

REMEDIES AVAILABLE TO ADMINISTRATIVE AGENCIES

icaj conference, Ottawa, 10/2/2009

France Houle
Professeure, Faculté de droit, Université de Montréal

Consistency and Efficiency

- *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282
- *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.A. 198; 60 Admin. L.R. (4th) 247 (Décary, Sharlow, and Evans J.J.A.)

Structuring the exercise of remedial discretion : examples

- To structure the mediation and conciliation process : **Public Service Commission**
- To determine the manner in which board members should calculate the amount of indemnity that a citizen can receive in matters of health and safety : **Health and Safety Board**
- To fix criteria, on a yearly basis, to be considered by the **Tenancy Board** to determine the increase of rent.
- To determine the conditions to be met by a citizen who filed a complaint that she was fired without just cause, or that he suffers psychological harassment at work : **Labor Board**.
- Etc.

- To what extent **should** administrative tribunals follow policies for the exercise of remedial discretion?
- Can these policies be binding on decision-makers?

Relevant conditions

- Type of legislative authority
- Binding character of the policy
- Nature (or the object) of the policy; and
- Type of tribunal engaging in a policy-making process

*Greater Vancouver Transportation Authority
v. Canadian Federation of Students —
British Columbia Component*, [2009] SCC 31
(July 10, 2009)

NO DEFINITE ANSWER IN THE CASE LAW

- *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139.
- *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120.

Greater Vancouver Authority

- [65] Thus, where a government policy is (1) **authorized by statute** and sets out a (2) **general norm or standard that is meant to be binding** and is (3) **sufficiently accessible and precise**, the policy is legislative in nature and constitutes a limit that is “prescribed by law”.

Bell Canada v. Canadian Telephone Employees Association, [2003] 1 S.C.R. 884

- In *Bell Canada*, s. 27 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 stated the following :
- 27. . . .
- (2) The Commission **may**, on application or on its own initiative, **by order, issue a guideline** setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a class of cases described in the guideline.
- (3) **A guideline** issued under subsection (2) **is**, until it is revoked or modified, **binding on the Commission and any member or panel assigned under subsection 49(2) with respect to the resolution of a complaint** under Part III regarding a case falling within the description contained in the guideline.

Greater Vancouver Authority

Legislative authority granted to one of the Transport Commission

- **2 (4)** The authority may carry on business, and, without limiting this, may enter into contracts or other arrangements, adopt bylaws, pass resolutions, issue or execute any other record, etc.. (par. 69)

Greater Vancouver Authority

- [71] Where a legislature has empowered a government entity to make rules, it seems only logical, **absent evidence to the contrary**, that it also **intended those rules to be binding**.

Two categories of policy

- Policies that are **legislative in nature**
- Policies that are **administrative in nature**
- In the French version of its reasons, the Court speak of :
 - **'politique réglementaire'** [regulatory policies]
 - and **'politique administrative'** [administrative policies].

- For the Court, 'regulatory policies' create *rights and duties*.
 - They add new norms into the legal system [they create, they innovate]
- Contrary to 'Administrative policies' which establish interpretive norms.

- Classification based on the object (the nature) of the policy
 - French Conseil d'État : *Notre-Dame de Kreisker*, CE, 1954.
- Classification based on the effect of the policy
 - French Conseil d'État : *Mme Duvignères*, CE, 2002.

Effect : imperative/non-imperative

- In the French legal system, 'imperative' means that the policy must affect in a sufficiently firm and precise way the legal order and consequently the legal situation of the person affected by the policy.
- The policy is imperative when it states provisions by which an administrative authority **aims at creating rights and duties OR imposing an interpretation of the law applicable to make specific individual decisions.**

Conseil d'État in 2002 :

- Some interpretive policies are binding on decision-makers
- From a judicial review perspective, these policies will be found legal when they correctly interpret legal rules.

To conclude ...

- **Administrative tribunals can and should use policy to enhance consistency and efficiency**
- **No express grant of power needed**
 - But : no explicit powers, no binding policy
- **Express power to issue norms in the form of policies**
 - Wording of the statute will determine whether they can be binding.
- **Express grant of power to issue 'rules'**
 - Binding character can be presumed unless there are some evidence to the contrary