The Standalone Charter Challenge Post-*Doré*

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Overview

- Charter Challenges to Delegated "Legislation"
  - *Slaight Communications* / *GVTA*
  - *Doré* / *Loyola* / *TWU*
  - Conflicting Case Law in Ontario
    - *Christian Medical*
    - *Alford*
    - *Williams v. Trillium Gift of Life*

Slaight Communications

- *Slaight Communications v. Davidson*, [1989] 1 SCR 1038
- "Prescribed by law" – distinguishes between Charter limits occurring:
  - As a result of law (generalized norm) → intelligble
  - As a result of discretion (individualized decision) → *vires*
- Not always easy to apply in practice
- *Multani v. Commission scolaire Marguerite-Bourgeoys*
  - Majority: Same requirements should apply to norms and individualized decisions
  - Concurring reasons: Admin law approach should be applied to decisions and order

GVTA

- Prescribed by law" for the purposes of S. 1
  - Binding rules of general application
  - Accessible and precise to those to whom they apply
  - The policies are not administrative in nature, as they are not meant for internal use as an interpretive aid for "rules" laid down in the legislative scheme. Rather, the policies are themselves rules that establish the rights of the individuals to whom they apply.
- Limits described to be "legislative in nature" and therefore "prescribed by law" within the meaning of s. 1

Doré

- Context: Individualized decision in an adjudicative context
- Reference to *GVTA*:
  - [37] The more flexible administrative approach to balancing *Charter* values is also more consistent with the nature of discretionary decision-making. Some of the aspects of the *Oakes* test are, in any event, poorly suited to the review of discretionary decisions, whether of judges or administrative decision-makers. For instance, the requirement under s. 1 that a limit be "prescribed by law" has been held by this Court to apply to norms where "their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 (CanLII), [2009] 2 S.C.R. 295, at para. 53).

Doré / Loyola

- Distinction between general norms and individualized decisions remains:
  - When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference…When a particular "law" is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application.
- New test to be applied to individualized decisions:
  - If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.
- *Loyola*
  - Context: Request for an exemption
  - Effect: a decision that has a disproportionate impact on Charter rights is not reasonable

TWU

- *TWU 1* and *TWU 2*: Breakdown of the *Doré* consensus
  - Concurring and dissenting reasons:
    - Focus on *Charter* rights, not *Charter* values
    - Return to *Oakes*

Available Procedures

- For a litigant seeking to challenge a policy on *Charter* grounds in Ontario:
  - Standalone action or application seeking s. 52 declaratory relief (Ontario - R. 14.05)
  - Application for judicial review (Ontario - *JRPA*)

Williams v. TGLN

- Trillium Gift of Life Network Policy - “Adult Referral and Listing Criteria for Liver Transplant”
  - One of the criteria is that an individual who requires a liver because of Alcoholic Liver Disease must not have consumed alcohol in the six months prior to his or her placement on the list. (“Listing Criteria” or Six Month Rule)
- Application under R 14.05 seeking a declaration under s. 52 of the *Constitution Act, 1982* that the Listing Criteria infringe ss. 7 and 15 of the *Charter*

Williams v. TGLN

- Motion by TGLN to transfer application to Divisional Court and effectively convert to JR: 2019 ONSC 6159 (CanLII)
  - Argument: The creation of the Listing Criteria was an exercise of statutory power and any challenge should proceed by application for judicial review
  - *Doré* would be argued to apply

Williams v. TGLN

- *Christian Medical* (2018 ONSC 579 (Div Court)): Requests for declaratory and other relief pertaining to the exercise of statutory power to enact a policy should, unless confronted with a situation of urgency, be brought by way of an application for judicial review
  - Para. 47, citing *J.N. v. Durham (Regional Municipality) Police Service*, 2012 ONCA 428)
- *Alford v. LSUC* (2018 ONSC 4269)
  - Challenge to Statement of Principles: Relief sought not limited to s. 52 declaration
  - Distinguishes regulations from policies
  - *GVTA* has no relevance

Williams v. TGLN

- *Di Cienzo,* 2017 ONSC 1351 (per Belobaba J.): While applications for a declaration under s. 52 can be heard in Div Court, the Superior Court maintains jurisdiction in such matters
  - The existence of a possible parallel route by way of judicial review does not nullify the Superior Court's well-established jurisdiction to hear a *Charter*-based constitutional challenge to subordinate legislation by way of a Rule 14.05 application.
- Context: Regulation

Williams v. TGLN

- Distinguished *Christian Medical* and *Alford*:
  - None of the cases relied on by Trillium involved a simple constitutional challenge seeking a s. 52(1) remedy unaccompanied by requests for other remedies
  - Adopted *Di Cienzo*
  - Power to transfer to Div Court discretionary
- Motion dismissed

ONCA

- *Christian Medical,* 2019 ONCA 393, para. 60:
  - I would leave for another day the question of which standard of review and framework [*Doré* vs. *Oakes*] ought to be applied in these circumstances

- *Gehl v. Canada (Attorney General),* 2017 ONCA 319:
  - The Draft Policy is properly characterized as an exercise of administrative discretion. It was an informal and internal document, adopted by the Registrar to assist departmental officials when making determinations of entitlement to registration. It was administrative rather than legislative in nature: see *Greater Vancouver Transportation Authority*, [2009] SCC 31, at paras. 58-66

Conclusion

- Stand-alone Charter challenge remains viable from a procedural standpoint
  - Need to fall within requirements of *GVTA*
    - Authorized by law
    - Binding rules of general application
    - Sufficiently accessible and precise to those to whom they apply
- Application to other forms of delegated "legislation":
  - Regulations, municipal by-laws, policies, OICs
- Reconciling with *Multani / Doré*
  - Burden of proof
  - Scope of admissible evidence