A Rejection of Charter Values as a Framework on Judicial Review?

June 22, 2017

The Ontario Court of Appeal's decision in *Gehl v Canada (Attorney General)*

In *Gehl v. Canada (Attorney General)*[1] ("*Gehl*"), the Ontario Court of Appeal set aside a decision of the Registrar for Aboriginal Affairs and Northern Development Canada (the "Registrar") denying the appellant, Dr. Gehl, registration as an "Indian" under the *Indian Act*[2] (the "*Act*").

The Court's decision is notable for its discussion of the utility of relying upon *Charter* values in administrative decision-making. Of particular interest are the concurring reasons of two of the Court's panel members, who would have decided the case on pure administrative law grounds without resort to *Charter* values. In *obiter*, the concurring reasons strongly criticize the development of Charter values as a tool to be used in administrative law and judicial review. In particular, they criticize the doctrinal foundation of the frame work and recommend that on judicial review such analysis should only be used as a last resort.

As we have written before, we agree that Charter values do not have as robust a doctrinal foundation and some of them continue to have an indeterminate definition as compared to specific Charter rights as such, courts and administrative decision-makers should use caution when applying them.[3]

Background and Facts

At issue in *Gehl* was Dr. Gehl's eligibility to be registered as a status Indian under the *Act*, which hinged on certain amendments made to the legislation in 1985.

Prior to 1985, an individual's entitlement to register as an Indian under the *Act* was based on the patrilineal rule. This meant that a child of an Indian man could register as Indian regardless of the mother's status, and a non-Indian woman who married an Indian man could also obtain status. The pre-1985 *Act* also provided that an Indian woman would lose her status upon marrying a non-Indian man.

In 1985, amendments were made to the *Act* in order to bring the legislation in line with the section 15 rights protected under the *Canadian Charter of Rights and*

Freedoms[4] (the "*Charter*"). The amendments repealed the provisions respecting the patrilineal transmission of status, and introduced a two-tier system of registration, making children with two Indian parents eligible for "full" Indian status, and children with only one Indian parent eligible for "partial" status. The amendments also provided that individuals with partial status could only pass their status onto their own child if the other parent also has Indian status, whether partial or full – a rule otherwise known as the "two-parent" rule.

Under the *Act*, the Registrar is the body responsible for determining an individual's eligibility for registration. In order to evaluate an applicant's eligibility, the Registrar has to assess the status of both of the applicant's parents. At the time the Registrar considered Dr. Gehl's request for registration, the Registrar had a draft Proof of Paternity Policy (the "Policy") that outlined five sources of evidence of paternity that the Registrar would accept to determine eligibility.[5]

Dr. Gehl's mother had no Indian status. Dr. Gehl's father, Rodney Gagnon, was born out of wedlock, but his mother had full status by operation of the 1985 amendments. However, as the identity of Rodney Gagnon's father was unknown, the Registrar found that he could only claim status through one parent, and only acquired partial status. As Dr. Gehl's mother had no status, and her father only had partial status, the Registrar took the view that Dr. Gehl could not satisfy the two-parent rule, had no right to be registered, and refused her request for registration. Dr. Gehl protested the Registrar's decision, which was also refused.

Alongside a statutory appeal of the Registrar's refusal, Dr. Gehl commenced an action seeking, among other relief, a declaration that the applicable provisions of the *Act* contravened section 15 of the *Charter*, and a declaration that she be entitled to registration under the *Act*.

The Charter Values Analysis

Sharpe J.A. took the view that while Dr. Gehl framed her action as a constitutional challenge, what she was really contesting was the reasonableness of the Registrar's Policy.[6]

Sharpe J.A. then proceeded to review the reasonableness of the Policy, in view of *Charter* values. Citing the Supreme Court of Canada's decisions in *Doré v. Barreau du Quebec*[7] ("*Doré*") and *Loyola High School v. Quebec*[8], he relied on the principle that courts will accord deference to administrative decision-makers' exercise of discretion, provided that they exercise their discretion in a manner that balances *Charter* values with the applicable statutory objectives.

While Sharpe JA purported to do a *Charter* values analysis, he does not follow the Doré framework, and balance the statutory objectives of the *Act* against the impact with the severity of the interference with the *Charter* values at stake. Instead, he simply considered the impact of section 15 *Charter* rights and values in relation to the Policy. He found that proof of identity of a parent is more difficult to establish for fathers than for mothers for plain biological reasons. He further found that women may have valid reasons not to disclose the identity of their child's father, or that they may be unable to disclose that identity for a variety of reasons. Accordingly, Sharpe J.A. held that the Policy, insofar as it imposed a demanding burden to prove a parent's identity,

perpetuated the disadvantage of Indigenous women inconsistent with the section 15 equality rights under the *Charter*. Sharpe J.A. found that this undermined the values and objectives of the *Act*, and in particular, the 1985 amendments, which were designed to be remedial and enhance equality.

In the result, Sharpe J.A. held that because the Policy did not take into account the values and objectives underlying the 1985 amendments to the *Act*, the Registrar's decision in regards to Dr. Gehl's status was unreasonable. Accordingly, he granted Dr. Gehl a declaration that she was entitled to be registered under the *Act* as a child of one parent with full status.[9]

The Concurring Reasons

While Lauwers and Miller JJ.A. agreed with the conclusion reached by Sharpe J.A., they would have resolved the appeal on administrative law grounds alone, without resort to *Charter* values.

In their concurring reasons, Lauwers and Miller JJ.A. undertook an administrative law analysis of the reasonableness of the Registrar's decision to refuse Dr. Gehl's request for registration. They found that the Registrar's decision denying Dr. Gehl status was based on the application of an evidentiary rule that demands specific evidence of an individual's identity when that evidence may not be knowable or available. They found that this evidentiary rule was in conflict with the purpose of the provisions of the *Act*, because the rule could operate to deny registration to individuals otherwise entitled to registration simply because they are unable to satisfy the evidentiary requirements outlined in the Policy, and not otherwise provided for under the *Act*. Accordingly, they concluded the Registrar's decision refusing Dr. Gehl's request for registration was unreasonable on the basis of their demand for otherwise unobtainable evidence.

Lauwers and Miller JJ.A. also commented on why Sharpe J.A. should not have applied a *Charter* values analysis to resolve the appeal. Specifically, they noted that the application of such values to Dr. Gehl's case added nothing substantive to the administrative law analysis, and did nothing to change the outcome. They noted that the Registrar's decision was not unreasonable because it was discriminatory or resulted in inequality – indeed, the Registrar's decision would have been just as unreasonable if Dr. Gehl had been unable to identify her biological mother or grandmother – but because a child who is unable to identify a parent is denied registration because of a rule that frustrates the purpose of the *Act*.

More broadly, they noted the following concerns with the application of *Charter* values as applied in administrative law cases:

1. a *Charter* values analysis risks pre-empting a *Charter* rights analysis, and therefore risks subordinating *Charter* rights;
2. *Charter* values tend to be subjectively applied because there is no doctrine guiding their identification or application;
3. unlike *Charter* rights, *Charter* values have been identified on an *ad hoc* basis, and are not easily ascertained;
4. *Charter* values have been defined at an abstract, conceptual level and their meaning and application can be debateable; and

5. the multitude of *Charter* values gives rise to issues regarding their relationship to one another, and their potential to conflict with one another in any given case where they simultaneously apply.

It is worth noting that Lauwers and Miller JJA also found that a *Charter* values analysis was not necessary to overcome any deference owed to the Registrar. They wrote that the Registrar's decision was not entitled to any deference to begin with – not because it failed to balance *Charter* rights or values with the statutory objectives – but because the Registrar's was not exercising any discretionary power in arriving at their decision. Lauwers and Miller JJA wrote that the Registrar's obligation to determine entitlement is not discretionary because its decision is (i) done in accordance with statutory criteria; (ii) appealable to the Superior Court (and not an appellate body with any experience in the subject-matter); and (iii) does not require the exercise of any specific expertise. This was another clear departure from Sharpe JA's reasons, who presumed deference was owed to the Registrar when he invoked his *Charter* analysis.

In any event, despite their disagreement with Sharpe J.A.'s *Charter* values analysis, Lauwers and Miller JJ.A. also granted Dr. Gehl a declaration that she was entitled to registration under the *Act*.

[1] 2017 ONCA 319 ["*Gehl*"].

[2] RSC 1985, c I-5 ["*Act*"].

[3] Christopher D. Bredt and Ewa Krajewska "*Doré: All that Glitters is Not Gold"* (2014) 67 SCLR 2d 339, see in particular p. 353.

[4] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 ["*Charter*"].

[5] Those five types of evidence were set out as follows, in order of preference: (i) birth certificates naming the father; (ii) court orders declaring paternity; (iii) statutory declarations (preferably by the mother and father); (iv) if the father denies paternity, it is preferable for the mother to work with vital statistics authorities to find other types of evidence to have the father's name added to the birth certificate; (v) where confidentiality or personal safety is a concern, and none of the above is available, the Registrar may consider other evidence, such as a hearing or DNA testing.
See *Gehl*, *supra*, at para. 18.

[6] Sharpe J.A. noted that Dr. Gehl's argument respecting the Policy should have been raised in her statutory appeal, but that it was in the "interest of justice" for the Court to address the issue. *Ibid*, at para. 37.

[7] 2012 SCC 69.

[8] 2015 SCC 12.

[9] It is worth noting that in the course of his reasons, Sharpe J.A. reviewed the evidence that Dr. Gehl offered in support of her paternal grandfather's identity, which he found was capable of supporting an inference that he had Indian status. *Ibid*, at para. 50.

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