

## Charter Rights and Charter Principles: The Interpretation and Exercise of Statutory Powers

Lorne Sossin, Faculty of Law, Univ. of Toronto  
Judicial Education Seminar  
Canadian Institute for the Administration of Justice  
Toronto, June 17, 2004

## Outline

- What is the relationship between *Charter* values, statutory interpretation and statutory discretion?
  - *Charter* principles and administrative discretion
    - *Slaight*
  - *Charter* principles and balancing rights
    - *Trinity Western*
    - *Chamberlain*
  - *Charter* principles and judicial methodology
- Questions arising from the role of *Charter* principles in Canadian administrative law

## Charter Principles & Discretion

- In *Slaight*, the Court stated that administrative discretion may be challenged under the *Charter* on one of 2 tracks:
  - 1) where the discretion could have been exercised in a fashion consistent with the *Charter* and was not, the decision is challenged;
  - 2) where the discretion could not have been exercised in a fashion consistent with the *Charter*, the statutory grant of discretion itself is challenged.

## Charter Principles & Discretion (2)

- As a consequence of *Slaight*, every discretionary decision-maker is deemed to be under an obligation to interpret and apply their authority with *Charter* rights in mind. This raises a series of questions:
  - How are discretionary decision-makers to weigh competing *Charter* rights?
  - What role should and do s.1 concerns have in this administrative exercise of discretion? When is discretion "prescribed by law"?
  - Do all discretionary decision-makers have the capacity to undertake a *Charter* analysis?
  - What obligations arise in preparing guidelines and manuals with *Charter* rights and obligations in mind? Are these "soft law" instruments subject to *Charter* scrutiny? Should they be? (e.g. *Little Sisters*)

## Charter Principles & Balancing Rights

- What are *Charter* principles? How do they differ from *Charter* rights?
- "Though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*." *Baker*, para. 56

## Charter Principles & Balancing Rights (2)

- A comparison of *Charter* principles and *Charter* rights in judicial review of administrative action:
  - *Trinity Western*
  - *Chamberlain*

## Charter Principles & Balancing Rights (3)

- **Trinity Western** (Supreme Court issues mandamus order compelling BC College of Teachers to issue TWU approval of its teacher education program, notwithstanding TWU prohibition of practices that are "biblically condemned", including homosexuality)
- Court held BCCT had jurisdiction to consider whether TWU policies were discriminatory, but that in doing so, the Board incorrectly failed to balance freedom of religion and conscience with the right to equality.
- L'Heureux-Dubé J., writing for herself, dissented and argued that the *Charter* analysis should not be conflated with the administrative law analysis. Under the *Charter*, she would have found a s.2(b) violation in the Board's decision but one justified under s.1

## Charter Principles & Balancing Rights (4)

- "A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict ... *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights." from *Trinity Western*, para. 31

## Charter Principles & Balancing Rights (5)

- **Chamberlain** (Supreme Court quashed as unreasonable a decision by a school board declining to approve three books for K-1 curriculum which depicted same sex families – in part because the board had failed to apply the principle of "secularism" contained in the Act)
- Gonthier J. (Bastarache J. concurring) dissented on the application of the reasonableness standard
- Lebel J. concurred but would have not applied the pragmatic and functional approach in reaching the standard of review

## Charter Principles & Balancing Rights (6)

- "However, in the case at bar, the Board made a largely factual determination with a view to balancing local parental concerns against the broad objective of promoting *Charter* values such as tolerance and respect through a comprehensive educational program spanning several years. In my view, this is the very kind of polycentric decision described by Bastarache J. in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, and should thus attract greater deference." *Chamberlain*, para. 143 (per Gonthier J. dissenting)
- Courts are well placed to resolve human rights issues. Hence, where the decision to be made by an administrative body has a human rights dimension, this has generally lessened the amount of deference which the Court is willing to accord the decision... Different types of human rights issues do, to be sure, play out differently. So the extent to which deference is lessened by the presence of a human rights issue will vary from case to case. The relevant question should always be whether the courts have an expertise equal to or better than that of the board, relative to the particular human rights issue that is faced. *Chamberlain*, para. 11 (per McLachlin C.J. for the majority)

## Charter Principles & Balancing Rights (7)

- Standard of Review concerns:
  - Does the mere raising of *Charter* values by a decision-maker automatically result in a correctness standard of review (in light of the conflicting signals of *Barrie*, *Trinity Western* and *Chamberlain*)?
  - Should the *Charter* aspects of judicial reviews be treated separate from the administrative law aspects?
- Fairness concerns:
  - Where a decision-maker is interpreting and applying *Charter* values, does a constitutional requirement of independence and/or impartiality arise? In light of *Ocean Port*, when is such a constitutional requirement triggered? Is it acceptable to have policy-making bodies (potentially appointed according to political criteria) develop and apply *Charter* principles?

## Charter Values and Judicial Method

- Are *Charter* values "influential authority" in statutory interpretation in administrative law; if so, how does this differ from international human rights norms or international customary law? (*Baker*)
- *Charter* values exert influence even where *Charter* rights are not at stake; for example, the Supreme Court has held that the development of the common law must remain "true" to *Charter* values (*Hill*, *Pepsi-Cola*, *Halpern*). Presumably, this logic applies with even greater force with respect to administrative law
- The Supreme Court has also applied the reverse logic, and developed procedural rights under the *Charter* under the influence of the common law (*Singh*, *Blencoe*, *Suresh*)

## Charter Values and Judicial Method

- "The *Charter* constitutionally enshrines essential values and principles widely recognized within Canada, and more generally, within Western democracies. *Charter* rights, based on a long process of historical and political development, constitute a fundamental element of the Canadian legal order ... the *Charter* must thus be viewed as one of the guiding instruments in the development of Canadian law." (*Pepsi Cola*, para. 18)

## Concluding Questions

- Can and should *Charter* principles be unhinged from *Charter* evidence, onus and burdens of proof, etc
- Do administrative decision-makers attract deference for their distinctive mandate and capacity to weigh and balance *Charter* values (even where they have neither the mandate nor the capacity to apply the *Charter*), or can we never say that a tribunal has expertise on *Charter* principles relative to courts?
- If all tribunals are part of the "policy-making" process, per *Ocean Port*, whose policy preferences relating to the *Charter* are being advanced?

## Table of Cases

- *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
- *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710
- *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130
- *Little Sisters Book and Art Emporium v. Canada*, [2000] 2 S.C.R. 1120
- *RWDSU v. Pepsi-Cola*, 2002 SCC 8
- *Trinity Western University v. B.C. College of Teachers*, [2001] 1 S.C.R. 772
- *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038

## A Preliminary Bibliography

- Sujit Choudhry and Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Democratic Accountability and Constitutional Remedies," (2002) 40 Osgoode Hall L.J.
- Mayo Moran, "Baker, Charter Values and the Puzzle of Method" in D. Dyzenhaus (ed.), *The Unity of Public Law* (London: Hart, 2004), pp.389-429
- David Mullan, "The *Charter* and Administrative Proceedings" 2002 Pitblado Lectures
- June Ross "Applying the *Charter* to Discretionary Authority" (1991) 29 Alberta Law Review 381
- Lorne Sossin "Discretion Unbound: Reconciling Soft Law and the *Charter*" (2002) 45 Canadian Public Administration 465
- David Wright, "Evaluating Policy-Based Decisions for *Charter* Compliance" Presentation to Constitution in Your Administrative Law Practice OBA Conference, March 2, 2004