Administrative Law & the *Charter*

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3 ways Charter intertwines with JRAA

1. Reviewing administrative decision making for procedural fairness on Charter grounds
2. Reviewing administrative decisions on a substantive level where a Charter right or value is implicated
3. Application of the Charter (and quasi-constitutional legislation) by an administrative tribunal
   - Challenges to provisions of home statutes
   - General application of Charter

Application of Charter to Administrative Actors

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Application of Charter to Administrative Actors

- Key ideas:
  1. actions that flow down the chain from the statutory authority (incl. orders, decisions regulations etc.)
  2. Power of compulsion
  3. Governmental function, implementation of specific government program or policy
  4. Non-governmental actors?-hospitals, universities, etc.?

s.1, Charter

- s.1, Charter

- The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Charter: Section 1 justification analysis (*Oakes* test)

- must show that the objective of the law relates to concerns that are pressing and substantial in a free and democratic society

proportionality test:

- whether the law adopted is rationally connected to the objective (rational connection)
- whether the law impairs the Charter right no more than is necessary to accomplish the objective (minimal impairment)
- an assurance that the law has not had a disproportionately effect on the person(s) to whom it applies (weighing deleterious and salutary effects)

Judicial review of *Charter* decisions, on substantive grounds:

Slaight Communications, SCC, 1989

- Majority approach:
  1. Does the impugned decision infringe a Charter right?
  2. If so, can the infringement be saved under section 1?

- Administrative law review provides insufficient rigour
- Pure Charter approach or "Orthodox" approach

Slaight Communications, SCC, 1989

- Minority approach-Justice Lamer
  1. Legality of the decision is first reviewed using principles of administrative law
  2. If the decision is found to be lawful under administrative law, it is then tested through the two-step Charter analysis
- Mixed administrative/constitutional approach

Multani, SCC 2006

Majority decision

- Applies approach developed by majority in *Slaight* Communications
- "Orthodox approach"

Multani, SCC 2006

- Majority decision:

  "My colleagues Deschamps and Abella JJ. see no reason to depart from the administrative law approach adopted by the Court of Appeal… With respect… I am of the view that this approach could well reduce the fundamental rights and freedoms guaranteed by the *Canadian Charter* to mere administrative law principles or, at the very least, cause confusion between the two." (Charron J. for the majority, paras. 15-16)

Multani, SCC 2006

Majority

Admin law not applicable – it's constitutional matter:

- "…it is the compliance of the commissioners' decision with the requirements of the *Canadian Charter* that is central to this appeal, not the decision's validity from the point of view of administrative law." (para. 18)….
- "There is no suggestion that the council of commissioners did not have jurisdiction, from an administrative law standpoint, to approve the Code de vie.

Multani, SCC 2006

Concurring majority reasons-Deschamps and Abella JJ.

main reasons why administrative law review is more appropriate

1. Administrative law review should catch decisions that are not constitutionally valid
2. using administrative law analysis will avoid blurring the distinction between constitutional and administrative law tools

Multani, SCC 2006

- Concurring majority reasons-Deschamps and Abella JJ.

Administrative law review should catch decisions that are not constitutionally valid

- *Baker* –

The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. **However, 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***

Multani, SCC 2006

- In the case at bar, the school board did not sufficiently consider either the right to freedom of religion or the accommodation measure proposed…. It merely applied the *Code de vie* literally. By disregarding the right to freedom of religion, and by invoking the safety of the school community without considering the possibility of a solution that posed little or no risk, the school board made an unreasonable decision.

Charter review or admin law review?

Should norms of general application be dealt with in the same way as decisions or orders of administrative bodies?

- Meaning of "law"/ "*règle de droit*" in s.1 *Charter*

- Burden of proof under s.1 *Oakes* analysis? – should tribunals be asked to "justify" their decisions?
  - "A tribunal's decision should not be subject to a justification process as if it were a party to a dispute." (para. 123, *Multani*)

Multani, SCC 2006

Concurring majority reasons-Deschamps and Abella JJ.

"Simply put, it is difficult to conceive of an administrative decision being permitted to stand if it violates the *Canadian Charter*." *(para. 86)*

Doré v. Barreau du Québec, 2012 SCC 12 (March 22, 2012)

- Reconciliation?
- **administrative law approach, not a section 1 *Oakes* analysis is appropriate**
- **SOR is reasonableness to determine whether an administrative decision-maker has exercised statutory discretion in accordance with *Charter* protection**
- **Why?** *Oakes* = Awkward fit, onus of proof

Doré v. Barreau du Québec, 2012 SCC 12 (March 22, 2012)

- the nature of the reasonableness analysis is always contingent on its context (para. 7)

- In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. (para. 7)

- the role of judicial review for reasonableness aligns with the role of the *Oakes* test – deference to a range/margin of appreciation – "conceptual harmony"

Doré v. Barreau du Québec, 2012 SCC 12 (March 22, 2012)

- how should this analysis be performed?
- Charter values should be considered both at the level of decision-making and on judicial review
- In both cases the overarching objective is to ensure that Charter values are balanced with statutory objectives
- the question on judicial review is whether the decision reflects a proportionate balancing of the charter protections at play. The court should assess the impact of the charter protection ,the nature of the decision and the statutory and factual content
- some leeway must be given to the decision maker so long the decision falls within the range of possible, acceptable outcomes (*Dunsmuir*).

Reflections…

- Has the Supreme Court of Canada in *Doré* struck the right balance in its analysis for the review of discretionary decisions involving the *Charter*?
- What impact might this decision of on your tribunal?
- This the analysis pose any challenges of considerations for lower courts on judicial review?