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Further Guidance from the Supreme Court of Canada with respect to the Application of the *Charter* by Administrative Tribunals

By Margaret Truesdale

In the last several years the Supreme Court of Canada has recognized the ability of administrative tribunals to consider the application of the *Canadian Charter of Rights and Freedoms* (the *Charter*) in certain circumstances. Where a *Charter* right is legitimately engaged in the subject matter before a tribunal, the tribunal is statutorily permitted to deal with questions of law, and there is no indication in the statutory scheme that *Charter* issues have been removed from the tribunal's purview, the tribunal may apply *Charter* interests in making its decision. In the recent decision of *Doré v. Barreau du Québec*, (*Doré*), the Court has elucidated the proper approach to the application of *Charter* interests in the context of an administrative hearing.

In *Doré*, a lawyer was being disciplined by the Barreau du Québec for intemperate remarks made in a letter to a judge. The letter was inflammatory, alleging that the judge was: loathsome; arrogant; fundamentally unjust; hiding behind his status like a coward; having a chronic inability to master any social skills; being pedantic; aggressive and petty in his daily life; obliterating any humanity from his judicial position; having non-existent listening skills; and, having a propensity to launch ugly, vulgar and mean personal attacks against anyone who expressed contrary opinions.

There was no question that when considering the issue of disciplinary action against the lawyer, the right to freedom of expression in the *Charter* was engaged. There was also no question that the judge had treated Mr. Doré in an unfair fashion. A complaint to the Judicial Council resulted in a reprimand to the judge.

The Court adopted earlier jurisprudence holding that: "It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values". The Court provided guidance for administrative decision-makers in applying *Charter* values to their exercise of statutory discretion.

When considering the proper approach of an administrative decision-maker to *Charter* interests, the Court held the decision-maker must balance the *Charter* values with the legislative objectives of the relevant statutory scheme. The decision-maker should first consider the purpose of the statutory scheme and the public interest engaged by the statutory scheme. The decision-maker should then ask how the *Charter* interest that was engaged could be best protected in line with the statutory objectives. This was referred to as a "proportionality exercise" which required a balancing of the severity of the *Charter* interference with the protection of the legislative goals of the statutory scheme. The court recognized that "courts must accord some leeway to the legislator" in this



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balancing exercise and proportionality will be satisfied if the measure "falls within a range of reasonable alternatives".

When reviewing the actual result reached by the Barreau, the Court acknowledged that the decision-maker was weighing two important interests. On one hand, there was the fundamental importance of freedom of expression and, in particular, the ability to criticize public institutions. On the other hand, there was the need to ensure proper civility within the legal profession. It was necessary to ensure that the Barreau had given due regard to the importance of the lawyer's right to freedom of expression and the interest of the public in open discussion. This balancing was described as "a fact-dependent and discretionary exercise".

The Court upheld the decision of the Barreau to suspend the lawyer for 21 days, as the Barreau had properly balanced the expressive rights of the individual with the necessity of maintaining proper decorum and discipline in the legal profession. The Court concluded that the lawyer had breached the generally accepted norms of moderation and dignity and had overstepped his authority to criticize the judge. The Court came to the conclusion that given the extreme nature of the letter, this decision "cannot be said to represent an unreasonable balance of Mr. Doré's expressive rights with the statutory objectives".

The importance of this case reaches beyond the issue of professional discipline, and provides guidance to all administrative decision-makers dealing with *Charter* interests which arise in the context of the tribunal's statutory scheme.

Margaret Truesdale is a lawyer in our Litigation Law Group. She can be reached at mtruesdale@perlaw.ca or 613.566.2820.