

The Use of Policy by Administrative Decision Makers: Authority and Limitations?

An administrative agency does not require an express grant of statutory authority in order to issue policies or guidelines. However, administrative decision-makers may not apply these policies inflexibly as if they were law. An individualized assessment is required in the circumstances of each case to determine whether it is appropriate to apply the policy. A decision made solely by reference to the mandatory prescription of a policy, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision-maker's exercise of discretion was unlawfully fettered.

Academic Commentary

With respect to administrative agencies issuing policies or guidelines, Sara Blake states in her text, *Administrative Law in Canada*, that:

"Care must be taken so that guidelines formulated to structure the use of discretion do not crystallize into binding and conclusive rules. Discretion, once conferred, may not be restricted or fettered in scope [...] The tribunal may not fetter its discretion by treating the guidelines as rules and refusing to consider other valid and relevant criteria. In the circumstances of each individual case, the tribunal should consider whether it is appropriate to apply the policy. A policy may not contain mandatory rules that must be followed in all cases nor may it contradict the statute or regulation." [Emphasis added]

David Jones and Anne de Villars, the authors of *Principles of Administrative Law*, note that the adoption of a general policy is legally acceptable, however "*the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at differently, on its own merits.*" [Emphasis added]

Case Law

Maple Lodge Farms Ltd v Canada, [1982] 2 SCR 2

This seminal case from the Supreme Court of Canada remains the authority for the proposition that decision-makers must not fetter their discretion by treating guidelines as binding.

In this case, the Minister of Industry, Trade and Commerce refused to issue the Appellant a permit to import a product included on an import control list, notwithstanding the ministerial guidelines dealing with the matter – the Minister's policy guidelines employed the words: "*If Canadian product is not offered at the market price, a permit will normally be issued*".

The Supreme Court of Canada found that the policy did not fetter the Minister's discretion, stating that, "*The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it*".

The Supreme Court added that:

"The Minister may validly and properly indicate the kinds of considerations by which he will be guided as a general rule in the exercise of his discretion [...] but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion."

Thamotharem v. Canada, 2007 FCA 198

In this case, the Federal Court of Appeal noted the following with respect to the role of policies and guidelines:

"55 Legislative instruments (including such non-legally binding 'soft law' documents as policy statements, guidelines, manuals and handbooks) can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable and agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case-by-case basis.

56 . . . an administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation: Ainsley Financial Corp. v. Ontario (Securities Commission) (1994), 121 D.L.R. (4th) 79 (Ont. C.A.) at 83 [...]

59 Although not legally binding on a decision-maker in the sense that it may be an error of law to misinterpret or misapply them, guidelines may validly influence a decision-maker's conduct.

62. Nonetheless, while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision-makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision-maker's exercise of discretion was unlawfully fettered [...] This level of compliance may only be achieved through the exercise of a statutory power to make "hard" law, through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure."

J.W. v Alberta (Victims of Crime Programs Committee), 2013 ABQB 212

The Alberta Court of Queen's Bench provided the following summary of the law in relation to the fettering of discretion:

"35 A statutory delegate who has discretion to make a decision must consider the merits of the applicant's case. An individual assessment is mandated. The statutory delegate cannot ignore this legislative direction and allow a rigid, arbitrary and inflexible policy to dictate the result. A statutory delegate who fails to make a merit-based decision disregards the will of the

legislature and acts unlawfully. [citing Maple Lodge Farms] ("The discretion is given by Statute and the formulation and adoption of general policy guidelines cannot confine it"); M.S. v. Crimes Compensation Board, 1998 ABCA 138, & 5 ("as a matter of law a tribunal which exercises a statutory discretion may not fetter the exercise of that discretion by the adoption of a inflexible policy"). W. Wade and C. Forsyth, Administrative Law 324 (9th ed. 2004) ("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"). D. Jones & A. de Villars, Principles of Administrative Law 198 (5th ed. 2009) ("The existence of discretion implies the absence of a rule dictating the result in each case").

The Court also noted that, *"The indisputable obligation administrative law principles impose on a statutory delegate who must exercise their discretion to assess each case on its merits does not deprive institutions of the right to craft policies and practices. These documents have a legitimate role to play in sophisticated statutory structures which encounter the same issues"*.

In this case, the Director of the Victims of Crime Financial Benefits Program refused to exercise his discretion under section 8(5) of the Victims of Crime Regulation in favour of J.W. to send J.W. to a psychiatrist or psychologist for a diagnosis of his psychological injuries.

The letter disclosing the Director's refusal to send J.W. for a psychological assessment stated that *"it is not the policy or practice of the Director's office to send victims for independent assessments to determine the extent of their injuries or to obtain a diagnosis"*. J.W. filed an originating application alleging that the Director had improperly fettered his discretion.

The Court went on to find that the Director did not assess J.W.'s case on its merits, as the Victims of Crime Regulation required him to do. The Director's decision was dictated by an inflexible and rigid *"policy or practice"*. As such, it was not made in accordance with section 8(5) of the Victims of Crime Regulation and was unlawful.

Kanhasamy v Canada (Citizenship and Immigration), 2015 SCC 61

This recent Supreme Court of Canada case illustrates the importance of making flexible, individualized assessments based on the circumstances of each case.

Kanhasamy was a Tamil from Sri Lanka. Fearing for his safety after he was subjected to detention and questioning by the army and police, his family arranged for him to travel to Canada to live with his Uncle. He filed an application for humanitarian and compassionate relief under section 25(1) of the *Immigration and Refugee Protection Act*, seeking to apply for permanent residence status within Canada. He was 17 years old at the time. The denial of relief would result in his removal from Canada.

The Immigration Officer who reviewed his application concluded that the relief was not justified by humanitarian and compassionate considerations. Drawing on language set out in guidelines prepared by the Minister, the Officer said she was not satisfied that return to Sri Lanka would result in hardship that is *"unusual and undeserved or disproportionate."*

The Supreme Court of Canada noted that "Officers can...consider the Guidelines in the exercise of their s. 25(1) discretion, but should turn '[their] mind[s] to the specific circumstances of the case." The Supreme Court found that the Officer failed to consider Kanthasamy's circumstances as a whole, and took an unduly narrow approach to the assessment of the circumstances raised in the application:

"45 She failed to give sufficiently serious considerations to his youth, mental health and the evidence that he would suffer discrimination if he were returned to Sri Lanka. Instead, she took a segmented approach, assessed each factor [listed in the Guidelines] to see whether it represented hardship that was "unusual and undeserved or disproportionate", then appeared to discount each from her final conclusion because it failed to satisfy that threshold. Her literal obedience to those adjectives, which do not appear anywhere in section 25(1) rather than looking at his circumstances as a whole, led her to see each of them as a distinct legal test rather than as words designed to help reify the equitable purposes of the provision. This had the effect of improperly restricting her discretion and rendering her decision unreasonable."

Conclusion

The case law shows that it is legally acceptable, and in fact encouraged, for administrative agencies to issue policies and guidelines to structure the exercise of its discretion or the interpretation of its enabling legislation. However, a policy may not contain mandatory rules that must be followed in all cases nor may it contradict the statute or regulation.

An individualized assessment is required in the circumstances of each case. This is important because a decision made solely by reference to the mandatory prescription of a policy, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision-maker's exercise of discretion was unlawfully fettered.