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Reconciliation of Administrative and Constitutional Law Principles: Reaffirming the Essential Link Between Deference and Expertise in the Immigration Law Context

2015 CBA National Immigration Law Conference

May 9, 2015, *OTTAWA*

Etienne v Canada (MPSEP)

The interplay between Administrative and constitutional principles and the framework the Court applies to decide a case has significant implications

It impacts

- the coherence and consistency of jurisprudence
- the possibility of achieving a just result; and,
- In ensuring access to justice

Etienne v Canada (MPSEP)

- In my presentation today I am hoping to generate some constructive discussion on a principled framework to reconcile the overlap between the administrative and constitutional law principles
- I try to explain why the appropriate framework should consider the often limited expertise of first level decision-makers in the area of constitutional law
- The Focus of my discussion will be the recent decision of the Federal Court in *Etienne v. Canada (MPSEP)*

Etienne v Canada (MPSEP)

- In Etienne, we were dealing with a situation of unassessed risk by the RPD
- The RPD had rejected the Etienne family's refugee claim, and based its decision exclusively on internal flight alternative, without conducting any risk assessment
- The family also had evidence of new risk, post-dating RPD to one of their children suffering from PTSD, which was presented to the enforcement officer

Etienne v. Canada

- Of course, but for the PRRA Bar, at the time of their removal the Applicants would have automatically been afforded a risk assessment by a PRRA Officer and had a statutory stay of removal.
- And they were becoming eligible for a PRRA in 5 days

- CBSA rejected the family's Deferral of removal
- And the Federal Court granted a stay of removal finding at para 30 that:

> "[a]lthough an officer is required to remove a person as soon as 'possible', this must mean as soon as legally possible" and "[r]emoval in breach of the Charter is an illegal removal." [Emphasis Added]

Etienne v Canada (MPSEP), 2015 FC 415 at para 30 [Emphasis added] *[Etienne*].

Motion for Judgment Dismissed

- The Court granted leave in the judicial review leave application
- Followed by a Motion for Judgment by the Respondent, admitting that there was a reviewable error
- the officer had unreasonably refused to defer, and arguing the judicial review was moot
- the Court dismissed the Respondent's motion

Etienne v Canada (MPSEP) (14 March 2014), Ottawa IMM-5649-13 at para 9 (FC) [*Etienne* Stay Motion].

Similar Impact on Other Applicants

- pointed out at para 10 of its decision that,

> Although that situation will never again arise for these Applicants, it may well arise for others. The Minister does not assert that the Court's determination of the constitutionality of paragraph 112 (2)(b.1) of IRPA in the cases now under consideration by this Court will also apply to that situation. Given the differing factual background, it cannot.

Etienne, supra at para 10 [Emphasis added].

CARL Granted Intervener Status

- In addition, the Canadian Association of Refugee Lawyers applied and was granted leave to intervene in the case by the Federal Court
- They also argued that removal w/o a PRRA violated s. 7 of the Charter and Canada's international obligations

Etienne v Canada (MPSEP) (9 April 2014), Ottawa IMM- 5649-13 (FC).

Judicial Review Decision: PRRA Bar not Determinative

- Last month the Court rendered a decision on the judicial review
- Honourable Mr. Justice Zinn decided that there was "no need for the court on this application to engage in an analysis of the constitutionality of paragraph 112(2)(b.1) of the Act."
- "… it was not that provision that was the direct cause of the Etienne family not having their risk assessed prior to removal; rather, it was the decision of the enforcement officer not to defer their removal."

  Etienne, supra at para 42.

Discretion Overrides Constitutional Law

- Ultimately, the case was resolved by applying administrative law principles
- You will notice, by the way, that in the decision, no standard of review analysis was set out by the Court
- And no question was certified for the FCA
- I have provided a copy of the decision in the materials for you

CBSA Was Required to Defer Removal

- **The court decided to reinforce the role of the CBSA OFFicer and expanded the parameters of the risk they are required to consider … at para 53**
- **53** … The enforcement officer [is] required to turn his mind to the evidence presented, to consider and assess it, and if it showed that the Etienne family might be at risk in the Turks and Caicos Islands, then he was required to defer removal in order that the risk could be assessed.

All Risk Must be Considered by CBSA

- **In addition … at para 54**
- **54** The risk the enforcement officer must consider is not restricted to a "new" risk in the sense that it arose after a refugee determination or other process. Risks that the enforcement officer is also required to consider include risks that have never been assessed by a competent body. … such as IFA or failure to establish identity

  Etienne, supra at paras 45, 52-54 [Emphasis added].

IRPA Requires Consistency of Decisions with the *Charter*

- Administrative decision-makers are of course required to exercise their discretion in accordance with the *Charter*
- Section 3 (3) of IRPA:

(*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada …

(*f*) complies with international human rights instruments to which Canada is signatory.

IRPA, supra, s 3(3)(d), (f).

- This provision in IRPA is a significant clue to parliamentary intent
- It conveys the necessary interplay between law & discretion and the fact that the 2 are meant to reinforce each other
- In other words, compliance with the Charter is a pre-requisite for all the discretionary decisions undertaken under the Act

Administrative Decision made in a Constitutional Void?

- in *Etienne,* the enforcement officer lacked the expertise to even recognize that in exercising his discretion, he was required to ensure compliance with the Charter
- removing the Applicants without a risk assessment clearly did not comply with the Charter
- Rather than a fluid reinforcement between law and discretion, the 2 conflicted

Narrow Discretion

- Of course, in any case, the Enforcement officers' authority *only* allows them a very narrow discretion to defer removals on the legal standard set out by the Court in *Wang, Baron* and *Shpati*.
- "… where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment."

Wang v Canada (Citizenship and Immigration), 2001 FCT 148; *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*]; *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286.

Enforcement of Removals "as soon as possible"

- And subsection 48(2) of *IRPA* requires enforcement of removals "as soon as possible."
- This is precisely why the Applicants argued the Officer fettered his discretion …
- How exactly are they to prioritize their very limited discretion, the requirements of subsection 48(2) on the one hand, the PRRA bar which is also binding on them, *and* the rights set out the *Charter*?

Baron, supra note 21 at para 51.

IRPA, *supra* note 2, s 48(2).

Enforcement of Removals "as soon as possible"

- We are asking the impossible of these enforcement officers … they are not left with any discretion at the end of the day, and they lack the expertise to ensure charter compliance
- In Etienne the Appellants' challenge to the PRRA bar was based on the resulting constitutional gap
- Was this a case where the Court should have addressed the constitutional issue

When should the Court Decide Constitutional Questions

- the jurisprudence of the Supreme Court of Canada reveals a concern with addressing constitutional questions in the abstract without a proper evidentiary record

SCC Jurisprudence

- *Baker v Canada (MCI),* [1999] 2 SCR 817
- *Philips v Nova Scotia (Commission of Inquiry in the Westray Mine Tragedy),* [1995] 2 SCR 97
- *Chieu v Canada (MCI)*, [2002] 1 SCR 84
- *Moysa v Alberta (Labour Relations Board)*, [1989] 1 SCR 1572

Concerns Did Not Apply in *Etienne*

- However, in *Etienne*, this concern did not arise
- The court offered no analysis based on the SCC jurisprudence just mentioned, which was before it, as to why this case was not appropriate case for application of constitutional principles
- The Court had before it a factual scenario and a challenge to the constitutional validity of a law, with the benefit of a full evidentiary record and an intervener.

Distinct But Overlapping: Administrative Law and the *Charter*

- Was the Court's decision to limit its analysis to Administrative law principles justified?
- And did this reflect an appropriate relationship between the Charter and administrative law?
- over the past two decades, we have seen the SCC grappling to set out an appropriate framework for the review of an administrative decision involving a breach of *Charter* rights

Baker v. Canada

- In the *Baker* decision for example, *Charter* rights were fully argued
- in that case, the certified question before the Court was whether federal immigration authorities have to treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the Immigration Act?

Baker v. Canada

- the applicants in *Baker* were not challenging the constitutionality of section 114(2), but rather what constituted a reasonable exercise of power and the degree to which the H&C officer was required to take into account the interests and needs of children.
  - *Baker v Canada (MCI),* [1995] FCJ No 1441 (QL) at para 47, 101 FTR 110 (FCTD) [Emphasis added].

Baker v. Canada

- In Baker, the SCC referenced the importance of *Charter* values in circumscribing the exercise of administrative discretion but ultimately combined an administrative and *Charter* approach
- It found that administrative decision makers must exercise their discretion:
  - " … 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

- Then in the 2006 *Multani* decision, the Court redefined analytical approach for administrative law decisions that impact *Charter* rights/values
- *Multani* involved the discretionary decision of a school board to prohibit a Sikh student from wearing a ceremonial dagger, to school.

Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6

- The Central issue in Multani was whether the administrative decision infringed freedom of religion under the *Charter?*
- The Supreme Court unanimously allowed the challenge and overturned the board's decision, but 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 and applied a strict section 1 *Oakes* analysis
- The Charter approach applying the s. 1 *Oakes* test was required to ensure the fundamental rights and freedoms guaranteed by the Canadian *Charter* were not reduced to "mere administrative law principles" (para 6)

Doré v Barreau du Québec, 2012 SCC 12

- In the 2012 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*

Doré v Barreau du Québec, 2012 SCC 12

- 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.
- It set out a framework for administrative decision-making involving *Charter* rights.

Doré v Barreau du Québec, 2012 SCC 12

- The Court held that the traditional constitutional law approach should be applied when assessing the constitutional validity of a law or a rule of general application (para 36)
- administrative law & Charter balancing approach is 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

With respect to the Administrative law and Charter balancing approach, the Court set out a Proportionality Test :

- 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)

Deference Justified Based on Expertise of Administrative Decision-makers

- The SCC's justification for the Administrative Law Approach was of course deference as respect to administrative decisions-maker based on their expertise and specialization and proximity to the fact in cases such as Dunsmuir (para 48) and Conway (para 35 & 47)
- administrative bodies are empowered and indeed required, to "consider *Charter* values within the scope of **their** expertise." (para 35)

Administrative Decision-Makers & Varying Levels of Expertise

- However, the reality is that NOT all first level decision-makers have expertise in constitutional law
- For example, H&C Officers, CBSA Officers, PRRA Officers are empowered to apply the *Charter* and are required to make decisions consistent with the *Charter* with no expertise in constitutional law *whatsoever*

Implications of Judicial Restraint on the Evolution of Legal Principles and Access to Justice

- Ultimately, the review of administrative decisions that give rise to a direct and specific challenge to a legislative provision, and particularly where the decision-maker lacks constitutional expertise, requires Court's intervention;
- The SCC in Dore affirmed that it is appropriate for the Court to assess the constitutional validity of a law or a rule of general application (Dore, para 36) based on the traditional constitutional law approach,
- The Court Neither applied the constitutional approach nor the admin law & charter balancing approach – there was no framework
- And admin law effectively sheltered constitutional law

Implications of Judicial Restraint on the Evolution of Legal Principles and Access to Justice

- Judicial restraint comes with a high price for access to justice.
- The time, resources, and efforts required both from applicants and interveners to bring forth a constitutional challenge, particularly involving vulnerable individuals with very limited financial resources, places an onus on the Court to fulfill its judicial function, including adjudication of difficult constitutional questions
- When will an applicant in Etienne's circumstances who has never received a risk assessment be able to challenge the constitutionality of the PRRA Bar, if the Court relies exclusively on administrative law principles in its decision-making?

Implications of Judicial Restraint on the Evolution of Legal Principles and Access to Justice

- the Court missed the opportunity in *Etienne* to address the constitutional gap created by the PRRA bar and decided to reinforce the obligation of enforcement officers to assess the risk based on admin law principles
- The Court's decision was positive and important in reinforcing the role of enforcement officers and their consideration of evidence of risk.
- However, it did not take into account the very serious lack of expertise by CBSA enforcement officers

Implications of Judicial Restraint on the Evolution of Legal Principles and Access to Justice

- Deference and the application of mere administrative principles will mean that the *Charter* rights of those applicants, who are facing removal and are not eligible for a risk-assessment, will not be guaranteed;
- It will continue to be left to the exercise of discretion by enforcement officers, who have a mandate to enforce removals, are bound by the PRRA bar and at best *may,* "as a "usual and expected practice," afford *Charter* protection to applicants.

  Etienne, supra at para 51.