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CASE SUMMARY: BALANCING CHARTER RIGHTS

Where Charter values are engaged in an administrative decision, Charter values do not have to be perfectly balanced; however other avenues and options must be considered in order for the decision to be justifiable, transparent and intelligible.

Administrative law – Decisions reviewed – Elections Officer – Charter of Rights and Freedoms – Discrimination – Judicial review – Standard of review – Reasonableness

Aryeh-Bain v. Canada (Chief Electoral Officer), [2019] F.C.J. No. 861, 2019 FC 964, Federal Court, July 26, 2019, A.M. McDonald J.

The applicants were Orthodox Jewish Canadians who sought a judicial review of the decision of the Chief Electoral Officer (CEO), who refused to recommend a change in the day of the federal election (the “Election”). The powers and duties of the CEO are outlined in the *Canada Elections Act*, SC 2009, c 9 and provide that the CEO may recommend changing the polling day. It was argued that the CEO had failed to properly consider their rights under the Charter.

The Election was scheduled for October 21, 2019, which conflicted with the Jewish High Holiday of Shemini Atzeret. During this period, orthodox observance involves refraining from activities including voting and campaigning. Orthodox Jewish persons are also restricted in what they may ask others to do, as Jewish law forbids encouraging another Jewish person from doing any work or any prohibited activity on their behalf. Therefore, an orthodox member could not ask anyone to vote or campaign on their behalf on Shemini Atzeret.

Complicating the situation was the fact that two of the advanced polling days conflicted with Sabbath or the festival of Sukkot, both of which are Jewish holidays. The parties were in agreement that the sole issue was the reasonableness of the CEO’s decision not to recommend that the election date be moved because of a conflict with Shemini Atzeret.

Loyola High School v Quebec (Attorney General), 2015 SCC 12, and *Dore v Barreau du Quebec*, 2012 SCC 12, were cited for the proposition that an administrative decision will be reasonable if it reflects a proportionate balancing of the Charter protection with the statutory mandate. It was also stated that deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance and that there may be more than one outcome that strikes the proportionate balance between Charter protections and statutory objectives.

The CEO's position was that by moving the election date it would negatively affect the general election and would pose logistical concerns. Both parties focused on section 3 of the Charter in their oral submissions. It was held that Charter rights are no less protected under an administrative law framework; however a reasonable decision is not necessarily a decision which fully protects Charter rights as per *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32. As a result, the CEO did not have to perfectly balance Charter values against the statutory mandate, rather he needed to consider the exercise of his discretion as an option that would reduce the impact on the Charter rights of the applicants.

The record was completely silent on whether the CEO properly balanced statutory objectives with Charter rights and values and it was therefore impossible to determine whether the balancing was proportionate. The result was a disproportionate outcome that did not protect Charter values as fully as possible. It was held that the CEO's decision was not justifiable, transparent or intelligible and the matter was remitted to the CEO for reconsideration.

This case was digested by [Deanna C. Froese](#), and first published in the LexisNexis® Harper Grey Administrative Law Netletter and the Harper Grey Administrative Law Newsletter. If you would like to discuss this case further, please contact Kara Hill at dfroese@harpergrey.com.