

REMEDIES AVAILABLE TO ADMINISTRATIVE AGENCIES

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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 an 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.

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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)

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- [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