GERAMI LAW PC

Arghavan Gerami
B.A. (Hons.), M.A., J.D., LL.M.
Barrister, Solicitor and Notary Public

Review of Administrative Decisions Involving Charter Rights: The Shortcomings of the SCC Decision in Doré

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Distinct But Overlapping: Administrative Law and the *Charter*

- Over the past two decades SCC has been grappling to define the appropriate relationship between the *Charter* and Administrative law as well as an appropriate framework for the review of administrative decision involving a breach of Charter rights

- The Court has oscillated between using a constitutional law approach (a section 1 Oakes analysis) and administrative law approach (standard of review of reasonableness) with respect to reviewing of administrative decisions for *Charter* compliance.

Slaight Communications v Davidson, [1989] 1 SCR 1038

- *In Slaight Communications,* the *Canada Labour Code* provision conferred broad discretion on labour arbitrators to impose equitable remedies for unfair dismissals
- The employer was ordered to provide a reference with specific text without saying anything more about employee
- At issue was the employer's right to freedom of expression under the *Charter*
- In reviewing the adjudicator's decision the SCC applied the more structured analysis of s. 1

Slaight Communications v Davidson, [1989] 1 SCR 1038

- If the decision or order was made pursuant to legislation that conferred (either express or implied) the power to infringe a protected right, the reviewing court was required to apply the standard *Oakes* test under s. 1 of the *Charter* to determine the constitutionality of that legislation

- SCC held that since legislature may not enact laws that infringe the *Charter*, neither can they allow another person or entity who has been delegated such authority to do so

- As such, all discretionary authority had the implied condition that unless it was consistent with *Charter* rights and guarantees, it would not be upheld

Cuddy Chick Trilogy: No Curial Deference to Administrative Decisions' Constitutional Law Decisions

Cuddy Chick Trilogy: Douglas/Kwantlen Faculty Association v. Douglas College [1990] 3 SCR 570; *Cuddy Chicks Lt v. Ontario (Labour Relations Board)* [1991] 2 SCR 5; *Tetreault-Gadoury v. Canada (Employment and Immigration Commission)* [1991] 2 SCR 22.

- SCC recognized that administrative bodies empowered to subject their enabling statute to the *Charter* but such decisions would not receive curial deference
  - "At the end of the day, the legal process will be better served where the Board makes **an initial determination** of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s. 2(*b*) of the *Labour Relations Act*"
  - "That having been said, **the jurisdiction of the Board is limited in at least one crucial respect: it can expect no curial deference with respect to constitutional decisions**."

Baker v. Canada [1999] 2 SCR 817.

- In the *Baker* decision, *Charter* rights were fully argued, but the Court decided the case on administrative law grounds. SCC referenced the importance of *Charter* values in circumscribing the exercise of administrative discretion but ultimately combined an administrative and *Charter* approach

- Court held that administrative decision makers must exercise their discretion:

  - " … in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, 1959 CanLII 105 (SCC), [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038).

Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6

- SCC's struggle on this issue continued and in 2006 *Multani* decision the Court redefined analytical approach for administrative law decisions that impact *Charter* rights or values

- *Multani* involved the discretionary decision of a school board to prohibit a Sikh student from wearing a ceremonial dagger, to school. The student and his family challenged the decision. Central issue: Did administrative decision infringe freedom of religion under the *Charter?*

- The Supreme Court unanimously allowed the challenge and overturned the board's decision but it split six to two on whether a *Charter* or administrative law analysis should be applied in reaching this result.

Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6

- Majority held that an administrative law approach would undermine the constitutional guarantees of the aggrieved party, and applied a strict section 1 Oakes analysis

- SCC recognized that "values underlying the rights and freedoms guaranteed by the *Canadian Charter* form part — and sometimes even an integral part — of the laws to which we are subject".

- The Charter approach applying s. 1 and the Oakes test was required to ensure fundamental rights and freedoms guaranteed by the Canadian *Charter* are not reduced to "mere administrative law principles" (para 6)

Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6

- Minority decision (Abella and Deschamps JJ) rejected the application of the constitutional approach.

- Section 1 Oakes analysis should be retained only for assessing the constitutional validity of a law or a norm of general application and administrative law approach must be utilized to review decisions or orders of administrative bodies. (para 103)

- The constitutional approach endorsed by the majority is two-fold : "The first is the equating of a decision with a law within the meaning of s. 1 of the *Canadian Charter*, and the second is the undermining of the integrity of the tools of administrative law and the resulting further confusion in the principles of judicial review." (para 111)

Doré v Barreau du Québec, 2012 SCC 12

- In the recent decision of Doré, the SCC did a full switch back to the Administrative law approach.
- In this case, the Disciplinary Council of the *Barreau du Quebec* reprimanded a lawyer for content of a letter he wrote to a judge after a court proceeding
- The Tribunal des professions upheld the decision. On Judicial review, Doré challenged the constitutionality of Barreau's ruling, claiming breach of section 2(b) of the *Charter*
- SCC Recognized the confusion surrounding the appropriate analytical framework for reviewing the constitutional validity of administrative decisions: at times, section 1 constitutional law approach applied while relying on a "classic judicial review approach" on other occasions.

Doré v Barreau du Québec, 2012 SCC 12

- The SCC sought to provide a definitive framework to analyse administrative decision-making involving *Charter* rights.
- Held that the constitutional law approach should be applied when assessing the constitutional validity of a law or a rule of general application (para 36)
- But administrative law approach would be appropriate for determining if an administrative decision-maker has taken sufficient account of *Charter* values in his/her exercise of statutory discretion

Doré v Barreau du Québec, 2012 SCC 12

SCC's Rationale for Administrative Law Approach:

- Deference must be shown to administrative decisions-maker by virtue of expertise and specialization (para 47)

- Even when Charter values are implicated, the administrative decision-maker has greater proximity to the facts to consider the impact of the relevant *Charter* values. (para 54)

Doré v Barreau du Québec, 2012 SCC 12:

Proportionality Test

- SCC held that the following simplified Proportionality Test integrates the "the essence" of the section 1 Oakes requirements:
  - Step 1: Identify and consider the statutory objective
  - Step 2: Apply the Proportionality Test - Decision-maker to balance the statutory objectives v. severity of the interference with the *Charter* protection (paras 55-56)

Compare to Good Old Oakes Test: *R. v. Oakes* [1986] 1 SCR 103

- First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom.

- Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components.

1. The measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective;
2. The means should impair the right in question as little as possible;
3. Proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be.

Doré Proportionality Test as Formulated by Justice Abella

Doré's Simplified Balancing & Proportionality Test

At Para 57 – 58

- On judicial Review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play … If, in exercising discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable"

‘Charter values’ not Identified or Defined

- SCC does not define Charter values in Doré:
  - Are they grounded in Charter rights?
  - Are administrative decision-makers to identify and define boundaries of these Charter values?
  - Are we creating a set of values parallel to Charter rights?
  - Are they secondary to those rights or do they have the same status?
- Doesn’t this create more confusion and complication rather than simply the analysis?
- Does it not result in inconsistency if reviewable on reasonableness standard?

What are the Sources of '*Charter* Values'?

Professor Sossin on Charter Values:

- "Courts have recognized at least four sources for *Charter* values: *Charter* rights (e.g. expressive freedom, equality), unwritten Constitutional Principles (e.g. the rule of law and respect for minorities), principles arising from the courts' *Charter* analysis (e.g. human dignity, privacy); and common law constitutional principles (e.g. fairness)."

  (Sossin, Lorne and Friedman, Mark, Charter Values and Administrative Justice, February 2, 2014. Available at SSRN: http://ssrn.com/abstract=2389809)

- However, first level decision-makers are left to sort through these values themselves without any specific guidance by the SCC

Charter Values are Assumed to Exist

- Professor Sossin explains that Charter values "are simply assumed to exist and to form a knowable conceptual framework to guide discretionary decision-making. Since the Court in *Doré* did not provide a definitive list of values that are to inform administrative law decisions, previous jurisprudence and tribunal decisions may be of assistance."

- " … *Charter* values remain an important tool of statutory interpretation where competing approaches to a statutory power are available. In still other cases, *Charter* values may inform how common law rules are interpreted and applied. *Charter* values in each of these contexts will be relevant to administrative justice. **How can the consistency and coherence of these interpretations of *Charter* values be assured**?

  (Sossin, *supra*, p. 24)

Reasonableness Standard & Range of Reasonable Outcomes: Suitable for review of decisions involving *Charter* rights?

- Added to these uncertainties concerning 'Charter values', is the application of the Reasonableness standard of review to review of such discretionary decisions

- Review of Reasonableness Definition: "… qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a **range** of possible, acceptable outcomes which are defensible in respect of the facts and law. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, para 47

Reasonableness Standard & Range of Reasonable Outcomes: Suitable for review of decisions involving *Charter* rights?

- Will the Reasonableness standard and rejection of a structured proportionality analysis compromise section 1 safeguard, which was meant to ensure adequate justification for government decisions limiting Charter rights?

- Does this approach compromise other values such as certainty with respect to the judicial treatment and interpretation of *Charter* rights & values?

Proportionality test on Reasonableness Standard (as opposed to applying Oakes test) waters down Charter Rights & Principles

- Doré has effectively adopted its own balancing regime rather than the Oakes test, integrated it in the administrative law context, and holding that the standard of reasonableness will apply on review of such decisions:
  - "In the Charter context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision does not interfere with the relevant Charter guarantees not more than is necessary given the statutory objectives" (para 7)
- Carefully examined, SCC is moving away from the Charter rights/protections grounded immutable principles to *Charter* "values" whose infringement is reviewable on a range of outcomes.

More Deferential Standard Means A Less Robust Balancing

- Applying the Dore decision means an infringement of a protected right may be found to be reasonable even if it does not meet all the constitutional requirements under s. 1 of the *Charter* in accordance with the Oakes test.
- Applying the proportionality test on reasonableness standard as set out in Doré rather than the Oakes test means:
  - legislative objective does not have to be pressing ;
  - means relied on does not have to be demonstrably justified;
  - No rational connection requirement;
  - No fairness and lack of arbitrariness threshold; and,
  - No minimal impairment test (consideration of less intrusive alternatives)

Doré v Barreau du Québec, 2012 SCC 12

- Yet SCC had held that administrative law approach essentially protects constitutional guarantees in the same manner as the Oakes test:

> "Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a 'margin of appreciation' or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives." (para 57)

Constitutional protections Effectively dissolved into administrative law standards?

- Noteworthy: *Multani* approach (para 6) discussed earlier re minimum constitutional protections which SCC has now moved away from in Doré :

  - "… the rights and freedoms guaranteed by the *Canadian Charter* establish a ***minimum*** constitutional protection that must be taken into account by the legislature and by every person or body subject to the *Canadian Charter*. The role of constitutional law is therefore to define the scope of the protection of these rights and freedoms. **An infringement of a protected right will be found to be constitutional only if it meets the requirements of s. 1 of the *Canadian Charter.*** " Moreover, as Dickson C.J. noted in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, the more sophisticated and structured analysis of s. 1 is the proper framework within which to review the values protected by the *Canadian Charter* (see also *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 32). [Emphasis added]

Deference based on Expertise of Administrative Decision-makers

- "The Administrative law approach also recognizes the legitimacy of that this Court has given to administrative decision-making in cases such as *Dunsmuir* and *Conway.* These cases emphasize that administrative bodies are empowered and indeed required, to consider *Charter* values within the scope of **their** expertise." (para 35)

- Administrative decision-makers have been empowered to apply the *Charter* at the first instance, but they are first and foremost experts in their home statute and not necessarily experts in constitutional law, identification of Charter values, principles and rights and appropriate balancing with legislative objectives

- However, the Doré decision means the only check on administrative decision-maker's exercise of discretion now is the simplified "proportionate balancing" test on a standard of reasonableness (without the Oakes safeguards)

Deference based on Expertise of Administrative Decision-makers?

Back to Notion of Deference: *Dunsmuir,* para 48

- … the notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). As Mullan explains policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system

Deference was to be based on Expertise of Decision-makers in Interpretation of Home Statute

Dunsmuir, para 50

- As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. **This promotes just decisions and avoids inconsistent and unauthorized application of law.**

Deference was to be based on Expertise of Decision-makers in Interpretation of Home Statute

Dunsmuir para 54

- Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72.

R. v. Conway, 2010 SCC 22

- In *Conway* the SCC recognized administrative tribunals have authority:
  - "[78] … to resolve constitutional questions that are linked to matters properly before them. And secondly, they must act consistently with the *Charter* and its values when exercising their statutory functions….".
  - However, *Conway* did not go further to say that such initial decisions by administrative decision-makers should be subject to deference on judicial review based on a range of reasonable outcomes

The SCC Assuming Expertise in Doré?

Is the SCC Assuming Expertise in Charter and constitutional law for all administrative decision-makers in Doré?

- [52] So our choice is between saying that every time a party argues that *Charter* values are implicated on judicial review, a reasonableness review is transformed into a correctness one, or saying that while both tribunals and courts can interpret the *Charter*, the administrative decision-maker has the necessary specialized expertise and discretionary power in the area where the *Charter* values are being balanced.

Administrative Decision-makers & Varying Levels of Expertise

- However, it cannot be assumed that all administrative decision-makers have such constitutional expertise
- For example, in the immigration context, a (Canada Border Services Agency ('CBSA') Officer who has expertise in one aspect of the their legislation (*Immigration Refugee and Protection Act*) on enforcing removals, but also wears an administrative decision-maker hat when exercising his discretion to defer a removal of an individual
- Noteworthy that currently no requirement for all first level administrative decision-makers to have a law degree

Administrative Decision-makers & Varying Levels of Expertise

- Similarly a first level immigration & citizenship decision-maker considers best interest of the child and is empowered to apply the Charter on a humanitarian & compassionate permanent residency application

- However, these initial decision-makers may not have any expertise on the *Charter* and constitutional law, whereas a Board or Tribunal member at the Immigration Appeal Division or a Refugee Protection Board member may have developed some expertise

Proximity to Facts vs. Lack of Constitutional Expertise

- "Deference is still justified on the basis of the decision-maker's expertise and its proximity to the facts of the case. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case*."

- But proximity to facts does not compensate for the lack of constitutional expertise and variability of decisions that will undoubtedly result if the court defers to the administrative decision-makers in cases involving *Charter* rights

Implications of Doré

- Less not more conceptual coherence in jurisprudence: a review of a first level administrative decision on reasonableness would mean there may be more than one Charter compliant decision

- Watering down of Charter rights through the less precise concept of Charter 'values' and variability in the scope of a particular Charter value as defined by first level decision-makers

- Administrative decision-makers can justify their decisions through less rigorous balancing test, effectively resulting in lower quality decisions, less transparency and less details as to the reasoning for justification of the Charter breach

Implications of Doré

- New approach is not consistent with the supremacy of the *Constitution* and the *Charter*
- Respect for *Charter* protected rights is the starting point and breach of those rights an exception, only justified in accordance with requirements of the Charter in section 1
- Section 1 of *Charter* places the onus on the state to meet the burden of justification in section 1 (the individual is not required to demonstrate the decision violating the Charter right is unreasonable and the decision-maker did not balance the Charter rights in a proportionate manner)

Unresolved Issues Post Doré

- SCC decision in Dore does not provided guidance on how first-level decision-makers are to assess reasonableness differently in cases involving Charter rights and values; also, not explained the meaning of "proportionate" and "proper" balancing; and, not turned its mind to situations where interpretation of legislation by first level decision-maker is at issue (also on reasonableness standard)?

- If standard of review for such administrative decisions is reasonableness, then definition of what is reasonable where Charter rights are at play must be changed and elevated to include all the elements of the Oakes test, such as pressing objective and minimal impairment?

Post-Doré Jurisprudence

Pridgen v University of Calgary, 2012 ABCA 139

- The matter dealt with an appeal by the University of Calgary of the decision of the Chambers Judge quashing the disciplinary sanctions imposed on the Pridgen brothers for posting critical remarks on a professor in a public Facebook group. The brothers had argued that the disciplinary sanctions infringed their freedom of expression.

- The Court summarized the Doré Approach: "The question to be asked is whether the administrative decision maker properly balanced its statutory mandate with the *Charter* right and its fundamental importance." (para 126).

- The Tribunal's failure to address Charter values at all would necessarily render the decision unreasonable. (para 127)

Post-Doré Jurisprudence

Kamel v Canada (Attorney General), 2013 FCA 103

- The Federal Court judge rendered the decision in 2010, and did not have the benefit of the Doré decision. The FC judge conducted a s. 1 Oakes analysis on the infringement of Charter rights.

- Regardless, the Federal Court of Appeal, quoting *Doré*, determined that the administrative law approach "works the same justificatory muscles" as the Oakes test. (para 18)

Post-Doré Jurisprudence

Smail v British Columbia (Human Rights Tribunal), 2013 BCSC 1079

- The Court stated that the constitutionality of the legislation and the constitutionality of the Tribunal's decision are separate questions that require different analyses (para 11).

- The Court applied the s. 1 Oakes test to assess the constitutionality of s. 8 of the Code (para 189). On the other hand, the Court deemed that the constitutionality of the Tribunal's decision would ordinarily be assessed on a standard of reasonableness as dictated by *Doré* (para 286).

- However, the Court distinguished the matter at hand from Doré because the Court was bound by a statute to apply a standard of correctness.

Post-Doré Jurisprudence

Najafi v Canada (MPSEP), 2013 FC 876

- The FC did not apply the Doré approach on the basis that the section 34(1) of IRPA did not confer a discretionary decision, but rather an explicit authority or power to declare a person inadmissible in Canada.

- Second, the Court determined where an administrative tribunal is requested to assess the violation of a Charter right in the absence of a discretionary power, the correctness standard of review remains applicable. (Paras 31-36)

Doré Distinguished: Charter Rights v. Charter values

Najafi v Canada (MPSEP), 2013 FC 876
(Paras 1-2)

- The Applicant was a citizen of Iran of Kurdish ethnicity. He came to Canada in 1999 and made a refugee claim that was accepted.
- On March 5, 2010, the decision-maker issued a report under subsection 44(1) of the Act and on March 2, 2011 referred the report to the Immigration Division of the Immigration and Refugee Board [the Division], seeking to have the applicant declared inadmissible due to his involvement with the Kurdish Democratic Party of Iran [the KDPI].
- The Respondent claimed that there were reasonable grounds to believe that Mr. Najafi was a member of the KDPI and that the KDPI had engaged in the "subversion by force" of the Iranian government such that he was inadmissible to Canada by virtue of paragraphs 34(1)(b) and (f) of the IRPA.

Doré Distinguished: Charter Rights v. Charter values

Najafi v Canada (MPSEP), 2013 FC 876

- [30] … I believe the framework set out by Justice Abella in *Doré* applies only to discretionary decisions of administrative tribunals (which must reflect *Charter* values) and not to cases where tribunals are called upon to make substantive rulings on ***Charter*** **rights.** I am of this view for two reasons.

- [31] First, the language used by Justice Abella in *Doré* consistently states that the types of administrative decisions to which the framework she posits applies are *discretionary* decisions. Thus, there is **nothing in that case which would mandate its extension to situations where administrative tribunals are making substantive decisions on a *Charter* claim.**

Doré Distinguished: Charter Rights v. Charter values

Najafi v Canada (MPSEP), 2013 FC 876

- [32] Second, it has long been considered settled law that in situations where, as opposed to making a discretionary decision, an administrative tribunal is instead called upon to rule upon a substantive *Charter* claim (like a claim that legislation is invalid due to its infringement of a *Charter* right), the correctness standard of review is applicable to the judicial review of that decision. This was recognized by Justice Abella in *Doré*, relying on *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]: "There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness (*Dunsmuir*, at para. 58)" (*Doré* at para 43).

- [34] Thus, the *Doré* analysis does not apply to non-discretionary decisions of administrative tribunals where the tribunal adjudicates a *Charter* claim. In those cases, the applicable standard of review is correctness.

Litigation Implications

- When there is an explicit authority to infringe a *Charter* right, such as in Najafi, the legislation will be subjected to the Oakes test, but the administrative decision will be reviewed on a standard of reasonableness when the power granted is discretionary

- As such, likely that applicants will seek to locate the source of infringement in the statute itself while the Respondent will attempt to frame the authority as imprecise and discretionary subject to a reasonable standard of review

Litigation Implications

- Also, litigation will likely be focused on drawing of the line between law & discretion
- Reality: administrative decisions impacting *Charter* rights involve a combination of law & discretion
- Will applicants now argue that <u>both</u> legislation and administrative decision have infringed their *Charter* rights?

Impact on the Individual

- Does it make a difference to an individual whose Charter rights have been infringed whether this is resulting directly from the legislative text or its discretionary application to his or her case?

- Is it practical and sensible to differentiate between law & discretion in this manner considering the overlap between the two?

- This issue will again be subject of further debate and litigation and SCC will yet again have to re-examine the complex relationship between the Charter and Administrative Law