertising campaigns. In this case, it was the Regulation as adopted by the College that was impugned. After concluding that commercial speech was protected by the *Charter*, the SCC held that the Regulations unduly limited the right to commercial expression, and that the limitation could not be justified under section 1.

In *United States v. Burns*,¹³⁸ an extradition case, the SCC analyzed the exercise of the Minister's discretion in extraditing the respondents to the United States, where they were accused of first degree murder and for which they could face the death penalty. In allowing the extradition, the Minister did not seek assurances that the respondents would not be executed. The Court first determined that even discretionary powers must be exercised according to the principles of fundamental justice where, as a result of the decision, the life, liberty, and security of the person could be

¹³⁴ *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 at para. 95 (S.C.C.).

¹³⁵ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, 2000 SCC 69, [2000] 2 S.C.R. 1120 (S.C.C.).

¹³⁶ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66 at para. 125, [2000] 2 S.C.R. 1120 (S.C.C.).

¹³⁷ *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] S.C.J. No. 65, [1990] 2 S.C.R. 232 (S.C.C.).

¹³⁸ *United States v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.).

jeopardized.¹³⁹ Thus, the Minister, in exercising his discretion, had to comply with section 7 of the *Charter*. As the death penalty “shocked the conscience” of the Canadian population, the extradition of the two accused was quashed until sufficient assurances were obtained. In *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*,¹⁴⁰ an infant whose parents were Jehovah’s Witnesses needed a blood transfusion. When the parents refused on the ground of religious beliefs, the Children’s Aid Society was granted a 72-hour wardship, which was later prolonged to 21 days. The child did receive a blood transfusion as part of the medical treatment. The SCC had to determine whether the implementation of the *Child Welfare Act* was unconstitutional as it breached the parents’ freedom of religion. In other words, was the administrative decision to remove the child from its parents custody consistent with the *Charter*? In that case, the majority held that the legislative scheme implemented by the Act, which culminated in a wardship order depriving the parents of the custody of their child and denied the parents their right to choose medical treatment for their infant according to their religious beliefs, was in breach of the *Charter*.¹⁴¹ In the end the Court held that, although the procedure breached section 2(a) of the *Charter*, the violation was justifiable under section 1.

In *Multani v. Commission scolaire Marguerite-Bourgeoys*,¹⁴² the School Board had refused a Sikh student the opportunity to bring to school his kirpan (a religious ceremonial dagger). Judicial review ensued on the issue of freedom of religion. The SCC held that the *Charter* applied to the discretionary decision made by the School Board and that the decision to prohibit the kirpan was a violation of freedom of religion.

In *Canada (Attorney General) v. PHS Community Services Society*,¹⁴³ the SCC held that a Minister’s decision not to renew an exemption from

¹³⁹ *United States v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 at para. 32 (S.C.C.). See also *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 (S.C.C.); *Canada v. Schmidt*, [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500 at 520-21 (S.C.C.); *Idziak v. Canada (Minister of Justice)*, [1992] S.C.J. No. 97, [1992] 3 S.C.R. 631 at 655-56 (S.C.C.); and see generally *Operation Dismantle Inc. v. The Queen*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 (S.C.C.); *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.); *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.).

¹⁴⁰ *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.).

¹⁴¹ *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 at 382 (S.C.C.).

¹⁴² *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6, 2006 SCC 6, [2006] 1 S.C.R. 256 (S.C.C.).

¹⁴³ *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44, [2011] 3 S.C.R. 134 at para. 126 (S.C.C.).

the *Controlled Drugs and Substances Act*¹⁴⁴ allowing Insite, a supervised injection site, to continue operating engaged the staff's liberty interests, and the clients' life and security of the person interests protected by section 7. Therefore, the Minister's discretion was not properly exercised as his decision breached the *Charter*.

In *Doré*,¹⁴⁵ a disciplinary body reprimanded a lawyer for his behaviour in relation to his conduct in a court proceeding. The lawyer had sent a particularly offensive letter to the judge. The Disciplinary Council applied the *Code of Ethics* and exercised its discretion to issue a reprimand and a 21-day suspension to the lawyer. The lawyer in that case did not contest the constitutional validity of the *Code of Ethics* on the basis that it infringed his right to freedom of expression, but rather sought judicial review of the Disciplinary Council's discretionary decision as to the sanction on the basis that it, and not the *Code of Ethics*, breached the *Charter*. The SCC, applying a standard of reasonableness, held that the decision represented a proportional balancing of the appellant's right to freedom of expression with the enabling statute's objective that lawyers behave with "objectivity, moderation and dignity".

1.3.8 UNWRITTEN PRINCIPLES OF THE CONSTITUTION

The Canadian Constitution comprises primarily written principles, but also underlying rules. These unwritten principles function in symbiosis: no single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.¹⁴⁶ These principles may also, in certain circumstances, give rise to substantive legal obligations and have full legal force, thereby imposing limitations upon government action.¹⁴⁷ For the purposes of administrative action, the unwritten principles of the protection of minorities and the rule of law are capable of limiting government actions.¹⁴⁸ This was affirmed in *Baker v. Canada (Minister of Citizenship and Immigration)* where L'Heureux-Dubé J., on behalf of the SCC, held that discretion had to be

¹⁴⁴ *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

¹⁴⁵ *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.).

¹⁴⁶ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 at para. 49 (S.C.C.).

¹⁴⁷ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 at para. 54 (S.C.C.).

¹⁴⁸ *Babcock v. Canada (Attorney General)*, [2002] S.C.J. No. 58, [2002] 3 S.C.R. 3 at para. 54 (S.C.C.); *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, [2005] 2 S.C.R. 473 at para. 60 (S.C.C.).

exercised in accordance with “the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian Society, and the principles of the *Charter*”.¹⁴⁹

In *Lalonde v. Ontario (Commission de restructuration des soins de santé)*,¹⁵⁰ the Court of Appeal of Ontario eloquently illustrated how the unwritten principle of the protection of minorities could be relied upon in quashing a decision of the Ontario Health Services Restructuring Commission. The Court of Appeal held that the Commission failed:

to take into account the importance of francophone institutions (including hospitals), as opposed to bilingual institutions, for the preservation of the language and culture of Franco-Ontarians, as not being ‘within the purview of the [Commission].’ The Commission failed to comply with one of the fundamental organizing principles underlying the Constitution, namely that of the ‘protection of minorities.’¹⁵¹

Since the Commission failed to consider that the Montfort hospital was the only francophone hospital in Ottawa, and was a premier educational tool for francophone doctors in Ontario, it “failed to give serious weight and consideration to the linguistic and cultural significance of Montfort to the survival of the Franco-Ontarian minority”.¹⁵²

The Commission had to exercise its powers pursuant to the enabling legislation, and in the public interest. Since it did not “take into account or give any weight to Montfort’s broader institutional role,”¹⁵³ the Commission did not give enough weight to a relevant ground, as it ignored the unwritten principle of the protection of minorities.¹⁵⁴

It is important to note, however, that only the administrative decision was quashed pursuant to the unwritten principles of the Constitution. The enabling statute, the *Ministry of Health and Long-Term Care Act*¹⁵⁵ and

¹⁴⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 at para. 56 (S.C.C.).

¹⁵⁰ *Lalonde v. Ontario (Commission de restructuration des soins de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 577 (Ont. C.A.).

¹⁵¹ *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 577 at para. 101 (Ont. C.A.).

¹⁵² *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 577 at para. 187 (Ont. C.A.).

¹⁵³ *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 577 at para. 186 (Ont. C.A.).

¹⁵⁴ *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 577 at para. 180 (Ont. C.A.). David Mullan, “Deference From Baker to Suresh and Beyond - Interpreting the Conflicting Signals” in D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford and Portland Oregon: Hart Publishing, 2004) 21 at 28.

¹⁵⁵ *Ministry of Health and Long-Term Care Act*, R.S.O. 1990, c. M.26.

its Regulations¹⁵⁶ remained in force and their constitutionality was not contested.¹⁵⁷

In *Saumur v. Québec (City)*,¹⁵⁸ the appellant was a Jehovah's witness and contested the validity of a city regulation prohibiting the distribution of books, pamphlets, and other writings without having obtained the approval of the Chief of Police. This regulation had the objective of precluding the dissemination of material critical toward the Catholic Church. The SCC allowed the appeal and held that the freedom of religion was as important as the freedom of speech:

From 1760, [...] to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.¹⁵⁹

Today, a case such as *Saumur* would be subject to the *Charter*, as freedom of religion is now protected by the Constitution, and an individual would not have to rely on the unwritten principles. Then again, *Saumur* could also have been decided today under the ground of discrimination, as the regulation in that case was obviously discriminating against anyone whose religion was not Catholicism.

1.3.9 STANDARD OF REVIEW OF DISCRETIONARY DECISIONS

As a result of the SCC's decision in *Dunsmuir v. New Brunswick*,¹⁶⁰ the standard applicable to the review of discretionary decisions is reasonableness.¹⁶¹

¹⁵⁶ *Health Services Restructuring Commission Regulations*, O. Reg. 88/96 (repealed O. Reg. 272/99, April 30, 1999).

¹⁵⁷ A similar argument failed in *Baie d'Urfé (Ville) c. Québec (Procureur général)*, [2001] J.Q. no 4821, [2001] R.J.Q. 2520 (Que. C.A.), leave to appeal dismissed [2001] C.S.C.R. no 524 (S.C.C.), as the Quebec legislation provided for the merger of cities. This was not an administrative action like in Montfort.

¹⁵⁸ *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 R.C.S. 299 (S.C.C.) ["*Saumur*"].

¹⁵⁹ *Saumur v. Québec (City)*, [1953] S.C.J. No. 49, [1953] 2 R.C.S. 299 at 327 (S.C.C.), *per* Rand J.

¹⁶⁰ *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9 at paras. 45, 53 (S.C.C.) ["*Dunsmuir*"].

¹⁶¹ *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 at para. 53 (S.C.C.); see also *Smith v. Alliance Pipeline Ltd.*, [2011] S.C.J. No. 7, [2011] 1 S.C.R. 160 at paras. 26, 110 (S.C.C.); *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] S.C.J. No. 10, 2012 SCC 10, [2012] 1 S.C.R. 364 at para. 27 (S.C.C.); *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] S.C.J. No. 29, 2012 SCC 29, [2012] 2 S.C.R. 108

The unreasonableness ground of review cannot be studied in a vacuum, however, and is closely related to that of “jurisdiction” — both types of errors lead to the same result — the decision being “*ultra vires*”.

As discussed in the chapter on jurisdiction,¹⁶² Lord Greene examined the two different types of review, one for determining the extent of the decision maker’s jurisdiction, and the other to determine the reasonableness of the decision in a substantive sense. While the first inquiry relates to the jurisdictional question, the second relates to the exercise of decision-making, or discretion. It was thought that where the remedy granted was within those that the decision maker could grant, the decision ought to stand unless it was unreasonable or, what was known at the time, *Wednesbury* unreasonable. As Lord Greene stated in his reasons, a court could intervene within jurisdiction when the decision maker has “come to a conclusion so unreasonable that no reasonable authority could ever have come to it.”¹⁶³

Decisions may also be quashed if they are so unreasonable, unfair or oppressive as to be upon any fair construction, an abuse of power.¹⁶⁴ The same was held by the House of Lords where Lord Green stated that:

There may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.¹⁶⁵

There was a time when courts were very reluctant to intervene in matters of discretion, as they were careful to give effect to the express intent of the legislator. There have been successive periods where courts were more, or less, inclined to intervene, but this all changed with Lord Reid’s decision in *Anisminic Ltd. v. Foreign Compensation Commission*.¹⁶⁶ In this case, Lord Reid accepted that any error of law allowed the intervention of the courts, branding as “jurisdictional” errors those that were

made prior to the exercise of discretion (the “X” conditions), or thereafter (the “Y” factors):

at para. 43 (S.C.C.); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 50 (S.C.C.).

¹⁶² See Chapter IV.

¹⁶³ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1947] 2 All E.R. 680, 1 K.B. 223 at 233-34 (C.A.). For a greater discussion of this concept, see Chapter IV and Chapter V.

¹⁶⁴ *Montreal (City) v. Beauvais*, [1909] S.C.J. No. 35, [1909] 42 S.C.R. 211 at 216 (S.C.C.).

¹⁶⁵ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1947] 2 All E.R. 680, [1948] 1 K.B. 233 at 229 (C.A.).

¹⁶⁶ *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 1 All E.R. 208, [1969] 2 A.C. 147 (H.L.).

[T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.¹⁶⁷

Without mentioning every ground of review of discretionary decisions, Lord Reid clearly suggested that courts could intervene for bad faith, improper purpose, failure to consider relevant grounds, or other errors of law, and that courts did not have to defer to the decision maker on these grounds. This basically eliminated deference in the approach for substantive review of administrative decisions in English Law.

In Canadian law, the approach developed by Lord Reid was accepted in *Metropolitan Life Insurance Co. v. I.U.O.E., Local 796*,¹⁶⁸ *Bell v. Ontario (Human Rights Commission)*,¹⁶⁹ and *Blanco v. Quebec (Rental Commission)*.¹⁷⁰ However, this approach would not last. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*,¹⁷¹ Dickson J., as he then was, developed a new approach favouring deference to administrative decision makers, which would apply to both discretionary and non-discretionary decision-making. This approach protected decisions of administrative decision makers that were made within their jurisdiction. Justice Dickson noted that a deferential posture was preferable, especially in cases where the jurisdiction-conferring section was very ambiguous, and that no one interpretation could be said to be “right”. Therefore, since the Board was interpreting what seemed to lie logically at the heart of its jurisdiction, the decision should not be overturned.¹⁷² He then defined the appropriate standard of judicial review in these words:

¹⁶⁷ *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 1 All E.R. 208, [1969] 2 A.C. 147 at 171 (H.L.).

¹⁶⁸ *Metropolitan Life Insurance Co. v. I.U.O.E., Local 796*, [1970] S.C.J. No. 9, [1970] S.C.R. 425 (S.C.C.).

¹⁶⁹ *Bell v. Ontario (Human Rights Commission)*, [1971] S.C.J. No. 66, [1971] S.C.R. 756 (S.C.C.).

¹⁷⁰ *Blanco v. Quebec (Rental Commission)*, [1980] S.C.J. No. 102, [1980] 2 S.C.R. 827 (S.C.C.).

¹⁷¹ *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] S.C.J. No. 45, [1979] 2 S.C.R. 227 (S.C.C.).

¹⁷² *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] S.C.J. No. 45, [1979] 2 S.C.R. 227 at 236 (S.C.C.).

Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?¹⁷³

This definition was close to that of Lord Greene in *Wednesbury*. Unfortunately, Dickson J.'s definition was not only limited to this statement. In fact, just before using the words "patently unreasonable" in his definition, he wrote this:

...It is contended, however, that the interpretation placed upon s. 102(3)(a) was so patently unreasonable that the Board, although possessing 'jurisdiction in the narrow sense of authority to enter upon an inquiry', in the course of that inquiry did 'something which takes the exercise of its powers outside the protection of the privative or preclusive clause'. In the *Nipawin* case, in a unanimous judgment of this Court, it was held that examples of such error would include, at p. 389:

... acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting the provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.¹⁷⁴

It appeared that substantive discretion should be reviewed for patent unreasonableness, but the criteria to be used in making that determination, *i.e.*, bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, *etc.*, were to be assessed on a "correctness" basis, as they were errors of law. As these grounds were difficult to prove, the courts entered into an era of deference that would continue until the advent of the standard of review analysis.

The standard of review analysis applies to both the determination of "jurisdiction" and the exercise of "discretion".¹⁷⁵ Moreover, in *Dunsmuir*, the SCC affirmed that on a discretionary or policy-laden decision, the

¹⁷³ *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] S.C.J. No. 45, [1979] 2 S.C.R. 227 at 237 (S.C.C.). This is also very close to the definition set by Cory J. in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] S.C.J. No. 35, [1993] 1 S.C.R. 941 at 963-64 (S.C.C.): It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. ... Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

¹⁷⁴ *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] S.C.J. No. 45, [1979] 2 S.C.R. 227 at 237 (S.C.C.).

¹⁷⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

standard of reasonableness will usually apply automatically.¹⁷⁶ Deference will also apply where the decision is mostly of a political nature, and courts ought to interfere only in the “clearest of cases”.¹⁷⁷ Prior to the SCC’s decision in *Dunsmuir*, the SCC had held that the standard of review of discretionary decisions could range from correctness to unreasonableness¹⁷⁸ (and, prior to its integration into the reasonableness standard of review, to patent unreasonableness).¹⁷⁹ After *Dunsmuir* it was no longer sufficient to slot a particular issue into a pigeonhole of judicial review, and the standard of review analysis had to be applied to determine the applicable standard for every administrative decision.¹⁸⁰

2. THE STANDARD OF REVIEW ANALYSIS

2.1 FUNDAMENTAL PRINCIPLES

Prior to *Baker*,¹⁸¹ judicial review of discretionary decisions had traditionally been approached separately from other administrative decisions involving the interpretation of the delegated authority. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where the decision maker did not rely upon irrelevant or extraneous considerations contrary to the statutory purpose, the courts ought not interfere.¹⁸²

¹⁷⁶ *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 at para. 53 (S.C.C.); see also *Smith v. Alliance Pipeline Ltd.*, [2011] S.C.J. No. 7, [2011] 1 S.C.R. 160 at para. 26 (S.C.C.); *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] S.C.J. No. 10, 2012 SCC 10, [2012] 1 S.C.R. 364 at para. 27 (S.C.C.); *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] S.C.J. No. 29, 2012 SCC 29, [2012] 2 S.C.R. 108 at para. 43 (S.C.C.); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 50 (S.C.C.).

¹⁷⁷ *Lake v. Canada (Minister of Justice)*, [2008] S.C.J. No. 23, 2008 SCC 23, [2008] 1 S.C.R. 761 at para. 30 (S.C.C.); *Sriskandarajah v. United States of America*, [2012] S.C.J. No. 70, 2012 SCC 70, [2012] 3 S.C.R. 609 at para. 11 (S.C.C.).

¹⁷⁸ *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] S.C.J. No. 43, [2001] 2 S.C.R. 281 at para. 54 (S.C.C.).

¹⁷⁹ See *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9 at paras. 44-45 (S.C.C.).

¹⁸⁰ *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No. 18, [2003] 1 S.C.R. 226 at para. 25 (S.C.C.).

¹⁸¹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

¹⁸² *Maple Lodge Farms Ltd. v. Canada*, [1982] S.C.J. No. 57, [1982] 2 S.C.R. 2 at 7-8 (S.C.C.); applied in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] S.C.J. No. 15, [1994] 1 S.C.R. 231 (S.C.C.).

In *Pushpanathan*, Bastarache J. confirmed the use of the pragmatic and functional analysis in determining the standard of review applicable to administrative decisions. The relevant factors to be considered are: (1) the presence or absence of a privative clause or a right of appeal; (2) the expertise of the decision maker; (3) the purpose of the Act as a whole and the provision in particular; and (4) the “nature of the problem”: whether a question of law, fact or mixed fact and law.¹⁸³

Therefore, not only did the proper elements have to be considered prior to the exercise of discretion, but the discretion also had to be exercised properly, with the situation of the individual in mind, within the purpose and perspective of the enabling statute, and in compliance with fundamental principles of constitutional and administrative law.¹⁸⁴

As for the exercise of discretion *per se*, L’Heureux-Dubé J. confirmed in *Baker* that the standard of review analysis applied and held that it was inaccurate to speak of a rigid dichotomy between “discretionary” or “non-discretionary” decisions.¹⁸⁵ In her view:

The ‘pragmatic and functional’ approach recognizes that standards of review for errors of law are appropriately seen as a spectrum of three standards of review ... and the standard of review of substantive aspects of discretionary decisions is best approached within this framework.¹⁸⁶

Therefore, the decision in *Baker* indicates that nothing differentiates administrative interpretations of the general rules of law from administrative exercises of discretionary powers, and that the same approach, namely the standard of review analysis, should be applied.¹⁸⁷

¹⁸³ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982 at paras. 29-38 (S.C.C.).

¹⁸⁴ See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 at para. 56 (S.C.C.); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.). See also David Dyzenhaus, “The Deep Structure of *Roncarelli v. Duplessis*” (2004) U.N.B.L.R. 52.

¹⁸⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 at para. 54 (S.C.C.).

¹⁸⁶ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 at para. 55 (S.C.C.); applied in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 at 35-36 (S.C.C.); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 1, [2002] 1 S.C.R. 84 at para. 22 (S.C.C.).

¹⁸⁷ Geneviève Cartier, “The Baker Effect: A New Interface Between The Canadian Charter of Rights and Freedoms and Administrative Law - The Case of Discretion” in D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford and Portland Oregon: Hart Publishing, 2004) 61 at 62.

The SCC confirmed the applicability of the standard of review analysis beyond traditional concerns regarding the *vires* of administrative decision-making. The SCC acknowledged that:

The spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament.¹⁸⁸

Having established that the review of discretionary decision could also be subject to the standard of review analysis, and thus result in a heightened degree of scrutiny, Binnie J., in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, cited *Baker* and opined that the review for abuse of discretion may in principle range from correctness through unreasonableness to, what existed at the time, patent unreasonableness.¹⁸⁹ This was obviously a departure from the Court's earlier assessments that discretionary decisions were only reviewable for patent unreasonableness, or for having made one of the nominate nullifying errors, such as bad faith, failure to consider a relevant ground, improper purpose or the consideration of an irrelevant ground. The interpretation of the reasons in *Baker* led to an assumption that courts, given that they could scrutinize the exercise of the discretion of the administrative decision maker, could re-weigh the factors. Perhaps having noted this interpretation, the SCC held in *Suresh v. Canada (Minister of Citizenship & Immigration)* that:

Baker does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors.¹⁹⁰

This was affirmed by the SCC in *Agraira v. Canada (Public Safety and Emergency Preparedness)*,¹⁹¹ where the Court held that: "a court reviewing the reasonableness of a minister's exercise of discretion is not entitled to engage in a new weighing process".¹⁹²

¹⁸⁸ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 at para. 55 (S.C.C.).

¹⁸⁹ *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.).

¹⁹⁰ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 at para. 37 (S.C.C.).

¹⁹¹ *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.).

¹⁹² *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 91 (S.C.C.); see also *Lake v. Canada (Minister of Justice)*, [2008] S.C.J. No. 23, 2008 SCC 23, [2008] 1 S.C.R. 761 at para. 39 (S.C.C.).

2.2 APPLYING THE APPROPRIATE STANDARD OF REVIEW

The review of discretion remains a very difficult endeavour. An applicant must first analyze the standard of review applicable to the particular administrative decision maker, and then prove that the decision must be overturned. While a reviewing court must not re-weigh the evidence adduced before the decision maker, the court may determine whether it: (a) applied the proper legal test; (b) properly considered the appropriate factors; (c) was or was not influenced by irrelevant grounds; (d) made the decision in good faith; and (e) allowed enough procedural rights.

What remains elusive is the application of the standard of review to the substantive decision. If a reviewing court is not allowed to re-weigh the evidence, how can it determine that the decision maker failed to consider a relevant ground, or considered irrelevant grounds? While the total failure to consider a relevant ground may lead to substitution of judgment (because if the decision maker did not consider the ground at all, then the reviewing court may intervene), the application of this principle is much more difficult when the decision maker did in fact consider the ground, but did not give it sufficient weight in the opinion of the reviewing court. The review is even more difficult where the decision maker did not provide extensive reasons justifying its decision. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*,¹⁹³ the SCC held that decision makers do not have to address and consider all the issues raised by the parties or cover every aspect of their reasoning.¹⁹⁴ In reviewing such decisions, the issue is whether the decision, viewed as a whole in the context of the record, is reasonable.¹⁹⁵

In some cases, reasons may be implicit from the ultimate decision, the decision maker's reasons, or from the record as a whole. A court should not intervene if a reasonable basis exists in the reasons that can explain why

¹⁹³ *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, [2011] 3 S.C.R. 708 (S.C.C.).

¹⁹⁴ *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, [2011] 3 S.C.R. 708 at para. 16 (S.C.C.); *Construction Labour Relations v. Driver Iron Inc.*, [2012] S.C.J. No. 65, 2012 SCC 65, [2012] 3 S.C.R. 405 at para. 3 (S.C.C.); see also *Cojocar v. British Columbia Women's Hospital and Health Centre*, [2013] S.C.J. No. 30, 2013 SCC 30, [2013] 2 S.C.R. 357 at paras. 13, 25 (S.C.C.).

¹⁹⁵ *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, [2011] 3 S.C.R. 708 at para. 16 (S.C.C.); *Construction Labour Relations v. Driver Iron Inc.*, [2012] S.C.J. No. 65, 2012 SCC 65, [2012] 3 S.C.R. 405 at para. 3 (S.C.C.); *Cojocar v. British Columbia Women's Hospital and Health Centre*, [2013] S.C.J. No. 30, 2013 SCC 30, [2013] 2 S.C.R. 357 at para. 25 (S.C.C.).

the decision maker came to that conclusion.¹⁹⁶ Sufficiency of reasons will therefore be analyzed within the overall reasonableness analysis.¹⁹⁷

Therefore, review of discretionary decisions continue to be one of the most important issues, and continue to be subject of debate. Since different judges sitting on the same reviewing court may assess or weigh the factors differently, how can the standards of review be properly applied? What may be reasonable for one judge may not be for another. Alternatively, the same can be said of two different administrative decision makers sitting on the same board or tribunal. This is essentially what discretion is all about: more than one decision is open to the decision maker and, whether within the statutory framework, the decision ought not to be overturned by courts.¹⁹⁸

As discussed in the chapter on the standards of review,¹⁹⁹ the review of administrative decisions, of which most have at least some degree of discretion, has led to debate on the use of the standards of review. It remains an elusive test that is very difficult to apply and has led, as acknowledged by LeBel J. in *Toronto (City)*, to criticism that reviewing courts were intervening and changing administrative decisions, because the decisions were in their sense not the best, as opposed to one of the many decisions open to the decision maker. Justice LeBel opined:

At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation.²⁰⁰

Thus, the application of the standard of review analysis, and its resulting standard of review, have not been clearly and consistently applied in the context of discretionary decisions. Moreover, it is very difficult,

¹⁹⁶ *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] S.C.J. No. 61, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 53-54 (S.C.C.); *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. 56-58, 62-63, 89 (S.C.C.).

¹⁹⁷ See *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, [2011] 3 S.C.R. 708 at para. 1 (S.C.C.); *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] S.C.J. No. 61, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 54 (S.C.C.); *Cojocar v. British Columbia Women's Hospital and Health Centre*, [2013] S.C.J. No. 30, 2013 SCC 30, [2013] 2 S.C.R. 357 at para. 25 (S.C.C.); *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] S.C.J. No. 61, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 50-55 (S.C.C.).

¹⁹⁸ *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 90 (S.C.C.); *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9 at para. 47 (S.C.C.).

¹⁹⁹ See Chapter VIII.

²⁰⁰ *Toronto (City) v. C.U.P.E., Local 79*, [2003] S.C.J. No. 64, 2003 SCC 63, [2003] 3 S.C.R. 77 at para. 99 (S.C.C.).

intellectually, for a reviewing judge to allow a decision to stand while, at the same time, having determined that the decision he/she would have made would be different had he/she had the jurisdiction to make it. In that sense, especially where the standard of review is that of reasonableness, it is possible to craft reasons that could lead to intervention. Such conduct, however, would be an intrusion into the powers of the Executive and Legislative branches by the judiciary, and may breach the unwritten constitutional principle of the separation of powers, as the intent of the legislator was to delegate the decision to an administrative body, and not to the courts. Thus, too much intrusion of reviewing courts over discretionary decision-making may impede the administrative process and undermine the legislative intention.

3. CONCLUSION

The review of discretion continues to be the subject of discussion. Historically, courts have been able to review administrative decisions despite legislative attempts to curtail judicial powers by privative clauses or otherwise. To the same extent, the legislator may try and circumvent the application of the standard of review analysis, which is essentially a judicial tool to divine the “intent of the legislature”. In that sense, if the legislature is clear as to the degree of scrutiny that courts should apply when reviewing administrative decisions, courts should not have to use the standard of review analysis.

In British Columbia, the *Administrative Tribunals Act*²⁰¹ provides that the exercise of discretion by a tribunal should not be set aside unless the decision is patently unreasonable. A patently unreasonable decision, for the purposes of the Act, is one where the administrative decision maker exercised its discretion in bad faith, arbitrarily, for improper purposes, based on irrelevant factors, or the decision maker failed to take statutory requirements into account.

In our view, this provision will not alter judicial review. It merely restates what the common law had already established and, moreover, repeats the same error in restating the nominate nullifying grounds of review. Again, those nullifying grounds of review will be analyzed for correctness, not for patent unreasonableness (which no longer applies outside of British Columbia post *Dunsmuir*), and so the standards of correctness and patent unreasonableness remain interlocked and blurred.²⁰² In other words, the decision maker will be of bad faith or of good faith;

²⁰¹ *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 58(2) and (3), and s. 59(4).

²⁰² For a further discussion on this, see Chapter VIII on the difficulties underlying the standards of review.

will have (or not) considered the appropriate grounds (reviewing courts cannot re-weigh the assessments); will (or will not) have considered irrelevant grounds; will (or will not) have acted arbitrarily or for improper purposes. As can be seen, given that a reviewing court may not re-weigh the elements, the consideration (or lack thereof) of the grounds does not grant any leeway. In that sense, once the reviewing court has determined that all those grounds have been properly assessed, then the substantive decision will not be reviewable unless patently unreasonable. Arguably, once this first determination of the factors has been made, for correctness, the chances of the ultimate substantive decision being patently unreasonable are greatly reduced, because a patently unreasonable decision is one that was not open to the decision maker and thus, likely one where the decision maker had to consider some specific grounds as opposed to others. Therefore, it is unlikely that this legislative amendment will represent the solution to this conundrum.

