Grey Areas

SML
Steinecke Maciura LeBlanc
Barristers & Solicitors

Charter Challenges: Grandstanding or Groundbreaking?

By: Richard Steinecke
April 2010 - No. 145

That was the title of the April 22, 2010 panel presentation hosted by the Federation of Health Regulatory Colleges of Ontario. Chaired by Brian Gover, the panel consisted of Janet Minor, from the Attorney General's constitutional office, and two senior lawyers in private practice, Peter Griffin and Scott Hutchison.

The panel discussed the areas in which the *Canadian Charter of Rights and Freedoms* appear to be raised most frequently:

1. When do orders to produce documents, inspect or search premises or otherwise compel a person to provide information contravene sections 8 (unreasonable search and seizure) and 13 (self incrimination)?
2. In what circumstances do disciplinary proceedings engage sections 7 (right to life, liberty and security of the person), 11 (penal proceedings) and 12 (cruel and unusual punishment)?
3. When do advertising restrictions trigger section 2(a) (freedom of expression)?

The short answers are:

1. Watch and wait. A few key rulings are expected soon.
2. Not very often.
3. There has been a hiatus on this issue for a while.

It has become clear that tribunals dealing with legal issues generally cannot avoid dealing with constitutional challenges. The Supreme Court of Canada has made it pretty clear in the case of *(Nova Scotia) Workers Compensation Board v. Martin*, that tribunals generally are expected to rule on such matters even though the courts will review their decisions on the basis of "correctness".

To further complicate matters, courts will usually not permit a challenge to be made of *Charter* rulings until after the entire hearing has been completed on the basis of "prematurity". So an incorrect ruling can nullify an entire hearing. However, the alternative of interrupting hearings after each ruling is likely more harmful to the process. It is possible for a party to seek a declaration as to whether a provision is contrary to the *Charter* to go directly to the court even while the discipline process is carrying on. However, where a remedy other than a declaration is sought (e.g., the exclusion of evidence), the parties have to go to the tribunal first.

The panel described some of the unique features of *Charter* challenges to assist tribunals in understanding and coping with them. The main reason that courts insist on tribunals making the initial ruling is so that the facts of the case can established. Courts are reluctant to make *Charter* rulings in the abstract. The circumstances really direct how a *Charter* concept should be applied.

Thus a major focus of counsel in *Charter* challenges is to get evidence on the record. While some of that evidence is familiar to tribunals (who did what to whom when), other evidence will be of a different nature. Social science data, academic research, impact analysis, government inquiries and practices in other jurisdictions are often introduced to establish the policy implications of the issue. This evidence is particularly necessary where there has been an infringement of the *Charter* right and the issue is whether the infringement is saved by section 1 of the *Charter* (i.e., reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society).

The panel urged patience from tribunals as counsel filed the necessary evidence. Mr. Griffin also discussed mutual expectations. Tribunals should expect counsel to provide a clear and orderly explanation of the issues to be determined. Counsel, in return, expect tribunals to permit them to lead the necessary evidence and make the appropriate arguments.

FOR MORE INFORMATION
This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Richard Steinecke, Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Telephone: 416-626-6897
Facsimile: 416-593-7867, E-Mail: rsteinecke@sml-law.com

If there has been a breach of the *Charter* that has not been saved by section 1, tribunals can make the kind of order that it could otherwise make during the course of the hearing. For example, the tribunal could exclude evidence or stay the proceeding. In addition, the tribunal can decline to apply a provision that it concludes is contrary to the *Charter* (e.g., a particular advertising restriction, a provision requiring closed hearings). The tribunal cannot make different kinds of orders that are generally provided only by courts (e.g., declaring the provision to be unconstitutional, awarding damages).

The difference between not applying an invalid provision and declaring it to be unconstitutional is that the former applies only to the specific parties in the case before the tribunal and the latter applies to everyone in all future cases.

True *Charter* challenges remain fairly rare because of the time and expense involved and because the courts have already determined that the application of the *Charter* to discipline proceedings is fairly confined. However, when they do arise, tribunal members are advised to sit back, accept their involvement in the making of fundamental law, and enjoy the ride.

FOR MORE INFORMATION
This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Richard Steinecke, Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Telephone: 416-626-6897
Facsimile: 416-593-7867, E-Mail: rsteinecke@sml-law.com

WANT TO REPRINT AN ARTICLE
A number of readers have asked to reprint articles in their own newsletters. Our policy is that readers may reprint an article as long as credit is given to both the newsletter and the firm. Please send us a copy of the issue of the newsletter which contains a reprint from Grey Areas.