

The Exercise of Statutory Discretion

CACOLE Conference
June 9, 2009

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What is Statutory Discretion?

- ▶ Discretion is having the power, but not a duty, to act – it involves choice among options.
- ▶ Discretionary power is not absolute or unfettered – it must be exercised within certain basic parameters.
- ▶ The primary rule when exercising discretion is that discretion should be used to promote the policies and objects of the governing Act.
 - Sara Blake, *Administrative Law in Canada*, 4th ed. (Toronto: LexisNexis, 2006)

Types of Statutory Discretion

▶ Procedural Discretion

▶ Examples:

- Dismissing complaints as frivolous & vexatious
- Recommending mediation
- Recommending disciplinary proceedings
- Determining level of accessibility to the complaints process for involved parties

Types of Statutory Discretion (Con't)

▶ Interpretive Discretion

- Determining the meaning of ambiguous substantive provisions in a statute

▶ Remedial Discretion

- Determining the appropriate remedial option in the circumstances

Guidelines on Exercise of Discretion

- ▶ Should civilian oversight agencies issue guidelines as to how discretion will be exercised?
- ▶ Discretion granted by legislature cannot be restricted or fettered in scope, but guidelines are frequently issued by tribunals/agencies.
- ▶ Pros/Cons:
 - Guidelines provide for consistency, predictability, uniformity of decisions.
 - Guidelines that are treated as binding/mandatory will violate rules against fettering.
- ▶ Are there circumstances where guidelines may be legally required?

Sufficiency of Reasons

- ▶ What reasons, if any, must accompany the exercise of discretion?
- ▶ The Supreme Court's approach to reasons and discretion is dealt with in *Baker v. Canada*, [1999] 2 S.C.R. 817. Baker established that reasons are necessary to demonstrate that discretion has been exercised reasonably.
- ▶ In *Gray v. Ontario (Disability Support Program, Director)* (2002), the Ontario Court of Appeal observed that:
 - "The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principle evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors."

Judicial Review

- ▶ What is judicial review? How do Courts review exercise of discretion by independent tribunals and oversight bodies?
 - Not an appeal or a retrial; it is the court exercising its jurisdiction to ensure that tribunal/agency properly exercised powers conferred by statute.
 - Judicial review of administrative action is the mechanism by which public bodies, such as civilian oversight agencies/tribunals, are subject to the supervision of the courts.
 - Governed by Judicial Review Procedure Acts in many jurisdictions, but common law remedies are generally continued.

Judicial Review (Con't)

- ▶ What are the grounds on which discretion could be challenged?
 - Bias or unfairness
 - Failure to consider relevant factors
 - Consideration of irrelevant factors
 - Bad faith, ulterior motives or improper purposes

Judicial Review (Con't)

- ▶ Can civilian oversight agencies seek standing to make submissions on the standard of review?
- ▶ Level of deference Courts will accord civilian oversight agencies will generally be "reasonableness".

Supreme Court of Canada (Re)Defining Reasonableness:

- ▶ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190:
 - [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Case Studies

Procedural Discretion:
Frivolous and Vexatious
Complaints

Frivolous and Vexatious Discretion

- ▶ Section 74(4) of the Nova Scotia *Police Act* states:
 - Where the Complaints Commissioner is unable to resolve the complaint, the complaint shall be referred to the Review Board in accordance with the regulations unless the Complaints Commissioner is satisfied that the complaint is frivolous or vexatious, and the Review Board shall conduct a hearing in respect of the complaint. (emphasis added)

Defining Frivolous and Vexatious

- ▶ John Yogis, Q.C., describes the term “frivolous” as follows:
 - Clearly insufficient as a matter of law; presenting no debatable question. A case may be dismissed as frivolous where it is clearly unsupported on the facts or is one for which the law provides no remedy. Thus, for a case to be considered frivolous, vexatious or an abuse of process, the alleged cause of action must be such that no reasonable person could treat it as bona fide and contend that he or she was entitled to approach the court with such a complaint. (emphasis added)
 - ▶ John Yogis, Q.C., *Canadian Law Dictionary*, 5th ed. (Hauppauge, NY: Barron's, 2003)

Frivolous and Vexatious Discretion: Balancing Competing Interests

- ▶ Competing Interests:
 - Need to ensure that potentially meritorious complaints against officer are pursued
 - Preventing officers from being subjected to unnecessary disciplinary processes
- ▶ *White v. Dartmouth (City) et al.* (1991), 106 N.S.R. (2d) 45 (TD):
 - [26] The *Police Act* does not expressly set out its purpose. However, it is obvious from its broad scope that the *Act* clearly covers both public protection from abuse of police power, and protection of police officers from unwarranted disciplinary action...

Frivolous and Vexatious Discretion: Balancing Competing Interests (Con't)

- ▶ *Kelly v. Police Comm.* (2006), 241 N.S.R. (2d) 300 (C.A.):
 - [27] The object of the hearing, however, is not to provide a remedy for the complainant. Although the Board can make recommendations, it has no jurisdiction to give the complainant any remedy aside from an award of costs and the vindication that follows from the complaint being upheld. Thus, from the point of view of a complainant, the hearing before the Board is an opportunity to present his or her complaint in an adversarial setting but with little prospect of any tangible remedy. From the point of view of the officer who is the subject of the complaint, his or her career is on the line. This is not to minimize the importance of the complaints process to a complainant or indeed to the public. But it must be noted that the personal rights and interests of a complainant are not in play in the process to the same extent as the rights and interests of the officer complained against. (emphasis added)

Frivolous and Vexatious Discretion: Extrinsic/External Information

- ▶ Can extrinsic/external information beyond the actual complaint be considered when making determination that complaint is frivolous and vexatious?
- ▶ **A: Yes**

Frivolous and Vexatious Discretion: Extrinsic/External Information (Con't)

- ▶ *Order MO-1921; Appeal MA-040355-1 LaSalle (Town) Police Services Board, [2005] O.I.P.C. No. 52*
 - Order by the Ontario Information and Privacy Commissioner
 - The appellant made a request for information to the Police Services Board and the request was rejected.
 - An appeal panel determined that the appellant's recurring requests for the same or similar information amounted to an abuse of process.
 - ▶ Reports provided by the police demonstrated that the appellant had initiated a litany of past failed requests for records.
 - ▶ These requests for information resulted in his obtaining access or being denied access to the same records time and time again.
 - ▶ The appellant behaved in an uncooperative and belligerent manner throughout.
 - The panel determined that the past conduct of the appellant was directly relevant to his appeal.

Frivolous and Vexatious Discretion: Extrinsic/External Information (Con't)

- ▶ *L.S. v. G.O.*, 2003 CanLII 52512 (MB P.C.)
- ▶ An appeal from the decision of the Commissioner appointed under the Manitoba *Law Enforcement Review Act*.
- ▶ The Commissioner declined to take further action on the appellant's police complaint because he found the subject matter to be vexatious.
 - This was based on:
 - ▶ An assessment of the appellant's written complaint;
 - ▶ A transcript of the call history from police dispatch; and
 - ▶ The notes of a telephone interview by a commission investigator with one of the civilian witnesses to the incident.

Frivolous and Vexatious Discretion: Credibility Assessments

- ▶ Should the gatekeeper make assessments on credibility in relation to the subject matter of the complaint?
- ▶ **A: No**

Frivolous and Vexatious Discretion: Credibility Assessments—CCLA v. OCCPS

- ▶ *Corp. of the Canadian Civil Liberties Assn. (CCLA) v. Ontario (Civilian Commission on Police Services) (OCCPS)*, 2002 CANLII 45090 (Ont. CA):
 - Under the *Police Services Act*, civilians may make complaints of misconduct or unsatisfactory work performance by a police officer.
 - The officer's Chief must investigate the complaint and then decide whether or not to order a hearing into the complaint.
 - If the Chief is of the opinion that "the complaint is unsubstantiated" no action shall be taken.
 - If the Chief decides that no hearing will be held, the complainant has a right of appeal to the Ontario Civilian Commission on Police Services (OCCPS).

Frivolous and Vexatious Discretion: Credibility Assessments—CCLA v. OCCPS

- ▶ OCCPS upheld a decision of the Chief not to order a hearing into a complaint.
- ▶ The Divisional Court reviewed the decision and quashed it.
- ▶ This decision was subsequently appealed to the Ontario Court of Appeal.

Frivolous and Vexatious Discretion: Credibility Assessments—CCLA v. OCCPS

- ▶ Justice Weiler of the Ontario Court of Appeal discussed the role of the Chief and the Commission:
 - It is important to note that the Chief is to investigate, not adjudicate. That is why the Chief does not hold a hearing. In administrative law contexts concerning regulated professions, findings of fact are to be determined at the hearing stage and not at the preliminary stage of resolving whether to hold a hearing into professional misconduct. In *Pierce v. Law Society of British Columbia*, 1993 CanLII 765 (BC S.C.), (1993), 103 D.L.R. (4th) 233 (B.C.S.C.), for example, the court held that findings of fact are a matter for consideration by the benchers and not the Discipline Committee whose task is to recommend whether or not to issue a citation to counsel...
 - In addition to the administrative law context, there is a common law theme in criminal and civil law that the gatekeeper ought not to assess credibility, weigh the evidence or find the facts.
 - The Divisional Court was correct in holding that the role of the Chief is not to make findings of fact. That question is reserved for the trier of fact at a hearing. The role of the Chief is to decide whether a hearing should be held and not what the result of a hearing should be. Given that findings of fact are based on an assessment of ultimate credibility, the Chief does not assess the ultimate credibility of the complainant. (paras. 59-61)

Conclusions on Frivolous and Vexatious Discretion

1. A complaint should only be dismissed on the basis that it is “frivolous or vexatious, without merit or an abuse of process”, if no reasonable person could treat it as bona fide;
2. Given that the officer is often the person most directly affected by the outcome of a disciplinary proceeding, a civilian oversight body should do its best to ensure that frivolous or vexatious complaints are disposed of summarily;

Conclusions on Frivolous and Vexatious Discretion (Con't)

3. In considering whether a complaint is “frivolous or vexatious, without merit or an abuse of process”, the oversight body is not limited to the material found in the complaint, but can consider the “whole history of the matter”;
4. The civil oversight body should not make assessments of the complainant’s credibility with respect to the factual allegations of the complaint itself. Those determinations should be made at a hearing and not on a preliminary basis;
5. Appropriate reasons should be given for dismissing the complaint so that the decision stands up to the *Dunsmuir* “reasonableness standard”.

Case Studies

Exercise of Discretion by OCCPS
and Judicial Review of
Discretionary Decisions

Role of OCCPS

- ▶ The Ontario Civilian Commission on Police Services (OCCPS) is an independent, quasi-judicial tribunal with duties and powers under the *Police Services Act* (the "Act").
- ▶ OCCPS composed of full-time Chair and seven appointed members, supported by Registrar, Advisors, Counsel, Complaints Staff, etc.

Statutory Discretion of OCCPS

- ▶ OCCPS is vested by the *Act* with a variety of discretionary powers in order to fulfill its civilian oversight duties, e.g.:
 - 22. (1) The Commission's powers and duties include, ...
 - (e.1) conducting reviews under section 72, at the request of a complainant, into the decision that a complaint is about the policies of or services provided by a police force or is about the conduct of a police officer, that a complaint is frivolous or vexatious, made in bad faith or unsubstantiated, that the complaint will not be dealt with because it was made more than six months after the facts on which it is based occurred, that the complainant was not directly affected by the policy, service or conduct that is the subject of the complaint or that the misconduct or unsatisfactory work performance was not of a serious nature...

Statutory Discretion of OCCPS (Con't)

- ▶ 72 (1) – If a complainant disagrees with the decision of a chief of police to deal with his or her complaint as a complaint about the policies of or services provided by the police force or as a complaint about the conduct of a police officer, the complainant may, within 30 days of receiving notice...ask the Commission to review the decision.
- ▶ 72(5) - If a complainant has been notified...that his or her complaint is unsubstantiated or that the conduct he or she complained of has been determined to be not of a serious nature, the complainant may, within 30 days of such notification, ask the Commission to review the decision.
- ▶ 72 (8) – Upon completion of the review, the Commission may confirm the decision or may direct the chief of police, detachment commander or board to process the complaint as it specifies or may assign the review or investigation of the complaint or the conduct of a hearing in respect of the complaint to a police force other than the police force in respect of which the complaint is made.
- ▶ 72 (11) – If notified by the Commission that the complaint is to be processed as specified, the chief of police, detachment commander or board shall immediately so process the complaint.
- ▶ 72 (12) – The Commission's decision under subsection (8) is final and binding and there is no appeal therefrom.

Statutory Discretion of OCCPS (Con't)

- ▶ 2600 Part V public complaints were made in 2006 and 2007
 - OCCPS was asked to review approx. 550 decision by chiefs
 - S.72 discretion to issue directives was exercised in approx. 100 cases
- ▶ Case managers gather information and prepare summaries for s. 72 review by panel members.
- ▶ Role of Counsel in relation to s. 72 reviews:
 - Ensure panel has accurate information to make decisions
 - Ensure compliance with the *Act*
- ▶ The process employed by OCCPS to fulfill its duties and exercise its discretion under s.72 was confirmed by the ON Court of Appeal in *Sadaka*.

Purpose of the *Police Services Act*

- ▶ In *Browne v. OCCPS; Sadaka v. Houde*, [2001] CanLII 3051 ("*Sadaka*"), the Ontario Court of Appeal held that the legislative purpose of the *Act* is to increase public confidence in the provision of police services in Ontario.
- ▶ The process mandated to receive, consider, investigate and decide public complaints about police conduct is an important part of the *Act*.
- ▶ The Commission plays a crucial role in this public complaints process.

Browne/Sadaka

- ▶ *Browne v. Ontario (Civilian Commission on Police Services); Sadaka v. Houde*, [2001] O.J. No. 4573; 56 O.R. (3d) 673
 - *Sadaka*: public complaint arises in course of police take down of van— police mistakenly believe van was stolen. Police investigate and deem complaint unsubstantiated.
 - The complainants requested that OCCPS conduct a review of the Chief's decision, pursuant to s.72 of the *Act*.
 - After its review, OCCPS concluded that there was sufficient evidence to allege unsatisfactory work performance against 2 officers involved and ordered a disciplinary hearing.
 - An application for judicial review was brought by the respondent officers alleging procedural and substantive unfairness.
 - The Divisional Court found that OCCPS had failed to set out the reasons for its decision and the allegations of the hearing with sufficient specificity.
 - The same reasoning was applied in *Browne*.
 - OCCPS appealed the decisions in both *Browne* and *Sadaka* and the appeals were heard together.

Browne/Sadaka (Con't)

- ▶ Key issues at Court of Appeal:
 - Sufficiency of reasons
 - ▶ OCCPS letters ordering hearings did not formally particularize the grounds for a hearing;
 - ▶ Because the chief of police was obliged to process the complaint "as specified" by OCCPS, it follows that OCCPS must clearly provide the information necessary for the chief to comply;
 - ▶ Compliance does not require elaborate particularity from the Commission, rather "sufficient information to permit the chief of police reasonably to inform the police officer of the case he or she will be required to meet";
 - ▶ The adequacy of the information's content, not the degree of formal delineation, governs the determination whether the requirement has been satisfied.
- ▶ Div. Ct. ruling overturned by ON CA.
 - Discretionary powers under s.72 were properly exercised in both *Browne* and *Sadaka*.

Gardner v. OCCPS

- ▶ *Gardner v. OCCPS*, [2004] O.J. No. 2968 (Ontario Div. Ct.)
- ▶ S. 25 (1)(a) of the *Police Services Act* reads in part, “The Commission may at a board’s request or of its own motion, investigate inquire into and report on the conduct or performance of duties of a member of a [police services] board.”
 - The Toronto Police Services Board asked OCCPS to investigate certain allegations against Chair Norm Gardner.
 - The Commission, acting corporately (all members with statutory powers of decision acting together as a whole) decided to investigate.
 - The Commission, again acting corporately, considered the results of its investigation, decided that the conduct in question might contravene the *Members’ of Police Services Boards – Code of Conduct*, and the matter was taken to a public hearing.

Gardner v. OCCPS (Con't)

- ▶ Of the members of the Commission who decided to take the allegations to a hearing, three were chosen to preside at the hearing and adjudicate the allegations against the Chair. The hearing proceeded and the Chair was found to be in breach of the Code.
- ▶ After the subsequent penalty hearing the Chair was suspended from his position for the balance of his term. The Chair sought judicial review of the Commission's decision.
- ▶ At the opening of the s. 25 (1) hearing, the Chair brought a preliminary motion asking that the charges against him be quashed.
 - He alleged that a reasonable apprehension of bias arose from the fact that the same Commission members decided to investigate the complaints against him, reviewed the results of the investigation and decided to go to a hearing, and then presided at the hearing.
- ▶ The Commission Panel dismissed the motion in the first instance.
- ▶ Divisional Court found that a reasonable apprehension of bias arose from the process implemented by the Commission.
 - It quashed the Commission's decision and directed a new hearing before a differently constituted panel of the Commission.
 - Before the new hearing commenced the Chair resigned, as a result of which the Commission lost jurisdiction and the new hearing ordered by the Div Ct did not take place.

Ensuring institutional independence and bias-free decisions: Applying *Gardner*

- ▶ OCCPS' motion for leave to appeal was denied.
- ▶ Following *Gardner*, process to consider and decide on requests under ss. 23(1) and 25(1) has changed:
 - Sufficient number of members are screened or recused from initial consideration of matters and resulting investigations or decisions;
 - These members can then be called upon to form a hearing panel, if required.