Charter: A Course S3E3– Charter Values

***\*Transcripts are auto generated\****

00:00

**Music:**

Charter a course, I will charter a course, if we can just get the country to trust us. Charter a course, south, east, west and north, and along the way we may find justice.

**Cheryl:**

Hello and welcome to Charter: A Course. I'm Cheryl Milne, the Executive Director of the David Asper Centre for Constitutional Rights and your host. Our podcast focuses on leading Canadian constitutional cases and issues.

It emanates from Toronto, which for thousands of years has been the traditional land of the Huron-Wendat, the Seneca and the Mississaugas of the Credit River. It is currently the home to many Indigenous peoples from across Turtle Island. Today, our constitutional conversation focuses on the somewhat elusive concept of Charter Values. Canadian courts and tribunals use Charter Values in various contexts to interpret and apply the rights and freedoms protected by the Canadian Charter of Rights and Freedoms.

**Cheryl** (01:04.366):

Our guests today are Professor Richard Stacey, and our Practice Corner guest is legal practitioner Matthew Horner. Professor Richard Stacey is an Associate Professor of Law at the University of Toronto Faculty of Law. He works in public law with a research focus on how governments and their administrative branches uphold and fulfill, or can be encouraged to uphold and fulfill, their constitutional commitments. With Richard's help, in this episode we will examine how courts have sought to define charter values...

and in what judicial context they arise. We explore when courts are obligated to consider these values and consider the challenges associated with doing so. Welcome, Richard.

**Richard:**

Thank you, Cheryl. Thank you very much for having me. It's an honor to be here. I hope you're not expecting us to have any answers to these Charter Values problems in this podcast. It's a notoriously difficult and confusing area of Canadian law.

**Cheryl:**

Well, can we start by asking you what they are?

**Richard:**

I guess that's as good a place to start as any. I think the easiest place to start in talking about charter values is to distinguish them from the more identifiable thing in the Charter, which is Charter rights. The rights protected in the charter have a specific language. They're written down. They're obviously open to interpretation, but the starting point of that interpretation is the text of the rights as they're written in the Charter.

Charter values aren't written down. The court has never been particularly willing to define them in any kind of usable sense. What it has done is, I guess, tell us three things about charter values. One, it suggested the kinds of things that they are. There's no closed list. There's no definitive list. But there are some examples of the kinds of things that the court think charter values are...

and we'll talk about some of those. Two, it's talked about how they're used and the role that they play in adjudication. And then third, I think the court has done some work in drawing a connection between charter rights and charter values. So, I think those are the three things that we can talk about in a substantive sense. Should I go through those one by one? Is that worthwhile to do?

**Cheryl** (03:29.69):

I think that would be the way to start, it sounds very logical.

**Richard:**

Okay, so let's go all the way back to the beginning. Let's go back to Oakes. Any law student will know what Oakes is about, and I'm pretty sure that most public law practitioners will know what Oakes is about. But there's one part of Oakes which isn't often remembered or talked about, and that's where the Supreme Court talks about charter values. It's one of the earliest cases in charter jurisprudence.

And I think this particular aspect of Oakes is overshadowed by the Oakes Test, which is the sort of major jurisprudential legacy of Oakes. But in talking about Section 1 and the justification of rights limitations, the court makes it clear that the core of that exercise is the values inherent in the Canadian Charter. And in order for a rights limitation to be reasonable and demonstrably justified, which is, of course, what Section 1...

requires, it has to be reasonable and justified against charter values. That's the justificatory standard to which section one justifications have to be held. And I'll just read you this passage from Oakes where they talk about the link between rights and reasonableness and justification in a free and democratic society. This is from Oakes.

**Richard** (04:54.71):

The court must be guided by the values and principles essential to a free and democratic society, which I believe embody, to name but a few, and here's the list, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions, which enhance the participation of individuals and groups in society. So, there's a list.

It's not a closed list, it's not a definitive list, but it's a kind of illustrative and illuminating list of the kinds of things that the court is talking about when it talks about charter values. And then it goes on. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the charter, and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect,

to be reasonable and demonstrably justified. All right, so what you get from Oakes is, first, a handful of examples of the values inherent in the charter to which a free and democratic society must be committed. Dignity, participation in democracy, accommodation of a wide variety of beliefs, and so on. And then you also get this idea that charter values are the basis of charter rights.

Okay, the charter values are the genesis of the rights. The rights don't come from nowhere. The rights are extracted from, built on, this deeper and underlying commitment to the set of values. And then third, you get this idea that any limitation of a right can only be justifiable if it serves the advancement, protection, enhancement of those underlying values. All right, so what you get from Oakes is not just a statement of the kinds of things that charter values.

are, but the role that charter values play in rights litigation or rights adjudication or rights enforcement or rights vindication, there's this very clear link between charter values and charter rights. So that, I think, is the easiest way to start thinking about charter values. They're not rights, but they have a very close connection to rights in the charter.

**Cheryl** (07:18.038):

So is that list in Oakes, do you think of that as a finite list or they're a more broader

charter values, for example. You didn't actually use the word equality, but it's kind of there within what you were describing. But we often hear that equality is a charter value.

**Richard:**

Yeah, you know, so let me go back to that paragraph. To name but a few, respect for indignity, commitment to justice rights and equality, accommodation, variety of beliefs, and so on. It's like section 91 of the Constitution Act of 1867. We're committed to all sorts of things, and here's a list of some of them. This isn't the end of it.

But these are some examples of the kinds of charter values. I don't think that is respect for minorities in there. I don't think respect for minorities is in there. But that's, I guess, part of dignity. It's part of equality.

**Cheryl:**

Although I think the seccession reference talks about the protection of minorities as being an inherent, well, constitutional principle, I think.

**Richard:**

Yeah, so I think you can distinguish between constitutional principles, unwritten constitutional principles and charter values in at least one respect the charter values come from the charter and unwritten constitutional principles come from the Constitution as a whole. Now you can obviously divide those two based on the date on which they were promulgated 1867 and 1982 and so the 1867 Constitution Act unwritten principles are the ones that the Seccession Reference talks about federalism democracy rule of law and respect for minorities.

Now, respect for minorities is closely connected to equality, and there's obviously lots of pre-charter jurisprudence that talks about equality and the kind of unwritten commitment to equality. And there's a common law constitutional commitment to equality. There's the Canadian Bill of Rights, which refers to equality. But the source of those two different things, charter values and unwritten constitutional principles, is a different constitutional document. Obviously, they share a kind of DNA.

But they aren't the same thing. They work in very similar ways. And I guess that's another thing that we can talk about. The structure of these things, charter values and unwritten principles, is the same to the extent that they are, that neither of them is justiciable. So, you can't go to court and assert your charter value. You can't go to court and say, you need to vindicate my dignity. The state has violated my dignity. That's not a thing that you can do.

**Richard** (09:39.098):

In the same way that you can't rely on an unwritten principle to challenge the constitutionality of a statute. The Supreme Court said that very clearly, or a majority of the Supreme Court said that very clearly in the Toronto versus Ontario decision from last year or two years ago. So both unwritten principles and charter values have this sort of background effect or this background role. In that they inform the operation of the operative principles or operative provisions.

of the Constitution and the Charter, but they aren't justiciable themselves. You can't rely on either of those things in order to press a suit against the state.

**Cheryl:**

So back to your three points. Where are we now in your analysis of them?

**Richard** (10:37.386):

Yeah. So the similarity between Charter values and unwritten constitutional principles is, I think, the second point, which is the kind of interpretive role that those two things play. They exist as interpretive resources for officials in the legal system, judges most primarily, but also legislators and administrative officials, in figuring out what the Constitution actually says. So when a decision maker, a legal official, is trying to work out if a right protects a certain kind of conduct, what the scope of a right is, how a right should be interpreted, that decision maker can have reference to the underlying charter values in coming to a conclusion about what it is that falls within or outside the scope of a right. Okay, so you couldn't go to court and say, my charter value of political discourse has been infringed, but the court has talked about how political discourse is one of the values that underlies the right to freedom of expression. So you rely on the right.

Okay, you say my right to freedom of expression has been infringed because I am engaging in political speech and the right to freedom of expression exists in order to protect, affirm, uphold this underlying value, the value of political discourse, of political engagement in society. So, the underlying value is a kind of inherently democratic value and the right to freedom of speech protects that value.

So, determining the scope or the extent of the right to freedom of expression depends on the extent to which it upholds or advances those underlying values. Does the expressive conduct, the expressive act, closely connect to the value that the right is trying to protect in the first place? And if it does,

then that's the kind of expressive conduct that the right to freedom of speech would protect, and if it doesn't, well then, then maybe it isn't the kind of thing that we want to protect. And unwritten principles play the same sort of role in interpreting what a statute means. A decision-maker has to have regard to the unwritten principles. If there are two equally plausible interpretations of a provision in a statute based on their plain text.

**Richard** (12:43.526):

and one of those interpretations is more consistent with an unwritten principle, say, judicial independence, then the official charged with interpreting the statute should prefer the interpretation that is consistent with those unwritten principles. So it's an interpretive aid, right? Toronto versus Ontario made it clear that you can't challenge a statute as being inconsistent with a constitutional principle.

But you could argue for an interpretation of the statute that accords better with those unwritten constitutional principles. So both charter values and these unwritten principles are interpretive aids. They allow decision makers to keep in mind the underlying normative commitment of Canada's constitutional structure when bringing their decision-making authority to bear on particular moments or situations or cases.

**Cheryl:**

So, tell me a little bit more about who these decision makers are. I think, you know, we often hear when we're talking about charter values, there's often reference to two particular cases, Doré and the Barreau du Québec and the Loyola High School versus Quebec Attorney General case. And they're often cited as leading cases in relation to charter values.

Who are these decision-makers? How do charter values fit in? When it isn't necessarily like a constitutional challenge where you've got judges making those decisions.

**Richard:**

Right. So there, I think, is where this third way that charter values operate is relevant, and that's in limitations analysis. What Doré told us to do in 2012 was depart from the more familiar Oakes framework….

for determining the section one justifiability of a rights limitation, when that rights limitation has been imposed by an administrative decision maker in an adjudicative context, rather than the legislature enacting a statute. So Doré starts off right at the beginning of the judgment by saying the Oakes framework was developed as a way to determine the justifiability, the proportionality of a rights limitation imposed by statute.

**Cheryl** (15:03.402):

And I'm just going to interject right there just to let our listeners know that we did a whole episode on Section 1 and the Oakes Test, the very first episode of Season 1 of our podcast with Professor Jacob Weinrib from Queens University. But anyway, go ahead, Richard, and continue.

**Richard:**

And then the court in Doré said, when we're looking at the adjudicated administrative context,

The considerations that those administrative officials have to take into account are vastly different from the considerations that a legislature takes into account when making broadly applicable social policy decisions. And so, because of that, you don't need to apply the whole Oakes framework. All you need to do is focus on proportionality in the strict sense or in the language of Oakes, the final stage of Oakes’ four-stage inquiry into justifiability or proportionality.

And in setting out that approach, the unanimous court in Doré ended up relying heavily on the language of charter values in ways that turned out to be extremely confusing for practitioners and subsequent courts dealing with what became known as the Doré framework or the Doré approach to rights analysis.

Perhaps it's germane at this point to talk about the confusions that Doré gave rise to, I'm not sure if that would be a good thing to talk about, or should we focus on something else for a second?

**Cheryl:**

I think that's a perfectly good spot to talk about that, because there has been certainly lots of criticism of Doré, and as you said, a lot of confusion by administrative decision makers who have to sort out this fairly complex approach to, I think...

balancing people's rights and where they're not necessarily in a situation where you're challenging legislation, for example.

**Richard:**

Right. Perhaps then let's go back a step. The question that you asked me a second ago, which I don't think I actually answered, was who are these decision makers? So, let's focus on that and let's give a couple of examples from the case law. So, who is Doré? Doré was a member of the Quebec Bar who was unhappy with the way that he was treated by a judge in Quebec and wrote a letter.

**Richard** (17:23.266):

to the judge, which the judge then brought to the Law Society on Quebec. The Law Society then disciplined Doré for insulting a judge, for acting in a manner unbecoming of a member of the legal profession. Doré then said that the decision-maker in this case, the Bar of Quebec, had violated his rights to freedom of expression. So, the decision-maker here is a statutorily authorized body, the Bar of Quebec, who exercises a power…

imbued by statute to regulate the conduct and ensure the professionalism of members of the bar, of the Quebec bar. So, there's a decision-maker exercising statutory authority, in this case the statutory authority to maintain professionalism, promote discipline in the legal profession, and then a complaint by the subject of one of these decisions that the exercise of that statutory power, the administrative decision had...

unjustifiably infringed his charter right. So, there's no challenge to the statute. There's no concern about the constitutionality of a statute. There is, however, a concern about the constitutionality of a particular individualized administrative decision. So that's one kind of decision-maker, the bar of Quebec. I was going to mention Trinity Western, which is another law society. In that case, the law societies of Nova Scotia, British Columbia, and Ontario.

all refused to accredit Trinity Western University's proposed law school on the basis that its admissions policy had discriminatory effect. The admissions policy was the requirement that everyone sign a community covenant that prohibited certain kinds of conduct, conduct which was likely to be difficult for members of certain communities to comply with.

Broadly speaking, it prohibited premarital sex between anyone, well, sex, prohibited sex between anyone other than couples married in a heterosexual relationship. And Trinity Weston then brought a complaint, brought a judicial review against the decision of the law societies complaining that Trinity Western's right to religious freedom had been infringed because their beliefs about premarital sex were a reflection of their religious commitments. So the decision maker here is again the law societies.

**Richard** (19:44.746):

and their decision to refuse to accredit the Trinity Western Law School was alleged to have violated the right to religious freedom. So those are the decision makers, exercising statutory powers in ways that in individual cases engage charter rights. And then the question is, how should those decision makers be thinking about the justifiability of the limitations that they impose in order to achieve their statutory objectives?

So, what Doré ended up telling decision-makers to do is basically forget about Oakes. Forget about the first three stages of the Oakes analysis, which if you listen to Jacob Weinrib's contribution to the podcast, you would know are, is there a pressing and substantial objective being pursued by the state action? Does the means to achieve that statutory objective, is it rationally connected to that statutory objective? Has the state adopted the least restrictive…

means to achieve that objective, and then finally, is there proportionality in the strict sense? That is to say, is there a proportionate balance between the salutary effects of achieving this objective and the deleterious consequences of limiting people's rights? So, what Doré told decision makers to do was just focus on that final stage of Oakes, right? And here's the language that Doré used. How then does an administrative decision maker apply charter values…

in the exercise of statutory discretion? He or she balances the charter values with the statutory objectives. Then the decision maker should ask how the charter value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise and requires the decision maker to balance the severity of the interference of the charter protection with the statutory objectives.

So, on one hand, what Doré does is nothing different to the final stage of Oakes. It says just do that balancing exercise. Forget about the first three inquiries, just do the balancing exercise. And we can talk about the desirability of doing that, okay? In and of itself. The difficulty, I think, is the emphasis that the court placed on charter values in this approach. So the court didn't say charter rights, it said...

**Richard** (22:01.006):

Charter values is a unanimous decision of the Supreme Court of Canada and they made a specific decision to use the phrase charter values instead of the more familiar phrase charter rights. Or the passage that I read you doesn't say charter rights once, it says charter values four times. And then it also says charter protections. So, after Doré, no one really knew what a charter value was or what a charter protection was or what the relationship between either of those two things was to each other or to charter rights. And this is where a lot of the confusion comes from.

**Cheryl:**

Well, and especially because the charter value that they were really talking about in that case was freedom of expression, which is a charter right.

**Richard:**

Right, exactly. And I think at some point in the judgment, it says the charter value of freedom of expression, which is, in its most charitable description, confusing, and in its least charitable description, wrong.

I think the core concern that arose after Doré is that changing the analytical framework from Oakes to something else and introducing this amorphous idea of charter values at the core of this new approach would leave charter rights under protected in the hands of administrative decision makers. Right? The concern was that administrative decision makers would now be acting in ways in pursuit of their statutory objectives that would...

erode the Charter's protections for those rights and expose rights bearers to increasing attack on their Charter rights, with a weak analytical framework for protecting those rights, and limited judicial oversight for the protection of those rights.

**Cheryl:**

So, minority decisions, both in the Trinity Western, and I think it comes up a little bit in the Loyola case that I mentioned, as you say, there is this criticism, but also this call for clarification of this framework. So you've alluded to those concerns. Would you say that the current state of Charter values, jurisprudence is in need of an evolution or that clarification, and what would be the necessary improvements to do that?

**Richard** (24:14.978):

I think your practice corner guest will have a lot to say about this. I'm not litigating these issues day to day, right? Even so, my view as a non-practitioner is that there's a desperate need for clarity. I just, I get the sense that litigators just don't really know how to engage with the analysis. There's emerged a kind of dichotomy between the Oakes approach and the Doré approach and…

litigators feel the need to press arguments for the adoption of one approach versus the other in a particular case. There's no real test for whether Doré or Oakes applies or should apply. And even if it does, it's kind of unclear if you adopt the charter values approach, as has come to be known of Doré. It's pretty unclear how to do that charter values thing. So, I think there are a couple of things that have to happen.

One. The relationship between Doré and Oakes does need to be worked out. And two, to the extent that Doré continues to be valuable, we need to work out what it is that Doré actually offers administrators and courts of judicial review. So yes, I think we need a kind of practice direction, if you like, as well as an analytical clarification for what Doré actually does and how it operates.

**Cheryl:**

And I think some of the confusion really stems from who is, and we go back to that original question about who the decision maker is, whose decisions are being challenged. So, it's really clear when it's government enacting legislation, what the approach is. It's a claim based on the charter rights, and you've got section one in play clearly. You've also got the remedies under the charter….

Section 52, or you can get a declaration that something's unconstitutional. Section 24, that can give you individual remedies. But what you have are these administrative decision makers who aren't necessarily government, but are empowered by government, making these decisions that are really related to individuals. And so, this is where I think there was this, the appeal of the charter values as opposed to full charter rights, because it's not clear that charter rights would apply because you couldn't make a claim against those individuals.

**Richard** (26:24.574):

But where an individualized decision engages a Charter right, there's still a claim to be made. And I do think that the distinction that the Supreme Court draws in Doré in its opening paragraphs remains a good one in ways that the subsequent case law and, to be quite honest, the application of a modicum of logic would bear out. And the difference is this. When the legislature is considering,

the myriad ways that it has to achieve an objective, a policy objective that is determined by the executive and tabled in a bill before them, there really is no limit to the mechanisms that they could adopt to try and achieve that objective. So, I guess just as an example, in Carter, the Supreme Court decided that prohibitions on medically assisted dying were unconstitutional and said to the legislature, said to parliament…

figure out a way of coming up with a solution. And there's a number of different ways that you could come up with a solution to that particular problem. So, when the legislature is faced with a social policy directive, a social policy objective, it has before it innumerable possible mechanisms of achieving that objective. So, in that situation, when legislation that results from that legislative process gets challenged as inconsistent or infringing a charter right…

it makes sense to ask the question, look, was there another way for the legislature to try and achieve this objective that is, A, less restrictive of rights, and B, just as likely to achieve that social objective? Because if there is, then there seems to be very little basis on which the government can claim that it was a proportional limitation of rights.

**Richard** (28:16.258):

So in those kinds of situations, it does make sense to ask the full range of Oakes' inquiries. Is this a suppressing statutory objective? Is this means rationally connected? And is there a less restrictive alternative? And if you answer all of those questions, then you get to the proportionality in a strict sense inquiry. What Doré pointed out and what the Trinity Western case bears out is that in lots of adjudicative administrative settings, those first three questions have already been answered, essentially,

So, it's not as if the Supreme Court was saying in Doré, the Oakes test is bad. They were just saying, asking these three questions from the Oakes inquiry, don't actually allow the decision maker to explain or justify whether his or her decision is justified or unjustified. And the Trinity Western case is a perfect example of this. The law societies have a statutory mandate to promote the public interest. No one challenged that. No one challenged the….

pressing and substantial nature of that statutory mandate. Maybe you could, but no one did, okay? They were faced with an application by Trinity Western to accredit their law school curriculum. And the two law societies who ended up in litigation in the Supreme Court, British Columbia and Ontario or Upper Canada as it then was, both decided that accrediting a law school curriculum or a law school that had...

an effectively discriminatory admissions policy would not be in the public interest. So, it would not be possible, it would undermine their statutory objectives were they to accredit Trinity Western. Now the options in front of them were accredit Trinity Western or don't accredit Trinity Western. That's all they could do. There was no range of options open to that decision maker in the way that there is a range of options open to a policymaker or a legislature.

So faced with those two possibilities and Chief Justice McLachlin's separate concurrence in Trinity Western and makes this clear, faced with those two options, it doesn't help either of those law societies to ask if there's a less restrictive means. Because there is obviously a less restrictive means which does not advance the statutory objective. OK, so the less restrictive alternative here is just to credit Trinity West. But doing so would have undermined the statutory objective.

**Richard** (30:42.678):

So, for either of those law societies to just take the less restrictive alternative would have resulted in their failure to discharge their statutory objective. That's not the end of the discussion. Okay? So, the minority, the dissent in Trinity Western makes a lot of the fact that if you apply the Doré framework, you end up with the statutory objectives trumping the rights every time. Okay? And that's wrong. Why is it wrong? Because that's not where the inquiry ends.

Once you've come to the conclusion that there is only one way to advance your statutory objective as an administrative decision maker, the next question for you to ask is, is it justifiable? Is it proportionate for me to limit the rights in this way in order to achieve my statutory objective? And that's where the Doré framework becomes valuable, right? Because it focuses the administrative decision maker on the only inquiry in the Oakes test…

that actually allows that decision maker to provide a coherent, intelligible, and transparent justification for why they are taking this action to limit a right in order to achieve that statutory objective. And at the same time, decision makers should recognize and be open to the very real possibility that it would not be a justifiable approach, that it would not be justifiable to limit a right in order to achieve that statutory objective.

And if they find themselves coming to that conclusion, the only approach that they can take is to say, you know what, I can't fulfill my statutory objective in this case. Doing so comes at too high a cost to charter rights, so I can't do it, right? And then say to their superiors, look guys, you've got to figure this out at a statutory level. It's not for me to do, I'm just the administrator, but I've now come to the situation where I cannot justifiably fulfill my statutory objective because the cost is just too high.

**Cheryl:**

Well, that makes it sound fairly straightforward. I think that's one of the arguments about Doré, and I'm quoting from an article by Paul Daly here that it's animating purposes to empower decision makers by prompting them to take account of charter values. And he says, in an informal, good faith way, and the goal is not to unmoor the charter from its textual anchors, which are those claims that we talked about, but rather to enrich.

**Cheryl** (33:06.15):

our collective understanding of foundational values in Canadian public law. So the problem is I have with that, and that makes it sound all very like this informal, good faith approach, is that we still have decision makers with a lot of confusion about how Doré really applies. And so I just want to know, like, where is that confusion, and how do we get past that?

**Richard:**

Well, I think there are a couple of things to say. The first is to go back to charter values and to go back right to the beginning of this discussion, what role do charter values actually play in this particular context, which is the justification of rights limitations by administrative decision makers, particularly in that context where the kind of more objective inquiries of the Oakes test don't apply.

So, the less restrictive means test is kind of evidence-based. You can kind of test the assumptions that people are making with evidence. But as soon as you're in the realm of proportionality, and is this more valuable than that, it's subjective and ad hoc and less objectively explicable. So, here's where I think the charter values that the unanimous court in Doré become relevant. And I think there are two ways that we can kind of bring this discussion home, which is to say...

Once you're in a world where you now have to engage in that very difficult morally subjective exercise of examining the strict sense proportionality of a rights limitation and the statutory objectives, charter values can help you to explain that balancing exercise, I think, in two ways. The one way is by examining the connection between the conduct protected by the right…

and the underlying values in order to figure out the seriousness or the extent of the rights limitation. Okay, so in cases like Keegstra and R.J.R. MacDonald, freedom of expression cases, the court makes it clear that if the act or the conduct that is protected by the right is closely connected to the core values that the right protects, then any interference with that conduct would be a serious violation of the right.

**Richard** (35:24.29):

However, if the conduct sought to be protected is only tangentially connected to those core values of the right, then an interference with that conduct, a limitation of doing that thing, would be a minor or a less serious infringement of the right. So in Keegstra, we're talking about hate speech, in R.J.R. MacDonald, we're talking about tobacco advertising. And in both cases, the court said, this is conduct, this is expressive conduct that's protected by the Charter right to freedom of expression, but they're very...

loosely, if at all connected to those underlying values, personal self-fulfillment, a search for truth, political discourse, that limiting that conduct, a statutory prohibition on that conduct, is not a serious violation of that right. Okay, so you can use charter values to come to a sense of how serious the infringement of the right is. Once you've got that, you can then balance that…

against the importance of the objective sought to be achieved. Okay, and the kind of basic, you know, the very visual metaphor of a set of scales is useful here. If you have a minor rights infringement weighed against a very important objective sought to be achieved by limiting the right, then you can see how the scales will respond, right? It's justifiable because the good achieved by the objective outweighs the minor infringement on the right.

Similarly, if there's a serious infringement and a minorly important or not very important objective sought to be achieved, then the limitation on the right would outweigh the importance of the objective and the limitation would be held to be unjustifiable. So, that's that kind of strict interest balancing approach to Section 1 analysis where charter values plays a role.

And that's essentially what the majority of the Supreme Court Trinity Western did. They said this is not a very serious and violation of the right. We can look at the jurisprudence, we can point you to the paragraphs where that's the case. But promoting equality and access to the legal profession is a very important objective, and therefore that outweighs this minor limitation of the right, and it's a justifiable limitation on the right. So that's how charter values can work in the Doré analysis. And I think that's what the Doré…

**Richard** (37:44.878):

court was trying to get us to, right? And the important thing to recognize here is that a charter value is not a charter right, okay? And that's part of the confusion that Doré fostered. This amalgamation of charter rights and charter values and charter protections obfuscates the fact that charter values are not charter rights. Charter values are an interpretive guide that help a decision maker and a court of review to figure out…

how serious the violation of the right is, in order to put it in the pans of the scales in that strict balancing exercise.

**Cheryl:**

So, you've recently worked with the Asper Centre in preparing an intervention factum, in an appeal that's coming up to the Supreme Court of Canada in October. It's the case of York Region Board of Education versus the Elementary Teachers' Federation of Ontario. It's being heard on the 18th. Tell us about the arguments that we are putting forward. Again.

The court may pick up on this argument or not, or we'll only know months down the road whether it's something that's resonated with them. But can you just explain a little bit about how we've addressed Doré and all this confusion and these issues that we've been talking about?

**Richard:**

Right. I think we've sought to do two things. One is to clarify exactly how Doré works and what's good about Doré and what's bad about Doré. And the second is to...

connect the underlying logic of Doré to the underlying logic of Vavilov, the Supreme Court's 2019 decision that vindicates the importance of a culture of justification and demands of every administrative decision maker in the Canadian legal order that they give to every person affected by their decisions a coherent, intelligible and transparent justification for why they've taken the decision that they have. So, our argument…

is that the Doré analytical framework is in some situations the best way for a decision maker to provide that coherent, intelligible, and transparent justification for why they've taken a decision that limits a charter right. Not in all situations, in other situations, Oakes will provide the best analytical framework to provide the most coherent, intelligible, and transparent justification.

**Richard** (40:06.454):

But in some situations, particularly those that we've talked about, where there's a limited range of options open to the decision-maker, where the first three inquiries of Oakes carry no explanatory value, then the Doré injunction to focus on strict proportionality is how that decision-maker will discharge the Vavilov burden of justification. So, the first thing I think we've tried to do is to make it clear that what Doré offers is...

a way of thinking through the justification or the justifiability of a rights limitation. And it's particularly apposite in certain kinds of administrative contexts. It's an alternative, or maybe not even an alternative, it's a more focused application of the Oakes inquiry in situations where only that inquiry into proportionality in the strict sense is capable of justifying the decision. And that's exactly what Vavilov demands.

Okay, so Doré is one way to uphold that culture of justification in certain circumstances. The second thing that we've sought to do is make a clear distinction between the mode of analysis, the mode of reasoning about the justifiability of rights limitations that Doré offers and what Doré has to say about the standard of review. Now...

It's hard to read Doré as saying anything other than when an administrative decision about the justifiability of a rights limitation is taken on judicial review, the standard of review must be reasonableness. And that has been affirmed in a number of subsequent cases. Having been invited in a number of different cases to comment on Doré, the Supreme Court has declined. And they may do so again in October.

**Cheryl:**

And just to sort of explain to listeners, because this is the first time, we really introduced the concept of standard of review, which for you and me, we're sort of steeped in that we know what we mean by that, but that is where an administrative decision is being reviewed by primarily a court. What is the test to determine whether the decision they made should be upheld or overturned? So, reasonable means...

**Cheryl** (42:25.782):

You know, it's within a range of reasonable decisions, and they're not going to, and this is me paraphrasing it, probably oversimplifying it, because it's one of these other elusive concepts, and the court has flip-flopped on it all over the place, quite frankly. But you're not going to get to whether or not they were correct if you're using reasonable. It's just you give the decision maker the sort of the power to determine.

really what that decision is within a range of reasonable possibilities. Whereas a standard of correctness is when they're interpreting their statute or their jurisdiction within a statute or when it's a constitutional question, they're supposed to be right. So, a judge could review that and say, no, you've done this, you've interpreted this wrongly, or you've made the wrong decision here. And I know I'm oversimplifying it, because we could do a whole episode on standard of review, but just as a sort of a...

Correct me if I've misstated anywhere, but I just want to make sure we're, we don't have the time to go into great detail what standard of review is, but I think it's at the core of some of the confusion and criticism of Doré as well. Yeah, so to get back to the core of the criticism of Doré, that charter rights will be under protected in the legal system if administrative decision makers have this latitude…

which comes from the standard of review on judicial review being reasonableness. So, the concern is that reasonableness is, and again, we're paraphrasing here, has kind of been understood as a right to make some degree of error. Okay, that's perhaps not entirely accurate, but that's one of the ways that reasonableness as a standard of review has been understood, that it gives some…

wiggle room to decision makers, not to make a perfectly correct decision, but to make a decision that's reasonably good enough. And if decisions about charter rights only have to be good enough, then that exposes charter rights to erosion. And that, I think, is true. If it's the case that administrative decision makers, who are not experts in constitutional law, are making decisions that engage charter rights...

**Richard** (44:39.634):

and those decisions are being reviewed on a more deferential standard, the standard of reasonableness, then I think there probably is a legitimate concern that rights are going to be exposed to greater erosion in the administrative state. There's a great statement of this from a UK Supreme Court, or perhaps it was the House of Lords at the time, a decision dealing with a determination about whether schools should allow a departure from its...

uniform policy for religious reasons. Right, there's obviously an engagement of religious freedom. Should someone be allowed to wear something that is not strictly compliant with the school uniform code. And the comment that stands out to me from that decision is when the Supreme Court said school principals or school boards cannot be expected to make decisions with a textbook of human rights at their elbows. And I think that's right. I think it's true…

that administrators from school boards to, well, from school boards to Ministers, quite frankly, are, unless it's the Minister of Justice, who we hope would be an expert in human rights, these administrative decision makers are not well-trained, certainly not as well-trained as judges in matters of constitutional rights. So, if it's the case that all of these decisions should be reviewed on a standard of reasonableness, then I do think we have concerns about whether those rights are adequately protected or not.

But if you can separate what Doré says about the way that you think about the justifiability of rights limitations from the standards of review when it does go on judicial review to a court, then I think that concern can be allayed. It can be allayed in the following way. You just say that the standard of review for constitutional questions is correct. And that's what the court says in Vavilov. The court, well, and in Dunsmuir before it, in 2008, the court says,

When a decision, when an administrative decision, engages constitutional matters, the standard of review must be correctness. Now, since Dunsmuir and Vavilov, there've been a number of decisions about charter rights, particularly what the scope of a charter right is, whether a charter right has been infringed, or whether a decision maker should have reviewed, should have thought about the charter at all. Those are all decisions that attract correctness on review.

**Richard** (47:01.462):

Now, if those decisions attract correctness on review, there seems to be no compelling reason that an administrative decision about the section 1 justifiability of a limitation shouldn't also attract correctness review. And if you do that, then I think you can meet both the demands that Vavilov sets out of a culture of justification and the concerns that critics have had about the erosion of rights.

So, in the first place, administrative decision makers have to justify their decisions in the best way that they can. And in some situations, Doré's analytical framework will give them the tools to do that. It will give them the tools to explain to a person affected by the decision, this is why I think this is a justifiable limitation or why I think this is an unjustifiable limitation and why I cannot pursue my statutory objective, right? So that meets the culture of justification demand.

It ensures that decision-makers can offer the most coherent, intelligible, and transparent explanation that they can. Once they've done that, it remains open to the subject of that decision to seek judicial review. And once they do that, in order to ensure the best protection for charter rights that we can, we just say to the courts, review this decision on the standard of correctness. Make the decision, judges, that you think should have been made.

That's what correctness means. That's what correctness review means. It means allowing the court to step into the shoes of the administrative decision maker and make the decision that they would have made had they been the decider of first instance. And if you do that, then charter rights are as well protected by the administrative system as they are by the judicial system. Why? Because it still judges making the ultimate determination about whether a charter right is justifiably limited or not.

And that's true, regardless of whether the analytical framework at the administrative level is the full Oakes analysis or the more focused Doré analysis.

**Cheryl:**

And it's potentially very consequential, because people don't realize that administrative decision-makers really have a huge impact on people's rights and on people's lives. Many, many decisions are delegated to administrative decision-makers.

(49:24.022)

whether it's through human rights, like human rights codes, rental tribunals, and also just basically applying for various things that you have to do. So, I think these issues are very important. As a final question, I just want to ask you what role do you think that legal scholars and academics play in shaping the understanding and application of these charter values that we've been talking about?

**Richard:**

Well, I think people like Jacob and myself. I think I would call us both public law theorists, very rarely engage in practical questions or questions that are particularly useful to practitioners. But I do think that there's clearly a connection, right? So, I've been thinking about charter values for a long time. I come from a jurisdiction, South Africa, where the animating constitutional principle in the post-apartheid legal order is Ubuntu, which means...

I am a person because I am part of a community. Now, that's a very broad and abstract statement of a constitutional principle, but that has been the animating vision of South African constitutional law, certainly in the early years. But it's very difficult to put into words. But the Constitutional Court of South Africa tried to grapple with that and tried to use that as that kind of guiding interpretive principle in the application and formulation of doctrine.

But it couldn't have done that, I don't think, without, first of all, the judges that it had on the Constitutional Court to begin with, many of whom were purely legal theorists, academics, and without the contribution of the legal academy. So I think once you get to these very, very difficult questions about whether the limitation of a right is justifiable against the values at the core of the Constitution, then I think it's helpful...

to have contributions from people who have the luxury to think about these things, right? And who are those people? They're legal scholars, they're academics, who quite frankly do have the luxury to sit in our offices or wherever it is we happen to work these days and think about what a charter value is and read all this jurisprudence and pick out from 20 years of jurisprudence or 30 years of jurisprudence, all of the cherries of...

**Richard** (51:48.054):

where the courts have turned their attention to what a charter value is, and then provide that to the court in cases where it is appropriate. So I feel very lucky to have been asked by the Asper Centre to work on an intervention that happens to have coincided with an area of law that I've been thinking about at a theoretical level for several years now. Whether that has any impact, I think, is beside the point. I think what's valuable is that...

this is now an argument that will go before the court. And whether they're engaged with it or not, I think it just brings the court's attention to the fact that there are people thinking about these issues.

**Cheryl:**

Well, thank you. Thank you very much, Richard, for both your contribution today and trying to explain these very difficult concepts, as well as your contribution to our argument in the York Region District School Board case. I think that part of what happened when we were…

putting together that argument was also bringing that theoretical together with a very practical of what does this mean for somebody making a decision at the front of the line. And our practitioner perspective that we brought to that as well kind of forced us to really think about it, both practically as well as theoretically. So thank you for both. We've been speaking with Professor Richard Stacey from the Faculty of Law at University of Toronto, trying to get a handle on what...

charter values means and even touching on the standard of review. In our practice corner, we'll be talking with lawyer Matthew Horner on his experiences practicing in administrative law area using these concepts.

**Richard:**

Thanks, Cheryl. What a pleasure.

**Cheryl** (53:34.326):

Welcome back to today's Practice Corner. I'm speaking with lawyer Matthew Horner on his experiences of practicing in the area of administrative law, where Charter Values sometimes find the home. Matthew Horner is counsel with the Ontario Human Rights Commission. Prior to joining the commission, Matthew was counsel for 11 years with the Constitutional Law Branch of Ontario's Ministry of the Attorney General. He's also the author of Charter Values, the Uncanny Value of Canadian Constitutionalism, an article…

where he examines the functional role that the court has assigned to Charter Values, as well as their substantive meeting. So welcome, Matthew.

**Matthew:**

Thanks for having me, Cheryl.

**Cheryl:**

Can you start off by telling us a bit about your current practice? Well, as you said, I am currently counsel with the Ontario Human Rights Commission. The Commission has a broad systemic mandate to examine and remedy discrimination in Ontario.

That can be done through a variety of means, including by studying and setting policies regarding the Human Rights Code, and as counsel we can provide input on policies. There's also a litigation aspect in which the Commission can choose to become involved…

in human rights proceedings before the Human Rights Tribunal of Ontario, as well as in proceedings before the courts. And so in my work, I've been involved in a variety of human rights issues, including issues relating to solitary confinement in Ontario's prisons, as well as issues regarding all forms of discrimination, including anti-black racism and other issues. So, that's sort of the work that we do. There's an advisory component and a litigation component to it.

**Cheryl** (55:46.482):

In our previous segment, we discussed the current state of charter values jurisprudence in Canada, including some of the challenges and opportunities. And in your 2014 paper on the subject, you expressed concern about the use of charter values and ultimately argued for their rejection, I believe.

Have your views evolved since the publication and is this something that you continue to see in your practice or has have things changed?

**Matthew:**

When I wrote the paper in 2014, it was just not long after the court's decision in Doré and the decision in Doré really left a lot of questions to be answered about.

what this analytical framework of charter values in administrative contexts would entail. I sort of saw three different axes on which there was open questions regarding charter values. One, what are charter values? What do they mean? Are they just charter rights or are they something more amorphous? Two, how could you limit charter values? What was the proportionality analysis going to look like?

And then three, how would these issues be reviewed on judicial review? What was the proper framework of analysis? And Doré had said it would be reasonableness. So, I think coming up to 10 years later, I think some of these questions have been answered. And the answer is charter values aren't doing a whole lot of work. You know if you look at the first question…

**Matthew** (57:10.658):

how do charter values, what are they, how are they defined? I think you see the court in Trinity Western saying charter rights should always be defined in the same way. And so you haven't seen sort of an expansion of charter values to include, you know, either broader concepts of freedom in some general sense or analysis of a charter right but without any of the internal.

limits on it, you know, life, liberty and security to the person, but without consideration of principles of fundamental justice, for instance. You have not seen that. So it seems like in terms of what is the charter values, what are the charter values, they are the charter rights. So that seems, that question and concern seems to have dissipated now. The second issue of how do you a proportionality analysis, that is that different from Oakes under section one of the charter.

I think the answer the courts have given over the past 10 years is it's not really different. In Loyola, for instance, the Supreme Court talks about a robust proportionality analysis using the same justificatory muscles. Those are some fancy words, but when I read the cases, I think you end up still being in the same place as you would be in a Section 1 Oakes analysis.

And I get some confirmation for that from Justice Lauwers’ recent decision in the Lauzon case from the Court of Appeal, where there was arguments from the appellant in that case that the Oakes test should be followed in that case, not the Doré proportionality test. And Justice Lauwers ultimately says that he doesn't have to decide that question because you'd arrive at the same conclusion that it was not a proportional…

or not a justified limit on the charter right or charter value at question in that case. And he does an analysis following the Doré framework using the language of Doré and proportionality. But I think when you read the work that he's doing there, it ends up looking a lot like a section one analysis, so you don't get that far. And so that just leaves the question of reasonableness review of administrative decisions. And…

**Matthew** (59:33.194):

You know, I think that's a question that is still a live one. I know that there's a decision going up to the Supreme Court on the York District School Board case where there's some question of how do you review these decisions post-Vavilov, whether reasonableness analysis for an administrative decision still makes sense. And the Court of Appeal in that case had said that, in fact, it should be a correctness standard in that context. So those are questions that Doré raised.

And my paper in 2014 had a lot of concerns, but most of my concerns over the past 10 years have been allayed by the fact that, at least in terms of the definition of the right and the proportionality analysis, it seems to end up being that we're in the same place as a charter analysis.

**Cheryl:**

Well, you'll be interested to know, and in our previous segment, we talked to Professor Richard Stacey about this, but the Asper Centre is intervening in the York region school board trying to come up with a way to make Doré, like some elements of Doré, relevant but still arguing that the standard should be correctness. And we touched a little bit upon this administrative law, judicial review sort of standard, whether it's reasonableness, whether the decision was reasonable or whether it was correct. And I mean, when it comes to the charter, we fall down on the side of it ought to be correct. And that part of the problem with Doré is they conflated the standard of a review with proportionality….

in terms of that analysis, but I think you'll be interested in our factum. It might have some relevance to the work. So could you, you know, you've kind of given us the sort of overview of what charter values are, what your arguments were in your paper, but I'm interested in more the sort of broader, how does the charter come up in your practice? And how do you see, at the first level, of course, is the tribunal, and then the next level would be the court's review of those decisions.

How do you see courts and tribunals engaging in these types of discussions, and what are the arguments that you see being successful?

**Matthew** (01:01:57.038):

Well, you know, when Doré originally came up, I actually worked as counsel for the Ministry of the Attorney General of Ontario. And so in that context, and early in the Doré days, we would see a lot of cases be brought where perhaps people hadn't…

put together a record that would meet the requirements of the charter test. And so a third or fourth alternative argument would be, well, maybe we haven't proven a charter violation, but at least, you know, charter values should somehow get mixed into this for the claimant to be successful. And as my previous answer suggested, there hasn't been a lot of success for parties following that approach. So that's not been the way it's gone.

And then in the interim, about six years ago, I came over to the Human Rights Commission, so more of a claimant applicant side practice. And from that side, within the confines of the type of work that the Human Rights Commission does, I have to be honest, I have not seen a lot of charter values being invoked. At the commission work, we see a lot of human rights claims…

to the Human Rights Tribunal and when you're in front of the Human Rights Tribunal, a claimant gets to argue that their Code rights were violated, that they were discriminated against, and there's, you know, arguments for flexibility in the scope of that test. But you don't often see a lot of extra charter values arguments being brought in. The way that I've seen constitutional issues raised before the tribunal...

has generally been in the more traditional sense where there's a challenge to the constitutionality of a provision of the Code. Whether a defense in the Code is unconstitutional, that itself violates the Charter, and therefore a respondent should not be able to rely on that defense. That's the way that it has come up before. For instance, there's a case…

currently on reserve with the tribunal in which there's been a challenge to some of the defenses relating to accommodation in housing when there's a shared bathroom or kitchen and there's a broad defense there that the code does not apply in those scenarios and an applicant has claimed that defense is unconstitutional and discriminatory under the Charter and therefore should not apply. And so that's...

**Matthew** (01:04:17.154):

generally how we've seen it, but that's been run as a traditional charter challenge. Like you would see one in a court, but as we know, the Human Rights Tribunal as a tribunal that has authority to decide questions of law, has authority to decide those types of charter questions. But if it got reviewed at the divisional court, obviously the standard of review would be correctness under Vavilov and previous case law on that issue. So we don't get into...

You don't see as much this question of, is the discretionary administrative decision.

**Cheryl:**

Do you see charter values being raised, though, where you might have some competing rights? So, for example, a discrimination claim based on sexual orientation where the response has to do with freedom of expression, for example. Is that a type of case that would involve charter values?

**Matthew:**

I think you do see instances in which there are competing rights or rights have to be balanced between the parties and the Human Rights Commission in fact has a policy on competing rights and how those get incorporated into, should be incorporated into, tribunal decisions. And you could think of that through a Charter Values framework, although that's not

not the way, at least the Doré framework is not the way that I've seen it approached by the tribunal.

**Cheryl:**

If charter values are here to stay or they're not here to stay, I don't know whether, I mean, I think that we've spent a lot of time talking about it in the first segment, because I think law school students learn a lot about charter values, but I'm not so sure in terms of your practice whether you see it as much anymore. But would you have any advice for litigators who are exploring bringing a charter values argument or even a charter argument forward at the tribunal level? Do you have some advice?

**Matthew:**

I think that, you know, obviously you need to follow, if you're doing a judicial review of an administrative decision, you need to follow the Doré framework that continues to be the law in Canada. And so you would want to follow that framework. I think that usually as a litigator, you need to make some strategic decisions of what…

**Matthew** (01:06:40.458):

makes your argument look the strongest. And so to the extent you'd be making a charter values argument as the fourth or fifth in the alternative argument, to my mind, it seems like it starts to suggest you don't have a good argument, you don't have a good case on the charter. So, I wouldn't recommend just sort of invoking charter values without being in the proper framework to discuss them. And usually, you'll be wanting to make sure…

that you're hitting the same notes that you would be hitting in a Charter case. We talk in charter values cases about how is the right engaged, but you'd want to make sure that your evidence and arguments also showed that the right was violated in this instance. Similarly, you'd want in the proportionality analysis, you'd want your evidence and your arguments to make sure that they met either the section one test or any other way that the test is described as being one of proportionality. So that would be my suggestion.

**Cheryl:**

I think you were saying that, I mean, charter values don't come up that much. And is it fair to say that's because the Ontario Human Rights Code is a pretty strong piece of legislation. I call it quasi-constitutional legislation that really, with its focus on discrimination, there's a long history of cases and understandings of what that means. And so that the charter doesn't necessarily need to come into play because it in itself is a strong piece of legislation to protect rights. Would you agree with that?

**Matthew:**

I would agree with that. I would say that one case in which, one human rights case in which Charter Values was in vote was a case I worked on when I was working with the Attorney General of Ontario, a case called Taylor-Baptiste. And that was a case in which the scope of protections of the human rights code seemed to have been reduced and read down...

because of the charter value of freedom of expression and labor speech in particular. And so that there's an example of a case in which that did occur. That case is a bit old now and as a litigator, you know, you take your wins, you take your losses, you have to move on. That's one that's always stuck with me as raising some questions for me as to how that ended up the way it did.

**Cheryl** (01:09:03.522)**:**

Is there anything else in terms of what you're working on? Any current cases that you would like to tell the listeners about?

**Matthew:**

Well, the Human Rights Commission is currently intervening in a case called OTCC versus Ontario, which is a case about the math proficiency test that Ontario initiated for teacher candidates, and the OTCC successfully argued at the divisional court that test had...

discriminatory impact on racialized teacher candidates. And so, the Ontario Human Rights Commission is intervening at the Ontario Court of Appeal because we've always had an interest in ensuring that the education system is operated in a manner that does not create barriers to racialized teachers or students. And also because of the impact that a charter section 15 case could have on the discrimination analysis in Ontario.

Well, thank you very much, Matt. We've been speaking with Matthew Horner about his very interesting practice at the Ontario Human Rights Commission, where both Charter Values, Human Rights Code, Discrimination and the Charter come into play. So, thank you very much for joining us, Matt.

**Matthew:**

Thank you, Cheryl.

**Cheryl:** That is our podcast on Charter Values. Earlier, we were speaking with Professor Richard Stacey of the University of Toronto Faculty of Law. He was mentioning…

the Asper Centre’s intervention in the case of the York Region District School Board and the Elementary Teachers Federation of Ontario, a hearing that was held at the Supreme Court of Canada on October the 18th. If you're interested in our intervention and in the arguments related to administrative law and the charter, you can watch that through the Supreme Court of Canada website. I want to thank Gabrielle Dunning, our student producer of this show, and our intrepid Tal Schreier, who produces all of our podcasts.

Next up, we will be talking about mobility rights. And our final episode of the season will be a special episode on the 15th anniversary of the David Asper Centre for Constitutional Rights. If you like our podcast, follow and like it on your preferred streaming platform.

**Music** (01:11:22.158):

Charter course, I will charter a course. If we can just get the country to trust us. Charter a course, south, east, west and north, and along the way we may find justice. Charter a course, I will charter a course, if we can just get the country to trust us. Charter a course, south, east, west and north, and along the way we may find justice.