

DISCRETION

“Discretion” expresses the idea of an express legal power to choose a particular course of action from a range of permissible alternatives including inaction. According to Justice L’Heureux-Dubé in ***Baker v. Canada (Minister of Citizenship and Immigration)***, “the concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries.”¹

In this sense, there is no clear interpretation of a discretionary power that produces a “correct” answer to a specific issue. The decision-maker must often resolve apparent ambiguities in statutory language by filling in the blanks in a way that is consistent with the overall objectives of the statute.²

ABUSE OF DISCRETION

Prior to the Supreme Court of Canada’s decision in ***Baker*** it was generally thought that judicial review of discretionary decisions was based on different principles than review of errors of law resulting from misinterpretation of more specific legislative powers. Justice L’Heureux-Dubé who wrote the majority judgment in ***Baker*** recognized this explicitly. She stated that:

Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, ***Maple Lodge Farms Ltd. v. Government of Canada***, [1982] 2 S.C.R. 2, at pp. 7-8; ***Shell Canada Products Ltd. v. Vancouver (City)***, [1994] 1 S.C.R. 231. A general doctrine of “unreasonableness” has also sometimes been applied to discretionary decisions: ***Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation***, [1948] 1 K.B. 223 (C.A.).³

These doctrines are summed up by the concept of abuse of discretion.

¹***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817, 8522.

²See D. Mullan (ed.), *Administrative Law*, 5th ed. (Toronto: Emond Montgomery, 2003) at 950.

³*Baker, supra*, at 853.