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Discretionary Power in the General Welfare Assistance Act of Ontario

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DISCRETIONARY POWER IN THE GENERAL WELFARE ASSISTANCE ACT OF ONTARIO

Marilyn Ginsburg*

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* Copyright © 1986 Marilyn Ginsburg. Marilyn Ginsburg is a lawyer at the Advocacy Resource Centre for the Handicapped in Toronto. The author acknowledges the helpful suggestions in the preparation of this paper by Professors Eric Tucker and Reuben Hasson of Osgoode Hall Law School. As originally written, this paper contained a number of appendices which are not included here. These include excerpts from the General Welfare Assistance
DISCRETIONARY POWER IN THE 
GENERAL WELFARE ASSISTANCE ACT 
OF ONTARIO

I. INTRODUCTION
There appears to be a commonly held belief among some municipal welfare administrators in the Province of Ontario that they are the repositories of a rare and "royal" power known as "absolute discretion". These self-styled mini-monarchs reign over their municipal kingdoms in seemingly arbitrary fashion sometimes making unreasoned decisions that seriously affect the day to day lives of their imagined "subjects". The purposes of this paper are to examine the legal limits of discretion in welfare decisions and to analyze the possible problems inherent in bringing an application for judicial review when those legal limits seem to have been exceeded.

A few examples will help to illustrate the nature of the decisions under consideration. Each of these decisions was made in response to individual applications under the "special assistance" or "supplementary aid" sections of the General Welfare Assistance Act, which will be examined in detail below.

Example #1: A young paraplegic, living in Toronto, applied for supplementary aid. His only source of income was a $400 per month disability Policy Manual (Ministry of Community and Social Services), detailed figures on expenditures for General Welfare Assistance in the City of London and the City of Thunder Bay; a Ministry Budget Worksheet for the Calculation of Special Assistance; two memos from the Commissioner of Community Services for Metropolitan Toronto concerning Supplementary and Special Assistance Expenditures, an excerpt from the Agenda of the Meeting of the Community and Protective Services Committee dealing with those memos and setting Metro Toronto policy; a letter from the Deputy Administrator of Welfare for the City of London to an applicant for Supplementary Aid, asserting that a limit of $500.00 per year per person in Supplementary Aid is imposed by the Province; and a letter from the Administrator of Welfare for the City of London to an Applicant indicating that only 90% of the cost of any Special Assistance or Supplementary Aid will be paid by Welfare. The author is prepared to make any or all of these documents available to interested parties who contact her.

1 All examples are accounts of actual cases related to the author either by the applicant or by an agency social worker who assisted the applicant.
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pension provided under the Family Benefits Act. His request was for approximately $300 to pay for a one-year supply of genito-urinary supplies necessitated by his disability. His application was processed and he was informed of the decision by a social worker from the local welfare office: the municipality would cost-share the items with the applicant on a 50/50 basis. Unfortunately, the applicant, who was already living well below the poverty level, did not have $150 to allocate toward the purchase of the required supplies. When the Welfare department was initially challenged on this "cost-sharing" decision the reply was: "That is our policy." When the matter was pursued at the provincial level, and the welfare administrator was questioned by a senior official from the Ministry of Community and Social Services, the decision became "a mistake" and the applicant received full funding.

Example #2: An elderly man living in Oxford County applied for supplementary aid. His only source of income was an Old Age Security pension. His request was for assistance with the purchase of dentures, as he recently had to have all of his teeth extracted. The local municipal welfare office rejected his application, without reasons.

Example #3: A young woman, living in London, Ontario, applied for supplementary aid for the purchase of a $3,000 wheelchair. Her only source of income was a $400 per month provincial disability pension. She was told that the policy of the municipality was to require each employed applicant for an assistive device to pay 10% of the cost of the device. Not only did she not have $300 to use toward the purchase of a wheelchair, but she was not employed. The policy was applied to her application regardless.

Example #4: A young woman in Toronto was a welfare recipient. She was also a drug addict. She applied for special assistance to pay for part of a drug treatment program which was not covered under the Ontario Health Insurance Plan (OHIP). Her application was initially rejected because "special assistance is not used to fund individuals residing in institutions". However, her application clearly indicated she was living in the community in an apartment. When this error was pointed out, the application was then rejected for the reason that "special assistance is not provided for medically related items". When it was pointed out that the Act itself permits the provision of assistance for the medically related items, a policy statement written by the municipal social service committee was forwarded. This policy statement indicated that funding

2 R.S.O. 1980, c. 151.
would not be provided for long-term treatment programs. It was finally on this basis that the application was rejected.

Initially this paper will explore these two discretionary sections (special assistance and supplementary aid) of the General Welfare Assistance Act; and the nature of decisions rendered pursuant to them. First, the general legislative framework will be examined in some detail. Second, relevant statutory and common law requirements for the exercise of discretion will be discussed along with the legal ramifications of breaches of those requirements. Third, an analysis will be undertaken of the likelihood of a successful application for judicial review, based on elements of the above four examples, and framed in terms of abuse of discretion. Non-judicial remedies will also be examined briefly in a discussion of the policy framework within the welfare system operates.

II. THE LEGISLATIVE FRAMEWORK

In making decisions regarding applications for supplementary aid and special assistance, welfare administrators are to operate within the bounds set out in the General Welfare Assistance Act and regulations. There is, in addition, a large compendium of Policy Guidelines published by the Ministry of Community and Social Services and distributed to all welfare departments in the Province. The Policy Guidelines are intended to establish a generally uniform delivery of welfare services across Ontario and to "flesh-out" the Act and Regulations with up-to-date Ministry interpretations and implementation procedures. The legal import of these Guidelines will be discussed below.

A. CLASSES OF ASSISTANCE

The Act distinguishes the provision of general welfare, which is worded in the language of a statutory duty, from the provision of other assistance, which is worded in a discretionary way.

s.7(1) "A municipality shall provide assistance in accordance with the regulations to any person in need who re-

3 R.S.O. 1980, c.188.


5 General Welfare Policy Guidelines, Ministry of Community and Social Services, Ontario.
sides in the municipality and who is eligible for such assistance." (emphasis added)

(2) "A municipality may provide assistance in accordance with the regulations to any other person who resides in the municipality and who is eligible for such assistance." (emphasis added)

Section 7 of Regulation 441 (R.R.O. 1980) goes on to define more specifically the classes of assistance that are available.

s.7 "The classes of assistance are general assistance, special assistance, supplementary aid..."

Basically, once an individual is in receipt of general assistance (or is in receipt of any other government pension or private income in excess of welfare levels), he or she is no longer "a person in need" as determined by sections 1(2), 12 and 13, of the Regulations. Therefore, if the applicant's "real" budgetary needs (as distinguished from the very restricted needs set out in the Regulations), exceed his limited income, his application for municipal welfare assistance will either be in the form of supplementary aid or special assistance, and, as previously noted, these fall within s.7(2) of the Act and are classified as discretionary rather than mandatory assistance.

These two types of assistance are authorized in different places in the legislation. Supplementary aid is provided for in s.13 of the Act.

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6 Section 7(1) is the basis for the provision of general welfare assistance to "persons in need". "Person in need" is defined by s.1(2) of the Regulations:

1(2) For the purposes of the Act and this Regulation, "person in need" means a person who by reason of,

(a) inability to obtain regular employment;
(b) lack of a principal family provider;
(c) disability; or
(d) old age,

has budgetary requirements as determined in accordance with section 12 that exceed his income as determined under section 13 and who is not otherwise made ineligible for assistance under the Act or this Regulation."

Section 11 of the Regulations goes on to state that "general assistance shall be paid to... a person in need... " It follows that the other two forms of assistance are available to applicants who are not "in need" as defined by the legislation.

The analysis is somewhat confused by the Policy Guidelines, section 0405-03 (para 1), which re-defines "person in need" for the purposes of special assistance as "one who by reason of financial hardship has budgetary needs in excess of his-her income".
s.13 "A municipality or the Province may provide assistance by way of supplementary aid to or on behalf of recipients of governmental benefits."

Special assistance, on the other hand, is not found in the Act but is outlined in section 15 of the Regulations (and defined in similar fashion in section 1(1)(0) of the Regulations):

s.15 (1) "Subject to sections 3 and 5, items, services or payments of special assistance approved by the municipality... may be paid or provided to or on behalf of a person,

(a) by a municipality, where the person resides in a municipality...

in such amounts as shall be determined by the welfare administrator but not exceeding the amount by which the budgetary requirements of the person as determined in accordance with subsection (4) exceeds his income determined in accordance with section 13...

(4) For the purpose of subsection (1), budgetary requirements shall be determined as follows:

1. For basic needs, an amount determined in accordance with paragraph 1,2,4,or 4(a) of s.12(2)...

7. The cost of drugs prescribed by a physician or dental surgeon.

8. The cost of surgical supplies and dressings.

9. The cost of dental services.

10. The cost of one or more prosthetic appliances including eye-glasses...

16. Any other special service, item or payment in addition to those set out in paragraphs 1 to 15 authorized by the Director."

7 "Recipient of a governmental benefit" is defined in section 1(i) of the Act and section 2 of the Regulations as persons who receive income under the Old Age Security Act, the Family Benefits Act, the Vocational Rehabilitation Services Act, the Ontario Guaranteed Annual Income Act, or a spouses allowance under the Old Age Security Act.
To summarize, supplementary aid is generally available to disadvantaged recipients of some governmental income maintenance program other than general welfare. Special assistance is available to those individuals already receiving general welfare or to low income wage earners. When such an applicant applies for special assistance or supplementary aid, his or her "budgetary requirements" are to be calculated so as to include the cost of the extraordinary item(s) requested.  

It is interesting to note that the Province administratively treats these two forms of discretionary assistance in the same manner, even though supplementary aid is never given detailed treatment in the legislation while special assistance is outlined quite clearly. For example, in the Policy Guidelines the municipalities are told that the items pre-approved for provincial cost-sharing under special assistance can also be used for supplementary aid, as can the same needs test and liquid assets test be used. In the remainder of this paper, for the sake of convenience, these two classes of assistance will be referred to jointly as "supplementary benefits", except where that leads to inaccuracy in specific instances.

(An interesting study might be undertaken to determine if municipalities are as willing to provide an assistive device to an individual already on welfare (i.e. as special assistance) as they are to recipients of other government benefits (i.e. as supplementary aid) since the Municipality is reimbursed for only 50% of amounts paid out for special assistance but for 80% of that paid out in supplementary aid.  

8 Special Assistance Budget Worksheet.


10 R.R.O. 1980, Reg. 441, s.15(5).

11 R.R.O. 1980, Reg. 441, s.16. This strange anomoly was discussed with a Ministry official who explained the higher reimbursement rate for supplementary aid as an attempt of the Province to "take care of our own". In other words, many applicants for supplementary aid will be recipients of a provincial allowance under the Family Benefits Act, while most applicants for special assistance will be on general welfare, which is seen as a municipal responsibility. Historically the Province seemed to feel a greater responsibility for providing for the extraordinary needs of its own F.B.A. recipients. Both classes of assistance are, in fact, cost-shared with the Federal government under the Canada Assistance Plan Act (CAP), with the federal government paying for 50% of the cost of both classes. In cases of supplementary aid, however, the Province picks up another 30%, leaving the municipality with only 20%.
B. STATUTORY RESPONSIBILITIES

It is important, in any analysis of this type, to determine what responsibilities are delegated in the legislation to each party taking part in the decision making process.

As is often the case, the Act is very general, leaving the details to be provided by the Lieutenant Governor in Council under the authority to make regulations. That authority, as set out in section 14 of the Act is very broad and it is therefore unlikely that any of the Regulations which will be considered could be attacked as ultra vires. Likewise, section 6 of the Act provides a municipal or regional welfare administrator with broad powers of delegation, so it is unlikely that this occasionally troublesome area will prove to be a fruitful ground for judicial review.

There are three primary delegates whose various responsibilities under the Act may have some bearing on the nature of the discretion being exercised in granting or denying an application for supplementary benefits.

1. The Director of Income Maintenance (of the Ministry of Community and Social Services) "shall exercise general supervision over the administration of this Act and the regulations and shall advise municipal welfare administrators, regional welfare administrators and others as to the manner in which their duties under this Act are to be performed." (The Director "advises" welfare administrators by providing them a lengthy set of Policy Guidelines.)

2. The "regional welfare administrator" is employed by the Ministry. He "may receive applications for assistance and shall determine the eligibility of each applicant for assistance and, where the applicant is eligible, shall determine the amount of assistance and direct provision thereof..."

12 This section, section 3 of the Act, is the one that gives the Director the authority to publish the Policy Guidelines which are distributed to all welfare administrators. It is possible that a welfare administrator might argue that this section does not require him to take advice from the Director in the area of supplementary benefits, as that is a discretionary area, not a "duty" under section 3. However, the preferred interpretation would seem to be that the administrator has a "duty" to exercise his discretion lawfully and that the Director, under section 3, should advise him as to how that might be done.

13 R.S.O. 1980, c.188, s.1(j).

14 R.R.O. 1980, Reg. 441, s.2(a). For the purposes of this paper the municipal welfare administrator's role will be examined much more closely than that of the regional administrator, who is not a "front-line" decision maker.
3. The "municipal welfare administrator" is appointed by the municipality. He "shall receive applications for assistance and shall determine the eligibility of each applicant for assistance, and, where the applicant is eligible, shall determine the amount of the assistance and direct provision thereof."¹⁵

For the purposes of this part of the analysis several points become important. First, although the "legal weight" of the Policy Guidelines published by the Director could become an issue in any application for judicial review, the Director clearly has authority under section 3 of the Act to issue those guidelines, and presumably, it is incumbent upon welfare administrators to take them into account in making their decisions.

This statutory relationship between the Director and welfare administrators could conceivably cause a problem if the administrators took direction from the Director in such a way as to fetter their own discretion under the Act. However, in the author's experience this has not proven to be a problem and will not be discussed. Instead we will concentrate on the legislative responsibilities of the two critical repositories of discretion, the municipality and the municipal welfare administrator.

By way of review, under section 7(2) of the Act, the municipality "may provide assistance in accordance with the regulations to any other person who resides in the municipality and who is eligible for such assistance." Furthermore, in section 13, "the municipality or the Province may provide assistance by way of supplementary aid to or on behalf of recipients of governmental benefits." Although section 13 does not specifically state it, by implication supplementary aid must also be provided "in accordance with the regulations" as required by section 7(2). This is because section 7(2) includes any assistance provided by the municipality to "any other person", which would include any recipient of supplementary aid, (as well as any recipient of special assistance.)

Therefore, a municipality may provide supplementary aid or special assistance, but any assistance provided must be in accordance with the legislation and regulations.

What is the character of the municipality's responsibility under these two sections? Quite clearly these are not mandatory sections but rather discretionary. On the face of it, it looks like the municipality has the discretion to examine every application for supplementary benefits and

¹⁵ Supra, note 13, s.4(1) and 4(2).
determine, within the boundaries of its discretion, if it will provide assistance to each individual applicant. Of course, in reality, the municipality considers estimates from its social services committee and approves a general welfare budget, including funds for supplementary benefits. The municipality exercises a general discretion as to whether it will or will not provide funds for supplementary benefits to its residents. It is not legally obliged to do so. This is the basic policy choice a municipality makes under section 7(2) of the Act. That is not to say it is the only policy decision that the municipality can make. The nature of other municipal policies or rules that are adopted to implement its major decision (of providing supplementary benefits) will be examined in greater detail later. However, for our present purposes the primary decision for the municipality will be viewed as that of deciding whether to provide any class of assistance other than the mandatory class of general welfare.16

Once the municipality has decided to provide funds for the classes of supplementary aid and special assistance (and provided any supporting policies or rules) what then is the statutory responsibility of the welfare administrator? His or her duty is spelled out, as already mentioned, in section 4(2) of the Act. She or he "shall receive applications for assistance and shall determine the eligibility of each applicant for assistance, and, where the applicant is eligible, shall determine the amount of the assistance and direct provision thereof..."

Although there may be elements of discretion involved in how the welfare administrator carries out his responsibilities, it is clear that his or her basic role under the Act is not a discretionary one. He or she is charged with certain duties and is legally bound to carry out those duties in accordance with the legislation. For example, once the municipality had allotted funds for supplementary benefits, the welfare administrator would act unlawfully in refusing receipt of an application. Likewise, if the administrator determined (in accordance with the legislation) that an applicant was eligible for assistance he or she would act unlawfully if he refused to direct "provision thereof".

Therefore, although the supplementary benefits sections of the General Welfare Assistance Act can correctly be referred to as discretionary in origin, it is not clear that the discretion goes as far as some municipal

16 In fact every municipality in Ontario has chosen to provide special assistance and supplementary aid to its residents, and where there is no consolidated municipality the Province provides it.
welfare administrators would like to believe.

Does this mean that once a municipality has approved funds for supplementary benefits that every application must be automatically approved? Do supplementary benefits then become as entrenched as general welfare? What discretion remains to the municipality and welfare administrators? These questions will be dealt with in the following sections.

C. NATURE OF THE DISCRETION: STATUTORY INDICATORS

(i) The Municipality's Discretion

The initial discretion vested in the municipality is clear - to provide or not to provide for the two discretionary classes of assistance. However, once the decision to provide supplementary benefits has been made, the issues become more complicated.

Any court would accept that in the allocation of limited resources a municipality should be permitted some discretion in setting policies regarding how those resources are to be distributed. But, as Evans says:

"To say that somebody has a discretion presupposes that there is no uniquely right answer... There may, however, be a number of answers that are wrong in law."17

The task at hand then is to determine which municipal answers "are wrong in law", and what criteria a court might use to make such a finding.

Once again we turn to the legislation for guidance. It has already been seen that section 7(2) of the Act stipulates that "a municipality may provide [supplemental benefits] in accordance with the regulations". The legislature did not envisage that each municipality that chose to provide supplementary benefits could do so entirely on its own terms. Therefore, it is again clear that any policies set by a municipality must conform with the regulations.18


18 By way of contrast, there is a series of cases decided under the Manitoba Social Allowances Act, which permits each municipality to provide even general welfare assistance according to the by-laws of that municipality. See Leblanc v. City of Transcona (1973), 38 D.L.R. (3d) 549 (S.C.C.); Keehn v. Benito (1985), 34 Man. L.R. (2d) 156.

See also the very interesting challenge to the Manitoba legislation on the
The first regulation of relevance is s.15(1) of Regulation 441, which reads:

"15(1)... services or payments of special assistance approved by the municipality... may be paid or provided to or on behalf of a person... in such amounts as shall be determined by the welfare administrator but not exceeding the amount by which the budgetary requirements of the person as determined in accordance with subsection (4) exceeds his income determined in accordance with section 13..."

There are several points that need to be made about this section. First it seems to support the author's initial interpretation of the municipality's discretion in general. In other words, the municipality may approve policies with regard to "services or payments", but the specific amount in each case is determined by the welfare administrator under s.4(2) of the Act.

Second, section 15(1) reiterates the limitation placed on the municipality in section 7(2) of the Act which was to provide assistance in accordance with the regulations. Also, by providing a maximum calculation, s.15(1) allows the welfare administrator some discretion in providing an amount less than the amount by which the applicant's budgetary requirements exceed his income. However, that income is to be determined in accordance with section 13 of the Regulations, and any amount given that is less than the maximum is presumably supposed to bear some relationship to the specific application under consideration. Again, it becomes obvious that the legislature did not intend for each municipality to provide assistance in any fashion it preferred. Once a municipality chooses to provide special assistance, any policies or rules it sets with regard to services or payments, or any related matter, must be done in accordance with the regulations.

All that remains to explore is section 13. Section 13 is a long and complicated part of the Regulations that is to be used in calculating the income of any applicant for any class of assistance under the Act. Basically, the section lists items that are to be included in calculating an applicant's income. (eg. wages, payments for support or maintenance, pension payments, etc.), and items that are not to be included in an applicant's income (eg. welfare benefits, charitable donations received, casual gifts of small value, etc.) However, section 13 does more than just provide lists.

ground that it violates the agreement under the Canada Assistance Plan Act, in Finlay v. Ministry of Justice (1983), 48 N.R. 126, (Fed, C.A.).
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It carefully distinguishes between applicants in various social settings. For example, gross income is used in certain instances and net income in others. The regulation also exempts part of the earnings of the applicant at the discretion of the welfare administrator, but these exemptions vary. For instance, one of the exemptions from income is up to $50 per month for a single person but up to $100 for a head of family not living with a spouse. For these single parents it is also permissible to deduct $40 per month for work-related expenses. In other words, the Regulations recognize different basic income needs for different family situations and the welfare administrator, after examining each application on its merits, is supposed to use his or her discretion in applying these statutory rules to the fact situation. We will now examine in greater detail the legislative constraints placed on the welfare administrator's powers of decision making.

(ii) The Welfare Administrator's Discretion

Some analysis has already been done of the welfare administrator's discretion, under section 15(1) of the Regulations, to determine the amount of special assistance that will be granted, based on a determination of the budgetary needs and income of the applicant. It has been shown that while some discretion does exist in this area, the administrator's calculations must be performed in accordance with the Act and Regulations. The welfare administrator cannot go so far as to arbitrarily ignore sources of income, budgetary needs, or the results of his calculations.

It has also been shown that the welfare administrator's basic duties under the Act, as set out in section 4(2), are not discretionary. He shall receive applications, shall determine eligibility, and where the applicant is eligible shall determine the amount of assistance and direct provision thereof. There are further statutory guidelines relating to these duties. The process of "determining eligibility" is set out in section 8(5) of the Regulations:

"In determining the eligibility of an applicant for any assistance, a welfare administrator shall make or cause to be made an enquiry into the living conditions and financial and other circumstances of the applicant..."(emphasis added).

Section 10(2) of the Act provides the final statutory guideline relevant to this analysis of the responsibilities of the welfare administrator:
10(2) A welfare administrator may refuse to provide or may suspend or cancel assistance under the Act where,

(a) the applicant or recipient is not or ceases to be entitled thereto or eligible therefor under this Act or the Regulations;

(b) the applicant or recipient fails to provide... the information required to determine initial or continuing entitlement to or eligibility for assistance...; or

(c) any other ground for refusal, suspension or cancellation specified in the regulations exists.

One should note that s.10(2) applies to suspension or cancellation of "assistance", not just general assistance. Presumably then it applies to supplementary aid and special assistance as well. The obvious significance of this section is that it indicates that the welfare administrator cannot arbitrarily refuse assistance to an applicant. A refusal, (or suspension or cancellation) must be based on some ground outlined in s.10(2) or in the Regulations. Because the cases at hand represent applications for supplementary benefits, one additional reason for finding an applicant ineligible under s.10(2)(a), that would not be present in applications for general welfare, could be a municipal policy excluding the requested item or service from municipal funding. In other words, as in the example of Metro Toronto deciding not to fund long-term treatment programs, an applicant for supplementary benefits can be found ineligible under s.10(2)(a) because funding for the item is simply not authorized. A welfare administrator may then lawfully refuse to provide assistance (assuming, of course, that the municipal policy is lawful and that the application at hand has at least been considered as a possible exception to the rule.)

However, having said that, it must also be noted that section 10(2) is not open-ended. Only those reasons listed are lawful reasons for refusing assistance. By implication, then, all other reasons are unlawful. It would be very unlikely that a welfare administrator would refuse to provide assistance for supplementary benefits for the stated reason that he or she did not like the specific applicant, or did not like disabled people, or did not like single mothers. However, what about the not so uncommon situation where the welfare administrator, as in example #2, simply refuses assistance with no stated reasons? There is case law, which will be discussed below, on both sides of the issue of a requirement to provide reasons for one's decisions.

What conclusions can be drawn at this point about the nature of the duties and discretionary powers of the municipality and the welfare ad-
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ministrator, as delineated in the legislation itself? On the one hand, the Act permits the municipality the discretion to choose whether or not to provide supplementary benefits. However, once it decides, as a matter of policy, to provide such classes of assistance then it must operate within the bounds set by letter and intent of the legislation. Subsidiary rules set by the municipality, in furtherance of its policy, must not violate the legislation and, in addition, must appear to be "reasonable", as opposed to arbitrary or capricious. This can only be determined by examining the context, wording and application of the rules in question.

On the other hand, the welfare administrator's responsibilities under the legislation amount to a subtle combination of duty and discretion. While he has a duty to accept applications, determine eligibility and provide assistance to eligible applicants, there are some minor areas of discretion involved, particularly in calculating income and income exemptions. In exercising his discretion the welfare administrator may not go too far afield so as to violate the legislation or frustrate the purposes of the Act. Nor can the administrator fetter his or her own discretion by deciding according to inflexible, pre-determined rules.19

The next major portion of the paper will be devoted to an examination of the case law, as part of our analysis of the feasibility of pursuing an application for judicial review against a municipality and/or welfare administrator for abuse of discretion. This involves a discussion of the scope of judicial review in this area, the intensity of review and some specific, recognized grounds for judicial review of discretionary powers.

III. JUDICIAL REVIEW: AN ANALYSIS OF THE AUTHORITIES

"In public regulation of this sort there is no such thing as absolute and untrammeled "discretion", that is that action can be taken on any ground or for any reason 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... "Discretion" necessarily implies good faith in dis-

19 But see the unfortunate and poorly reasoned case of Alden v. Gagliardi (1972), 30 D.L.R. (3d) 760 (S.C.C.), where the Court found that the provision of all welfare assistance in British Columbia is discretionary, and that a blanket policy excluding all applicants who have been "locked out" in labour disputes is valid.
charging public duty; there is always a perspective within which a statute is intended to operate..."20

This passage, from the famous Canadian case on abuse of discretion, Ronald carelli v. Duplessis, states the basic legal principle in the area and the framework within which an examination of authorities must take place. "There is always a perspective within which a statute is intended to operate"; the task now is to explore the perspective within which a court might find the General Welfare Assistance Act is intended to operate. This will be accomplished through an examination of case law and relevant principles of judicial review.

A. INTENSITY OF REVIEW ISSUES

(i) Judicial or Administrative Discretion

Discretion is an area where the courts have shown a greater willingness to become involved in recent years, which is either encouraging or not, depending on one's views of the value of judicial interference in administrative decision making.21

Historically, however, the exercise of discretion by a municipality and administrator of the kinds presently under consideration would not have been seen as proper subjects of judicial review. This is because it would have been difficult to characterize their functions as "judicial". The municipality, in exercising its very broad discretion of whether to provide supplementary benefits at all, is certainly the repository of a purely administrative/policy type of power. It is difficult to imagine a court finding, even today, any requirements that the municipality act judicially at this point in the administrative process.

Later in the decision-making process, when both the municipality and the welfare administrator are required to act "in accordance with the Act and Regulations" it might be possible to argue that they are required to act quasi-judicially, although it must be remembered that there is no requirement, in dealing with applications for supplementary benefits, that the administrator afford the applicant even an opportuni-


ty to be heard before suspending or refusing assistance, nor is there any provision for appeal to the Social Assistance Review Board.\textsuperscript{22}

Historically, however, some courts came to define "acting judicially" in very loose terms. For example, in a 1952 English case dealing with local committees responsible for dispensing legal aid certificates, the court said:

"Though the local committees may be said to be administrative bodies in the sense that they are responsible for administering the Act, they are quite unconcerned with questions of policy. They cannot refuse legal aid because the fund is becoming depleted or because they think that certain forms of action should be discouraged. They have to decide the matter solely on the facts of the particular case, solely on the evidence before them and apart from any extraneous considerations. In other words, they must act judicially, not judiciously."\textsuperscript{23}

This kind of reasoning could be applied to the decision making power of a welfare administrator.

A further leap in judicial review of administrative decisions can be seen in cases where courts expanded their scope of review to include non-judicial type activities. For example, the Court of Appeal decision in the controversial case of \textit{Padfield v. Minister of Agriculture, Fisheries and Food} said, through Lord Denning:

"It is said that the decision of the Minister is administrative and not judicial. But that does not mean he can do as he likes, regardless of right or wrong. Nor does it mean that the courts are powerless to correct him."\textsuperscript{24}

Again, a few years later, the Court of Appeal in England indicated its willingness to intervene in non-judicial situations:

"It is for the council and not for this court to determine what the future policy should be in relation to the number of taxi licences which are to be issued in the City of Liverpool... This Court is concerned to see that whatever policy the corpora-

\textsuperscript{22} R.S.O. 1980, c.188, s.10(3) and s.11(2).

\textsuperscript{23} \textit{R. v. Manchester Legal Aid Committee, ex parte R.A. Brand & Co. Ltd..} [1952] 2 Q.B. 413, at 431.

\textsuperscript{24} [1968] A.C. 997, at 1006.
The cases above reflect the basic flow or direction of the courts on this issue. This should not lead one to believe that there have not been many contrary decisions, or decisions of courts not interested in getting into the business of reviewing every exercise of an administrative discretion that comes before them. However, this brief and sketchy history should at least show that what was previously a threshold issue in reviewing decisions of tribunals or administrators will no longer stop a court that is intent on review. Unfortunately, the old distinction between judicial and administrative functions could still be relied upon by a court intent on not reviewing with much intensity. This is always a possibility in the area of welfare rights where Canadian courts have shown little inclination to adopt an interventionist attitude, (which could be attributed, in part, to the fact that they have been asked very few times to do so.)

(ii) Ex gratia Payments / Supplementary Benefits

A related issue, and possible stumbling block to a successful application for judicial review of decisions involving supplementary benefits, is the fact that these benefits may be viewed as ex gratia payments rather than as legally enforceable rights. The small body of law coming from English courts dealing with supplementary welfare benefits is not very helpful because that legislation includes supplementary benefits within the welfare appeal process and because the structure of supplementary benefits is less discretionary than in the Ontario Act. Although in reality the legislation here probably allows for no more discretion than the English law, the initial ex gratia nature of this class of assistance may colour a court's eagerness to review, or its intensity of review.


The cases that are more to the point are those emanating from decisions of the Criminal Injuries Compensation Board. Although the English Board was set up by a "scheme" or act of the Crown, rather than by statute, the *ex gratia* nature of its awards has been an issue in judicial review applications. For example, in the case of *R. v. Criminal Injuries Compensation Board, Ex parte Lain*, Diplock, L.J., wrote:

"True it is that a determination of the board that a particular sum by way of ex gratia payment of compensation should be offered to an applicant does not give the applicant any right to sue either the board or the Crown for that sum. But it does not follow that a determination of the board in favour of an applicant is without any legal effect upon the rights of the applicant to whom it relates. It makes lawful a payment to an applicant which would otherwise be unlawful... It makes a determination by the board, in the exercise of its judicial functions, that an offer of a particular sum to a particular applicant is justified, a condition precedent to the board's authority in the exercise of its administrative functions to make any payment to that applicant... It is... in my opinion quite sufficient to attract the supervisory jurisdiction of the High Court to quash by certiorari a determination of an inferior tribunal, made in the exercise of its quasi-judicial powers, that such determination should have the effect of rendering lawful and irrecoverable a payment to a subject which would otherwise be unlawful..."

The courts in England have apparently not been troubled by the *ex gratia* nature of an award from this Board, and seem to be saying that as long as there exists some quasi-judicial function in the board, the courts will have jurisdiction to review the board's exercise of that function.

It is certainly arguable that the *Lain* case and others could be useful in persuading a Canadian court to seriously review the activities of a welfare administrator, even in supplementary benefits cases. A determination of the administrator that an applicant is *prima facie* eligible for benefits is a condition precedent to the lawful receipt of any sum, just as in the Criminal Injuries Compensation Board decisions. That determination makes "lawful a payment to an applicant which would otherwise be unlawful", thereby having some "legal effect upon the rights of the applicant to whom it relates". The nature of the welfare administrator's

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responsibility is closely akin to the responsibilities of the Legal Aid Committee in Manchester, quite simply to accept applications and apply the statutory criteria provided to the fact situation before them. Although there remains some element of discretion in all of these decisions, the welfare administrator is given more discretion and more extensive criteria through the legislation than were the Legal Aid Committees and Criminal Injuries Compensation Board. This narrows the discretionary powers of the welfare administrator, or makes them more "objective", which may assist our somewhat conservative courts in feeling comfortable reviewing the manner in which that discretion has been exercised. The matter of "objective" and "subjective" discretion will be discussed in more detail in the next section.

The English cases discussed above have been examined in some detail because the *ex gratia* issue and the judicial/administrative distinction could both become relevant in an application for judicial review of a supplementary benefits decision, in spite of the fact that the *Judicial Review Procedure Act* of Ontario defines a "statutory power of decision" as including a decision "prescribing the legal rights, powers, [and] privileges... of any person." (emphasis added).

There does exist a Canadian judicial statement regarding the reviewability of *ex gratia* payments. In *Re Sheehan and Criminal Injuries Compensation Board*, the Divisional Court decided:

"There is no obligation of the Board to award compensation. It could be argued that the payment is an *ex gratia* payment. Even so the general intent of the Act is clear and that is to provide compensation to victims of crime. *Claimants to ex gratia payments are entitled to have their claims considered on a proper basis...*" 28 (emphasis added)

This would seem to adequately deal with the *ex gratia* issue, although, as will be seen shortly, the court's tone regarding this issue changed considerably when the Divisional Court decision was overturned on appeal.

**B. LEGISLATIVE INTERPRETATION: OBJECTIVE AND SUBJECTIVE DISCRETION**

Thus far we have examined some cases dealing with scope of review, more specifically the court's willingness to review exercises of discretion

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in administrative (as opposed to judicial) functions, and in *ex gratia* / supplementary (as opposed to "as of right") payments. Once these theoretical barriers have been crossed, the court will want to look very carefully at the legislation, as was done in the first portion of this paper, to determine the specific nature of the discretion in question. The courts have dealt with the many different types of discretion, in part, by attempting to categorize them as "subjective" or "objective". Is the discretion "subjective" in that the legislation provides no criteria for its exercise and no conditions precedent to its activation? Are there statutory duties attached to the discretion, or is it completely independent of any other legislative responsibility? Is the discretion tied to duties and confined by specific statutory criteria, thereby rendering it "objective" in nature?

"That this distinction is a relevant one to make becomes apparent when it is realized that the application by the courts of the doctrine of substantive *ultra vires*, in reviewing discretionary powers, depends upon the existence in the empowering legislation of criteria against which the decision-maker's choice can be measured. In the absence of such criteria, the doctrine of *ultra vires* is impotent."^{29}

The objective-subjective distinction is mentioned at this point because it provides a useful way of thinking about the different types of discretion under consideration, and because it is used implicitly by courts in their analysis of the specific grounds for finding an exercise of discretion *ultra vires*.

Briefly, it could be argued that only one of the discretionary powers in the General Welfare Assistance Act, under consideration in this paper, is truly "subjective" in nature. The otherwise objective tone of the powers is set in section 7(2) of the *Act* which requires Municipal assistance to "any other person" to be provided *in accordance with the Regulations*. This requirement immediately provides a court with a body of legislative "directives" to refer to in determining how the other discretionary powers in the legislation are to be exercised. The only exercise of discretion for which there are no statutory criteria is that of whether or not the municipality will provide the classes of supplementary aid and special assistance in the first place.

We therefore proceed into an examination of the specific grounds for judicial review of discretionary powers, with the understanding that once

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the municipality chooses to provide supplementary benefits at all, any exercise of discretion from then on has at least some specific objective criteria by which its legality can be judged.

C. GROUNDS FOR REVIEW: THRESHOLD ISSUES

(i) Consideration of Irrelevant Matters - Failure to Consider Relevant Matters - Exercise of Discretion for an Improper Purpose

As is typical in administrative law analysis, many of the grounds for review that are discussed in isolation seem to merge on actual application. For example, returning to the "10% policy" from the City of London, (example #3), one could argue that the consideration of whether or not someone was employed was irrelevant, since all income and work related expenses were to have been taken into account in calculating the applicant's available income. One could also argue that in applying the 10% rule the welfare administrator was failing to consider a relevant matter - the actual budgetary needs/income calculation.

In order to convince a court that this case was an appropriate one for review, (i.e. that an irrelevant matter had been used as the basis of a supplementary benefits decision) one would have to analyze the relevant legislative sections to assist the court in determining what matters would be relevant ones.

One could certainly argue that the "10% policy" violated both section 15(1) and section 143 of the regulations, outlined above. For example, in a public statement of the "10% policy" the municipal committee responsible for deciding welfare policy explained that in determining an applicant's eligibility for special assistance items, a provincial form is completed (to comply with s.13) on which income is compared to budgetary needs (including the cost of the requested item). That memorandum goes on to state:

"Where there are earnings defined as income realized through employment, an earnings exemption is applied in the completion of the form, allowing a certain amount of the earnings to be exempt from consideration. However, these clients are requested to pay 10% toward the cost of the requested item since they have benefited from exempted income."

(emphasis added).

Clearly, section 13 of the Regulations contains no provision for requiring an applicant to pay 10% of an item requested under special assistance or supplementary aid. It does permit some discretion to the welfare admin-
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istrator when he or she is allowing earnings exemptions, but this discretion is presumably to be used during an examination of the actual needs of the applicant and his or her family. According to the statement from the Committee, this permissible discretion has, in fact, already been used in the process of completing and assessing the provincial form, as it should be.

What seems to be left is simply the arbitrary application, to every request where earned income is present, of a requirement that the individual pay 10%. In fact, after conversations with several London residents who have been required to pay 10%, it appears that the policy is applied as rigidly as stated in the memorandum - in every situation regardless of the amount of earned income available. The practical consequence of this rigid application of a pre-determined policy is that a low-income wage earner, e.g. earning minimum wage, will be required to pay 10% of the cost of a wheelchair for her husband, as will a single disabled applicant who is only working a total of 8 hours a week. In other words, family situation and the amount of earned income, both relevant considerations, are not taken into account.

This result appears to be a violation of both the intent and content of the Regulations. The municipality may, under section 15, approve services or payments of special assistance, as London has done (item 10 on the London memorandum lists items that the municipality has approved). However, as has been shown, this assistance and any calculations used in determining eligibility must be done in accordance with the legislation. There is nothing in the Act or Regulations which permits a municipality to ignore or change the regulation relating to calculating available income. Nor is there anything that permits a municipality to fetter the discretion vested in the welfare administrator in this way. Once the welfare administrator has correctly completed the form, having calculated the income and having used his discretion in the areas of income exemptions and work-related expenses, this policy tells him to ignore the results of those calculations and require the applicant to pay 10% of the item regardless of the amount of available income.

In law, this amounts to requiring the administrator to ignore a relevant consideration (the results of his calculations) and take into consideration a factor that is irrelevant (simply whether the applicant "is employed", regardless of the amount of available income).

These two related grounds (irrelevant/relevant considerations) are often discussed in the same cases with yet another ground, that of exercising discretion for an improper purpose. For example, let us consider fact situation #4, where a Social Service Department refused to fund an appli-
cant's supplementary benefits request for a drug treatment program. A court is not likely to attack the policy of Metropolitan Toronto as expressed in the final decision in that case, (in spite of the bumbling way in which the application was handled). According to the policy, as stated in the memorandum from the Social Services Committee of the municipality, the Committee spent several months in consultation and meetings with interested parties deciding on priorities in this area. There was nothing arbitrary or unreasoned about the decision not to fund long-term treatment programs that were not covered by the Ontario Health Insurance Plan. Even if one does not agree with the content of this policy, the procedures used by the municipality in arriving at the policy would seem to be a fair and reasonable exercise of its discretion to allocate available resources. Also the decision would not be seen as an unreasonable interpretation of the purpose of welfare legislation.

There are a few interesting cases where exercising discretion for the purpose of saving money was viewed as improper. These are relevant to our analysis because this is so often the reason, either implicitly or explicitly, for a refusal of supplementary benefits. In the case of Re Doctors Hospital and Minister of Health the Divisional Court of Ontario ruled that a discretion exercised by the Minister of Health under the Public Hospital Act was ultra vires, in that it was exercised for an improper purpose. The Government of Ontario had determined that in order to reduce the funds expended for hospital care it would close certain hospitals. It chose to accomplish this by having the Minister of Health refuse to renew the approval that was required for the hospitals to continue in operation. The Court found that the legislation was regulatory in nature and its purpose was primarily to ensure proper staffing, management and operation of public hospitals.

"It has been held that even if made in good faith and with the best of intentions, a departure by a decision-making body from the objects and purposes of the statute pursuant to which it acts is objectionable and subject to review by the Courts... We have then determined from a review of the Public Hospitals Act and its history that it is regulatory in nature. Section 4(5) was not designed or intended to be used as a means of closing hospitals for financial or budgetary considerations... Since the Lieu-

30 It could still be argued, theoretically, that automatically excluding an entire category of assistance, without the option of considering exceptional cases, is a fetter on the municipality's discretion. See Policy Guidelines, 0405-03.

31 (1976), 68 D.L.R. (3d) 220.
tenant-Governor in Council in its decision took into account financial considerations, it considered extraneous matters that were beyond the objects and policy of the Public Hospitals Act.32

A similar outcome can be seen in the English case of Hansen v. Radcliffe Urban District Council.33 In this older case the local education authority, in an attempt to economize, tried to terminate its employment agreement with the plaintiff and others, and then re-hire them at reduced salary. The Education Act allowed the school authority the discretion to dismiss teachers on "educational grounds". The Court found that the desire to economize did not entitle the defendant to exercise its discretion as that was not an "educational ground".

It would seem possible to argue along these same lines against the London "10% policy". If the policy were coming from the welfare administrator alone it would clearly be an abuse, as his discretion is highly controlled by the legislation and does not extend to policy decision of this nature. His discretion simply lies in how he applies the legislation to the facts before him. Is it permissible for the municipality, however, to institute such a policy for the purposes of conserving municipal revenue? In addition to the arguments previously mentioned of taking into account irrelevant matters, or failing to consider the actual calculation arrived at in order to determine available income, could a court not also be persuaded that such a policy is in direct conflict with the purpose of welfare legislation? In other words, it is not improper for a municipality to arbitrarily attempt to economize on the backs of the poor when the purpose of the legislation is to provide for their "special" but still basic needs.

(It should also be noted that in the Hospital and Hansen cases obtaining evidence of the purpose behind the decision was not a problem. There were letters and clear statements of rationale for each decision available to the plaintiffs (or applicants). It is not always easy to prove the purpose for which a discretion is actually being exercised. This is especially true in the welfare area where policy manuals are considered

32 Ibid. at 230-232.

33 [1922] 2 Ch. 490. But see Price v. Rhonda Urban District Council, [1923] 3 Ch. 372, where the Court upheld the discretion of the school authority to terminate the employment of married women teachers, for the express purpose of providing employment for new teachers just completing their training but without any prospects of securing teaching positions. Under the Elementary Education Act the statutory power of the education authority was to be exercised so as to make tenure at the pleasure of the board; hence the purpose behind the decision was not for the Court to question.
"internal" documents to which the applicant has no access, and where reasons for decision are frequently not given.)

Again, in the more recent case of *Re Multi-Malls Inc. and Minister of Transportation and Communications* an exercise of discretion by a Minister was found to be improper because the Court decided that he acted upon extraneous and irrelevant considerations. His discretion, vested under the *Public Transportation and Highway Improvement Act* to issue or refuse to issue access permits to parcels of land abutting public highways, was exercised for an improper purpose. The Court of Appeal found that a refusal to issue a permit because the proposed use of the land conflicted with the municipality’s official plan was an irrelevant consideration under the legislation, the purpose of which was traffic planning. Of course, this case involved land use where our courts tend to be more willing to intervene anyway. There was also extensive correspondence available to give the Court some insight into the purpose behind the Minister’s decision.

At the opposite end of the "interventionist" scale is the Ontario Court of Appeal decision in *Re Sheehan and Criminal Injuries Compensation Board*. The applicant for compensation from the Board had been an inmate in Kingston Penitentiary where he was twice assaulted by fellow inmates. His application was denied by the Board primarily because he had been convicted of criminal offences himself and would not have been in the penitentiary in the first place had that not been so. (In other words, the Board did not consider him a very worthy recipient of an award.) The Divisional Court had decided that although the Board, under its enabling legislation, had very broad discretion to consider "any behaviour of the victim that directly or indirectly contributed to his injury or death", that the behaviour so considered by the Board had to be relevant to the injuries sustained. Therefore, the fact the Sheehan had undertaken criminal behaviour in the past, and was consequently in prison, was not relevant to the injuries that were the subject of the application. However, the Court of Appeal reversed the Divisional Court in a decision that permitted the Board great discretion in deciding what considerations were relevant to its decisions. The Court of Appeal decision was based, in part, on the very broad, subjective language of the *Law Enforcement Compensation Act*.

34 (1976), 14 O.R. (2d) 49.

35 *supra* note 28.
"s.3(1) The Board... may make an order in its discretion in accordance with this Act..."

And furthermore, the Board may:

s.5... "have regard to all such circumstances as it considers relevant, including any behaviour of the victim that directly or indirectly contributed to his injury or death." (emphasis added)

The Court of Appeal was dearly influenced by this subjective language in the Act. Justice Kelly wrote:

"In my opinion the Divisional Court erred when it considered that its task was to determine if the said circumstances were relevant. In the light of the discretion vested in the Board to have regard to all circumstances which it considered relevant so long as it acted in good faith, the decision of the Board as to what considerations are relevant is unreviewable..."36

However, the Court was willing to review a decision of the Board if it acted arbitrarily, capriciously, failed to observe principles of natural justice, or if it made relevant a consideration which is "patently irrelevant". This Court was obviously much less willing than was the Divisional Court to review the decision of the Board with any high level of intensity. Unfortunately, it is obvious that part of the Court's reluctance to intervene was also based on what the Court perceived as an ex gratia award:

"It should be emphasized that this is not an instance where the Board has a precise jurisdiction within which it may, by its discretion, hold that an applicant is one entitled to his rights granted under statute, regulation or contract. The applicant has, under this legislation, no right to compensation, his right being limited to making an application therefore to the Board."37

There are strong arguments to be made that this was not, in fact, an ex gratia award. Furthermore, other Courts seemed to be moving in the direction of the Divisional Court's earlier reasoning in this case, that even claimants to ex gratia payments are entitled to have their claims considered on a "proper basis."


37 Ibid. at 732.
It is important to note that the legislation in this case was much less objective than the welfare legislation we have been analyzing. There was much less legislative direction to the Board in how its discretion should be exercised and there were no regulations at all - in other words, there are fewer "hooks" for a Court to hang its "ultra vires hat" on in the review process.

It is interesting that subsequent to the Sheehan case the Compensation For Victims of Crime Act was amended so that now the Board "shall have regard to all relevant circumstances". Also, in the more recent case of Dalton and Criminal Injuries Compensation Board the Divisional Court ruled that the Board, in failing to consider the extent of the victim's injuries, had failed to consider a relevant circumstance. The case was not appealed.

(ii) Effect of Failure to State Reasons

Although failure to state reasons is not a ground for reviewing an exercise of discretion (unless the legislation requires reasons) it is an issue that must be dealt with by the courts in reviewing for abuse on other grounds. Basically, where the court sees a valid ground for review, the absence of reasons will not deprive the applicant of his action. This is especially true where there is an appeal available from the initial decision, as the courts will not allow the decision maker to deprive an individual of a statutory right of appeal by not providing reasons. Some courts have drawn a negative inference from the decision maker's refusal to give reasons and have inferred an improper reason for the exercise of his or her discretion. This raises the possibility that a court might draw such an inference when a welfare administrator refuses to give reasons for a negative decision on an application for supplementary benefits, as occurred in fact situation #2. Although the welfare Act does not require reasons, and does not provide a right of appeal in these cases, it does stipulate in section 10(2) the conditions under which a welfare administrator can legally refuse or cancel assistance. Where the applicant can show prima facie eligibility for assistance a court may infer that none of the conditions in s.10(2) were present and that the administrator is therefore improperly exercising his or her discretion.

38 Compensation For Victims of Crime Act, R.S.O. 1980, c.82, s.17(1). (emphasis added).
For example, in the case of Minister of National Revenue and Wrights' Canadian Ropes Ltd., (on appeal from the Supreme Court of Canada), the Privy Council inferred an arbitrary exercise of discretion when the Minister disallowed business expenses, which in his discretion he determined to be in excess of what was reasonable or normal for the business in question, but where he refused to disclose the report and recommendation of the local tax inspector.

"Their Lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action under section 6(2). But this does not necessarily mean that the Minister by keeping silence can defeat the taxpayer's appeal... The court is... always entitled to examine the facts which are shown in evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the court insufficient in law to support it, the determination cannot stand. In such a case the determination can only have been an arbitrary one... The only inference which... can legitimately be drawn from the available evidence is that apart from the documents which were before the court, the Minister had no material before him which influenced his mind in making the determination he did."  

Again, in the important case of Padfield v. Minister of Agriculture, Fisheries and Food, the Privy Council addressed the issue of whether a Minister must give reasons for his decision where it is not required by the legislation. In this case the Minister refused to exercise his discretion to refer a complaint by producers, who were controlled by a Milk Marketing Scheme, to a committee of investigation. Although the Minister did give the reason that he did not feel this complaint was a suitable one for investigation, he would go no further and contended that he was not required to give any reasons at all. Lord Reid said:

"It was argued that the Minister is not bound to give any reasons for refusing to refer a complaint to the Committee, that if he gives no reasons his decision cannot be questioned, and that it would be very unfortunate if giving reasons were to put him in a worse position. But I do not agree that a decision cannot be questioned if no reasons are given. If it is the Ministry's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case..."
that that had been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act.\footnote{supra, note 24, at 1032-1033. Of course, this decision came from a very active court dealing with what it perceived as an important economic issue. On the positive side, the welfare legislation under examination here is much less subjective and the court would be dealing with a municipal body and welfare administrator, not a Minister.}

(iii) Failure to Exercise Discretion: Fettering

Where a discretion is given to a tribunal or individual, the formulation of general rules as to the manner in which the discretion is to be exercised may be inconsistent with its proper exercise. This does not necessarily operate to prohibit the formation of a general practice, as long as hard and fast rules are not applied indiscriminately without regard to the facts of the case at hand. This is a particularly important consideration in the administration of law where thousands of applications must be processed each year, and some degree of efficiency is required. However, as case law indicates, the interests of efficiency, and even consistency, cannot be allowed to operate so as to fetter the holder of a discretion in the responsibility to consider each application that comes before him or her with an open mind.

This is probably the most fertile approach to take in any Divisional Court application based on the examples previously given. It would be difficult to see how a rigid application of the London "10% policy" could not be viewed as a fetter on the exercise of the welfare administrator's discretion to provide supplementary benefits in accordance with the legislation and the needs of the individual applicant. There are a number of interesting English cases dealing with the application of rules or policies which inhibit a welfare administrator's proper use of discretion.

In the case of \textit{R. v. Greater Birmingham appeal Tribunal, Ex parte Simper} \footnote{[1974] 1 Q.B. 543.} the applicant had been receiving welfare for several years. In addition to the basic allowance she was receiving an extra sum of 35p per week for heating, which was an adjustment used where the basic amount for a particular expenditure did not meet the actual expenditure, as authorized under paragraph 4 of the \textit{Act}. After two years of receiving welfare she became entitled to an additional payment of a maximum of 50p per week under paragraph 12, the purpose of which was to provide for
certain things which were needed in cases of long term poverty. The Act required the welfare commission "shall have regard to" other payments when using its discretion in awarding an amount under paragraph 12. The commission's procedure was to "have regard to" any amount received under paragraph 4 (35p) and automatically deduct it from the 50p allowable under paragraph 12. In other words, rather than receiving the additional 50p under paragraph 12 she only received an additional 15p. The applicant's solicitor argued that the commission had laid down a hard and fast rule rather than using its discretion, having regard to the needs of the individual applicant. The Court agreed:

"... the person making a determination of the sum of money due should exercise a broad judgement to ensure that in fact there is no overlapping, but that he ought not to proceed simply on a rule of thumb that exact deductions should be made."43

A second English welfare case provides another pertinent example of a welfare authority wrongly applying general rules. In R. v. Barnsley Supplementary Benefits Appeal Tribunal, ex parte Atkinson 44 there were actually two pre-set rules applied by the welfare commission to an application for summer welfare from a student. The first rule used was to deduct from his basic allowance a notional sum for maintenance because of his father's income (on the assumption that his father was providing that amount to him for the summer vacation.) Further, because of the Commission's view that maintenance of students was not a proper function of the welfare scheme, it deducted a further amount from the applicant's allowance of the basis that being a student constituted "exceptional circumstances" that it was entitled to consider under the Act. The relevant section of the legislation was very broad:

"Where there are exceptional circumstances, (a) benefits may be awarded at an amount exceeding that (if any) calculated in accordance with the preceding paragraphs; (b) a supplementary allowance may be reduced below the amount so calculated or may be withheld; as may be appropriate to take account of those circumstances."

The Court of Appeal decided that the commission could not apply an inflexible rule of deducting set amounts from the welfare benefits of students on the assumption that their parents were providing a sum for their maintenance during the vacation. For the sake of convenience in

43 Ibid. at 549.
processing student applications, the commission could begin with this assumption. However, it must be a rebuttable presumption and open to the student to show the commission that his or her parents cannot or will not provide the sum in question. Second, on whether "being a student" should be considered an "exceptional circumstance" the court wrote:

"It cannot be right... for the commission... to invoke the discretion under paragraph 4(1)(b) to justify discrimination against a whole class of persons... The trend of contemporary legislation, and indeed of generally accepted contemporary social attitudes, is firmly opposed to such discrimination. Wide as the phrase "exceptional circumstances" may be, it must... have been used in paragraph 4(1)(b) in reference to the particular circumstances of individual cases. For these reasons we think that the commission... if they deducted £1 from the claimant's weekly benefit on the ground that the fact of his being a student was an "exceptional circumstance", acted on an erroneous principle which justifies the intervention of the court."  

It is interesting to note that the court in Ex parte Atkinson looked to the "Supplementary Benefits Handbook" (i.e. policy manual) to determine how to define "resources" as used in the legislation.

(iv) Use of Policy Guidelines

This leads to a discussion of the subsidiary issue of the legal import of policy manuals, which are so frequently used by administrators to decide issues in the welfare area. As was previously mentioned, section 3 of the Act requires the Director of Income Maintenance of the Ministry to "exercise general supervision over the administration of the Act and the Regulations and [to] advise municipal welfare administrators... as to the manner in which their duties under this Act are to be performed." One of the ways the Director performs this duty is through the publication of a policy manual. In addition, because the Act treats Supplementary Aid...
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(as opposed to Special Assistance) in such a cursory fashion, municipalities are directed to produce their own written policy outlining the requirements for obtaining Supplementary Aid. It is unfortunate that rather than using policy manuals to inform the interested public of "the rules of the game" most municipalities consider their manuals as secret documents. The value of open, informative policy manuals is discussed in the literature. The legal issue surrounding policy manuals is whether they carry the force of law, in other words, whether they are binding, whether they can give rise to procedural obligations, or whether they can be used as evidence of the matters that may legitimately be considered in the exercise of discretion. Sometimes the evidence in question is not an organized policy manual, but just circulars or letters of guidance on policy matters from local or regional authorities. (This was the case in fact situation #1, where the municipal practice was to require applicants for supplementary aid to cost share the expense with the municipality.) Some cases discuss whether or not the policy guidelines in question were produced as a requirement of the enabling legislation. Arguably, under section 3 of the welfare Act, the provincial policy guidelines for the municipal welfare administrators are produced as part of the Director's mandatory responsibility to advise them in their duties.

This issue is discussed in the Supreme Court of Canada case, Martineau and the Matsqui Inmate Disciplinary Board where policy directives to the Board, containing certain procedural rights and safeguards that were to be afforded inmates during disciplinary hearings, were not followed. In a split decision the majority decided that "while they are authorized by statute, they are clearly of an administrative, not legislative, nature. It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity."

The weight of authority seems to be that policy guidelines of the type issued for welfare administrators are not binding but can be used as further evidence as to what matters should be considered in exercising a discretion. Policy guidelines might even be used to show an absence of good

46 See, for example, Molot, "The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion", (1972), 18 McGill LJ. 310.


faith on the part of the municipality or welfare administrator. For example, correspondence is available from the London Welfare Administrator to applicants, in which they are told that the Municipality "is not permitted" to spend more than $500 on any individual in one year for supplementary benefits. The policy guidelines could be used to show that this is simply not true and that what is required in expenditures over $500 is simply the "rubber-stamped" approval of the area manager for the Ministry. 49

IV. POSSIBLE ALTERNATIVE APPROACHES

Supplementary benefits under the General Welfare Assistance Act of Ontario provide low income wage earners and recipients under income maintenance programs with one of the only avenues for obtaining a variety of items that are clearly basic to everyday living. However, the legislature of the Province has seen fit to include these types of items under Supplementary Aid and Special Assistance.

In very practical terms this means that individuals in need are at the mercy of their municipality and municipal welfare administrator. This produces grossly unfair results with great inconsistencies in services provided from one municipality to the next and unconscionable hardship to residents in less generous or less wealthy areas. While this is often blamed on discrepancies in the tax base between heavily populated, urban centres and poorer rural municipalities, this factor certainly does not always account for differences in services provided to needy applicants.

For example, the financial data on municipal welfare expenditures shows that the City of London, with a population of 283,670 50 spent $71,327 in supplementary aid and special assistance in the 1983 fiscal year. (This figure represents actual municipal dollars spent after cost-sharing.) Thunder Bay, on the other hand, with a population of 121,380 spent $107,871 for supplementary benefits in the same time period.

This means that Thunder Bay, with a population only 42% the size of London's, spent approximately one-third more in discretionary aid. Al-

49 Further evidence of "bad faith" occurs where the City of London welfare department finally issues a voucher for 90% of the cost of the requested item and the voucher is stamped "valid for 24 hours".

The author was informed, shortly after the research for this paper was completed, that the City of London had changed a number of the welfare policies that have been examined here.

50 Population figures are for 1982, supplied by the Ontario Ministry of Culture and Tourism.
though these figures represent only two municipalities, they at least show that something other than size accounts for the disparities in welfare services that exist across the Province. It is interesting to note that London has one of the worst reputations in the Province for providing social services to its needy citizens, while Thunder Bay is known for a more cordial relationship with its well-organized and active disabled community. These reputations seem to be borne out in the statistics.

There is a strong movement among administrative law academics to encourage improvement in the way discretion is exercised, by creating change from within the system rather than by relying on the courts, because (these authors are quick to point out) judges often lack the background and understanding of the issues to make a well reasoned judgement. In addition, they say, structuring of discretion at this level has a more pervasive effect as opposed to judicial review, which is often seen as a "band-aid" approach to the problem.51

In an effort to improve the fairness and efficiency of discretionary decision making, administrators are told to develop standards at the earliest possible time and then try to further confine their discretion through principles and rules. In the early development of standards an approach should be adopted that allows for full participation of interested parties, and the resulting rules, by which the discretion will be exercised, should be available to the public. In other words, the affected parties should help define the rules by which the game will be played and have those rules at their disposal, for the purposes of compliance or challenge, as the case may be. The goal of all of this careful structuring of discretion is multi-facted: to allow an efficient exercise of discretion where hundreds and even thousands of decisions must be made each year; to allow for a greater degree of consistency within that body of decisions; and, in other ways, to increase the level of fairness to the applicants.

There is no question that these are admirable goals. The difficulty lies in the fact that most of the administrative structures referred to by these academics involve "high-profile" tribunals or agencies like the Canadian Transport Commission or the Canadian Radio-television and Telecommunications Commission. The parties who are directly affected by these commissions are primarily large corporations with enormous resources and power. They are fully prepared, with a large legal staff in

tow, to participate in every way possible in the initial development of standards for the exercise of the commission's statutory discretion. Furthermore, once the standards and subsequent rules are in place, these participants have the ability to monitor the system to ensure that discretion is being exercised in compliance with the rules, that exceptions are being considered etc.

Due to the nature of the parties coming in contact with these "high profile" agencies there is often, in addition, recognition of some procedural rights that should be afforded. Right to notice of hearings, right to make submissions, right to certain information and reports prepared by government and the right to reasons for the ultimate decision are just a few procedural rights that are almost common place in administrative agencies of this nature.

Contrast this scenario to the one involving the exercise of discretion by a welfare administrator. This is really a different brand of administrative law to which little attention is paid, either politically, or by most lawyers, academics and the media. Welfare recipients are, for the most part, poor, unorganized and powerless. There are no demands heard for participation in the rule making process, and if there were they would be summarily dismissed as coming from "bleeding heart liberals who have no idea of what life in the bureaucratic front-line is really like". Even if there were some mechanism for participation in the processes of establishing priorities and determining assessment procedures in awarding supplementary benefits, it would be difficult to get interested citizen input. Agency contributions (e.g. from community health clinics, legal clinics, and some consumer rights groups) would undoubtedly be forthcoming, but individual participation is difficult when the affected individual does not have money for bus tokens to get to the meetings.

The importance that government attaches to a particular administrative process is sometimes reflected in the procedural safeguards provided to the applicant. In the area of supplementary benefits there are no procedural rights, in the strict sense. There is no right to make submissions, no right to a review board hearing, no statutory right to reasons, no right to anything except to take whatever is given, be grateful and, preferably be quiet.

As long a society sees braces and wheelchairs, eye glasses and dentures, transportation to medical appointments, clothes for infants, surgical supplies and home oxygen equipment as optional by-products of its largess, then there will be no procedural safe-guards, no meaningful limitations on discretion, no open policies of participation and public distribution of rules. The only safeguard that is available for the powerless, those
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without money, influence, or organization, is judicial review. Granted, judges are a product of the society in which they live, and often mirror the prevailing values. However, assuming the remedy is there, not to use it because it is not a panacea to all the problems in the system, shows callousness to the needs of individual applicants and a failure to recognize the possible, systemic ramifications of one or two successful test cases. (A discussion of the possible unavailability of even this remedy, due to a lack of legal representation for the majority of welfare recipients, will have to wait for another paper.)

Of course it is not being suggested that every detail of a supplementary benefits request should become the subject of an application for judicial review. However, a few well argued cases, based on good fact situations, would hopefully begin to convince municipalities and welfare administrators that they are, indeed, bound by certain legal principles even in the exercise of their discretion.

There are other avenues that could be pursued. The Provincial government should be encouraged to make supplementary benefits reimbursed at 100%, rather than 50% or 80% (depending on the class). This would result in consistency across the Province in the provision of basic, required items and services that no one should be denied. One senior official in the Ministry stated that "Relatively speaking, making supplementary benefits 100% cost-shared would not be an expensive item in our budget."

In addition, section 13 of the Act might possibly be used to some benefit. It states that "a municipality or the Province may provide assistance by way of supplementary aid..." (emphasis added). Although this section has never been used to allow individuals in municipalities to apply directly to the Province for supplementary aid, there is no reason it could not be. The Ministry's position is that the section was included in the Act to permit the Province to supply supplementary aid in areas where there are no municipalities. Apparently in the northern part of the Province the Ministry provides supplementary aid in a fairly generous fashion, comparatively speaking. Why could an applicant living in London, who had been denied supplementary aid by the municipality, not apply directly to the Province? If the Province denies the application, but would have granted it in the case of an applicant from northern Ontario, is this not denial of "equal benefit" of the law? This is men-

52 For a discussion of certain caveats concerning the type of cases that a court is likely to hear in the welfare area see the English Supplementary Benefits case, R. v. Preston Supplementary Benefits Appeal Tribunal, Ex parte Moore, [1975] 1W.L.R. 624.
tioned only to indicate that even the Charter should not be ignored as a possible tool in this area.

The final comment comes from the late Chief Justice Laskin who provided in *dicta*, in his dissenting opinion in the *Martineau* case, a useful answer to the traditional "floodgates" argument (so often heard regarding judicial review of welfare matters):

"It is irrelevant to suggest that if the respondent's decision is overruled there will be a flood of similar applications... it is more likely that other tribunals would realize that they are expected to follow their own rules of procedure."}\(^{53}\)

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\(^{53}\) *supra*, note 48, at 119.