



Jurisdiction, Rights & Values: Constitutional Elephants in the (Hearing) Room

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Constitutional issues before tribunals

- ❖ Courts have long struggled to **reconcile the *Constitution Act, 1982* with administrative law principles**
- ❖ At times constitutional issues can be addressed in parallel judicial proceedings (i.e. via bifurcation)
 - e.g. *Germain v Automobile Injury Appeal Commission*, 2009 SKQB 106 re: publication of tribunal decisions
- ❖ But in many cases constitutional issues are inseparable from the **exercise of discretion** or **evidentiary record**
- ❖ Whatever doubt may have existed in the 1990s about tribunal jurisdiction to hear & determine constitutional issues, Canadian law has now long favoured tribunals grappling with these issues at first instance
- ❖ But constitutional issues can be murky & unwieldy

Why address the Constitution?

- ❖ Can't constitutional issues simply be left up to the courts?
- ❖ **No, not if a tribunal has jurisdiction over them** (*Nova Scotia (WCB) v Martin*, 2003 SCC 54)
 - “Canadians should be entitled to assert the rights & freedoms that the Constitution guarantees them in **the most accessible forum available**, without the need for parallel proceedings before the courts.”
 - “[A]n administrative tribunal which has been conferred **the power to interpret law** holds a concomitant power to determine whether the law is constitutionally valid.”
 - “[T]he presumption may only be rebutted by **an explicit withdrawal of authority** to decide constitutional questions or by a **clear implication** to the same effect, arising from the statute itself rather than from external considerations.”
- ❖ **Access to justice** is a key consideration in this context

Why address the Constitution?

- ❖ **Administrative tribunals know their own home statutes & the day-to-day realities of their regulatory contexts best** (*Nova Scotia (WCB) v Martin*, 2003 SCC 54)
 - “...*Charter* disputes do not take place in a vacuum. They require a thorough understanding of the **objectives of the legislative scheme** being challenged, as well as the **practical constraints** it faces & the **consequences of proposed constitutional remedies.**”
 - “This need is heightened when, as is often the case, it becomes necessary to determine whether a *prima facie* violation of a *Charter* right is justified under s. 1.”
 - The tribunal's **factual findings & informed & expert view** of the relevant issues, such as competing policy concerns, will often be invaluable to a reviewing court.

Why address the Constitution?

- ❖ The Supreme Court of Canada has reiterated these basic principles in *York Region District School Board v Elementary Teachers' Federation of Ontario, 2024 SCC 22*
 - Administrative tribunals = “**competent to & tasked with** the work of adjudicating *Charter* questions where they arise”
 - **No need to bifurcate** proceedings for *Charter* questions
 - If a tribunal can decide a question of law, it can determine a *Charter* question unless this jurisdiction is clearly withdrawn
 - Tribunals (i) have the **authority** to resolve constitutional questions linked to matters properly before them...
 - ...and (ii) **must act consistently** with the *Charter* & its values when exercising their statutory functions
 - Tribunals should play a **primary role** in the determination of *Charter* issues falling within their specialized jurisdictions

What kinds of constitutional issues?

- ❖ **Constitutional issues may flow from specific provisions**
- ❖ Administrative tribunals are “creatures of statute”: generally operating pursuant to enabling legislation, & more often than not, they must interpret & apply their home statute
- ❖ Section 52(1) of the *Constitution Act, 1982* states that: **“any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”**
- ❖ What if someone shows a provision in your enabling statute to be unconstitutional & thus “of no force or effect”?
- ❖ Only superior courts have the jurisdiction to issue **binding** declarations under section 52, but...
- ❖ ...tribunals typically still have jurisdiction to decide these issues & **decline to apply unconstitutional provisions**

What kinds of constitutional issues?

❖ Constitutional infringements may flow from the exercise of discretion under an otherwise constitutional provision

- Tribunals are creatures of statute & all statutes are subject to the Constitution as the supreme law of Canada...
- "...it is [thus] **impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter***, unless, of course, that power is expressly conferred or necessarily implied...": *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038
- In other words, *Charter* infringements **exceed jurisdiction**
- This approach evolved as administrative law embraced more grounds for review & greater levels of deference
- By 2006, the Supreme Court began debating whether it made sense to apply the same test for the justification of legislative infringements to discretionary decisions

What kinds of constitutional issues?

- ❖ In *Multani, 2006 SCC 6*, Deschamps & Abella JJ raised this in concurring reasons: the test to justify **norms of general application based on collective goals** is not a clear fit
 - Nor did it make sense to call on a tribunal to justify how its decision infringes constitutional rights as a **neutral arbiter**
 - LeBel J raised a similar concern: parts of the justification test could be irrelevant for discretionary decisions & the focus should be **proportionality** in the **relevant context**
- ❖ In *Doré v Barreau du Québec, 2012 SCC 12* & subsequent cases these concerns led to a revised justificatory analysis
 - As paraphrased in *Loyola High School v Quebec, 2015 SCC 12*: a discretionary decision makers must “**proportionately balance** the *Charter* protections to ensure that they are **limited no more than is necessary** given the statutory objectives that she or he is obliged to pursue”

What are constitutional values?

- ❖ A more complex issue raised in these cases was the role played by “*Charter values* — those values that underpin each right & give it meaning” (*Loyola*, para 36)
- ❖ The Supreme Court has long recognized a role for *Charter* “values” to play beyond the *Charter*’s direct application
 - The common law must be developed **consistently with constitutional values**: e.g. *R v Salituro*, [1991] 3 SCR 654
 - This can be done by enunciating a non-infringing rule **without a justificatory analysis**: *R v Swain*, [1991] 1 SCR 933
 - This can be done in **private litigation** without state action: *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130
 - Statutory interpretation must also favour **an interpretation that respects *Charter* values** when faced with ambiguity: *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42

What are constitutional values?

- ❖ In some cases, *Charter* values appear co-extensive with *Charter* rights, though perhaps stripped of technicalities
 - e.g. freedom of expression, as discussed in *Hill* (1995)
- ❖ In other cases, *Charter* values end up abstracted from the high-level principles or purposes of more specific rights
 - e.g. “good reputation”, as discussed in *Hill* (1995), which the Court linked to privacy & innate dignity of the individual
- ❖ Some academics have tried to list constitutional values that may need to be balanced by decision makers:
 - the flourishing of minority communities
 - the Honour of the Crown
 - liberty, human dignity, equality, autonomy, fairness, privacy, expressive freedom & enhancement of democracy
- See [Daly 2023](#); [Sossin & Friedman 2014](#)

Moving beyond criticism & resistance

- ❖ Some criticize the idea of decision-makers proportionately balancing *Charter* values against statutory objectives in the exercise of discretion & this attracting deference
- ❖ But the Supreme Court unanimously reiterated & applied this approach in *Commission scolaire francophone des Territoires du Nord-Ouest v NWT, 2023 SCC 31*
- ❖ It involved a challenge to decisions denying admission to French language schools for non-rights holder children
- ❖ While s. 23 of the *Charter* was not breached, the Supreme Court concluded that the decision-maker failed to conduct a proportionate balancing of the values underlying it
- ❖ The preservation & development of minority language communities are values underlying s. 23 & admission of non-rights holders can support these objectives

Moving beyond criticism & resistance

- ❖ A discretionary decision, to be reasonable, must be made in accordance with the fundamental values of Canadian society as reflected in the *Charter* (para 65)
- ❖ Administrative decision makers *must* consider “relevant” values embodied in the *Charter* as **constraints** (para 66)
- ❖ A *Charter* value’s relevance will often be “evident” from: (i) the nature of a **statutory scheme**; (ii) parties’ **submissions**; or (iii) its **link to the matter** under consideration (para 66)
- ❖ If this duty is triggered, the decision must demonstrate that relevant *Charter* values were **meaningfully** considered & the decision’s **impact** on them must be **reflected** (para 68)
- ❖ **Weight matters**: are there other reasonable options that reduce impacts on *Charter* protections while still furthering relevant statutory objectives sufficiently? (para 72)

Other considerations...

- ❖ The same basic framework applied to *Charter* rights & values gets applied to other constitutional instruments
 - e.g. the same jurisdiction test applies to division of powers issues (e.g. [3510395 Canada Inc, 2020 FCA 103](#))
 - e.g. the same jurisdiction test applies to s. 35 rights (see [Paul v BC, 2003 SCC 55](#) & [Clyde River, 2017 SCC 40](#))
 - e.g. section 35 has its own values that may need to be taken into account (see [Wsáneć School Board v BC, 2017 FCA 210](#) & [AltaLink Management Ltd v Alberta, 2021 ABCA 342](#))
- ❖ Even if a decision maker cannot determine constitutional challenges, constitutional values might remain relevant
 - ❖ e.g. assessing Honour of the Crown even if prohibited from deciding consultation issues ([Fort McKay, 2020 ABCA 163](#))
 - ❖ e.g. addressing *Charter* breach underlying key evidence as procedural fairness issue ([Beniuk v Alberta, 2024 ABKB 567](#))

Other considerations...

- ❖ The Supreme Court stated in *Vavilov* that constitutional questions should receive consistent, final & determinate answers from the courts (i.e. correctness review)
 - e.g. on the division of powers, separation of powers, & the scope of Aboriginal & treaty rights under section 35
 - In *York Region District*, a majority of the Supreme Court decided correctness review applied to the scope of section 8 of the *Charter* as applied to a school board too
- ❖ Section 15(8) of *The Constitutional Questions Act, 2012* states administrative tribunals can require notice of constitutional questions to the AG in the same manner as courts would
 - But keep in mind that courts only require filing of a notice of constitutional questions if statutory provisions are directly challenged (see e.g. *Canada v Mikisew Cree, 2004 FCA 66*)

Where does this leave us?

- ❖ Courts continue to insist that constitutional arguments are to be heard before tribunals when directly relevant to a matter before them & where they have jurisdiction to do so
- ❖ Courts will essentially re-decide some constitutional issues, such as the constitutionality of a provision or the scope & content of a specific constitutional right
- ❖ But they will afford deference to exercises of discretion that limit constitutional rights & values so long as they do so in a way that is explicit, meaningful & proportionate
- ❖ Tribunals have some degree of autonomy to develop their own jurisprudence on the appropriate balance between constitutional values & their statutory objectives
- ❖ But courts have taken a dim view of sidestepping these issues altogether, even where one's jurisdiction is limited



Thank you!

Further questions?

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