

Canadian Institute for the Administration of Justice  
Institut canadien d'administration de la justice

2016 National Roundtable on Administrative Law

# **Charter Values in Statutory Interpretation and in the Exercise of Discretion**

Mr. Justice Harvey M. Groberman  
British Columbia Court of Appeal

# Supremacy of the *Charter*

## Section 52(1) of the Constitution Act, 1982:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force or effect.

# Ability of Tribunals to Apply the *Charter*

- Administrative tribunals that have jurisdiction to determine issues of law can grant remedies under s. 52

*Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54

- Where particular remedies are within the general jurisdiction of such a tribunal, it may also grant them as remedies under s. 24 of the Charter

*R. v. Conway*, 2010 SCC 22

## *Charter* Values in Statutory Interpretation

- The *Charter's* role is not confined to rendering legislation inoperative. It is also an interpretive tool
- Where a statute is equally susceptible of two interpretations, the one that is consistent with the *Charter* is generally to be preferred
- The *Charter* cannot be called upon to create ambiguity when none is otherwise present

# *Charter Values* in Statutory Interpretation

- More generally, statutes are to be interpreted in accordance with *Charter* values
- Confusingly, the phrase “*Charter* values” is used in the case law both to refer to:
  - the underlying fundamental values reflected in the *Charter*; and to
  - the *prima facie* rights set out in ss. 2 – 23 of the *Charter*

# The Fundamental Values

- In general, the fundamental values do not give rise to difficulties
- The use of fundamental values as an interpretive tool long pre-dates the *Charter*
- The Supreme Court has not provided a comprehensive enumeration of *Charter* values, but has indicated that they include:
  - Liberty
  - Human dignity
  - Equality
  - Autonomy
  - Enhancement of democracy

*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37

# Individual *Charter* Rights

- Arguments that statutes should be interpreted in such a way as to respect individual *Charter* rights will usually be targeted, so the tribunal will have some assistance
- In any event, given that lack of deference by the courts, it may not matter what the tribunal does!

# No Margin of Appreciation for *Charter* remedies

- Administrative tribunals do not enjoy any margin of appreciation in respect of their interpretation of constitutional protections. The standard of review is correctness.

*Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 58

- On the other hand, a specialized tribunal may be entitled to deference on factual issues and characterizations.

*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16

# Administrative Action is Subject to the *Charter*

- Orders of statutory decision makers are subject to *Charter* scrutiny
- Tribunals must not make orders that are contrary to the *Charter*

*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038
- The task for the tribunal is to balance the values reflected in the *Charter* right with the justifiable demands of its own statutory regime

# Deference to the Tribunal

- The tribunal is will ordinarily be entitled to deference on the issue of whether an order is justifiable in light of a *Charter* right

*Doré v. Barreau du Québec*, 2012 SCC 12

# The Balancing Process

- As described in *Doré*, the balancing process is as follows:
  - First, the tribunal considers the objectives of the statutory regime it is applying
  - Next, it considers any infringement of *Charter* rights or values that its order may cause
  - The tribunal then balances the severity of any interference with *Charter* protections against the statutory objectives of the regime

*Doré*, paras. 55-6

# Consequences of the Balancing Process

- The deference afforded the tribunal makes it clear that the tribunal's assessment is of importance
- There are, however, some difficulties with the demands of a balancing process:
  - The tribunal must recognize the existence of a *Charter* issue
  - The tribunal must consider the contours of the *Charter* right; this may require substantial resources

# Identifying *Charter* Issues

- To date, most challenges to exercises of administrative discretion have focussed on certain concrete (and expansive) *Charter* rights:
  - Freedom of Conscience and Religion
  - Freedom of Expression
  - Freedom of Association

## Problematic *Charter* Issues

- The biggest interpretive problems will arise in cases involving rights under s. 7 (life, liberty, security of the person) or 15 (equality)

## How Much Analysis is Required

- While *Doré* appears to expect an explicit balancing process to be included in the tribunal's reasons, this might not always be necessary
- The tribunal will, of course, provide reasons for its discretionary decision
- The balancing will typically be implicit in the reasoning

## How Detailed Must the Balancing Be?

- Ordinarily, the tribunal's assessment of the weight to be accorded to the statutory purpose and the weight to be accorded to the *Charter* right will be obvious
- It is unlikely that a detailed explanation of the weighing process will be required

## What Analysis is Crucial

- The tribunal will, however, need to show some awareness of the place of its discretionary order in the statutory scheme
- It will also be best for the tribunal to explicitly acknowledge any *Charter* issue