June 1st, 2009

# The Charter, School Boards and Discrimination Claims

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**Cases Considered:**

*Hamilton v. Rocky View School Division No. 41*, 2009 ABQB 225

In a recent post I examined whether the *Canadian Charter of Rights and Freedoms* would apply to the University of Calgary in the context of its handling of an anti-abortion protest that took place on University campus (see Freedom of Expression, Universities and Anti-Choice Protests). A recent decision of the Alberta Court of Queen's Bench looks at a similar issue, namely the application of the *Charter* to a local school board, but this time in the context of an employment discrimination issue. In *Hamilton v. Rocky View School Division No. 41*, Justice Bryan Mahoney found that the *Charter* did not apply to the school board's alleged actions, and that the plaintiff was restricted to pursuing his claim under human rights legislation.

The plaintiff Hamilton was 62 years old when he applied for and did not get a teaching position at Bert Church High School in Airdrie, Alberta in 1994. This school is part of the Rocky View School Division No. 41 ("Rocky View"), and had advertised for a teacher for a Career and Life Management ("CALM") course as well as another to teach Drama and English. Hamilton had previous teaching experience in Calgary in 1974, and in the United Kingdom from 1987 to 1991. Colleen Brownlee, Director of Human Resources for Rocky View, decided that Hamilton was not qualified to teach the CALM course, and although he made the long list for the Drama/English position, he was not ultimately short listed for that job. When he asked why he was not hired, Alfred Gould, the principal of Bert Church High School, advised that his qualifications were not as strong as those of the applicants who were short listed.

In January, 1995, Hamilton filed a complaint of employment discrimination on the ground of age under the governing legislation at the time (the *Individual Rights Protection Act*, R.S.A. 1980, c. I-2). Following an investigation, the Human Rights Commission's investigator found that Hamilton's complaint had some merit, and having compared applications using Rocky View's criteria, concluded Hamilton's qualifications merited an interview. The investigator recommended a settlement whereby Rocky View would (1) pay Hamilton $1,500 compensation for loss of self esteem, (2) notify Hamilton of employment opportunities for which he may be qualified for the following two years, and (3) interview Hamilton if he applied for a position with Rocky View within that period. This settlement proposal was non-binding, and Rocky View refused to agree to it, saying that it did not discriminate against Hamilton. Brownlee offered to

meet with Hamilton "to discuss and better assess his qualifications for future Rocky View employment opportunities" (at para. 9), but Hamilton did not accept this overture.

At some later point in time, Hamilton brought an action against Rocky View in the Court of Queen's Bench for discrimination on the basis of age and geographic origin contrary to the *Charter*, as well as for defamation and injurious falsehood. It is not clear when this action was commenced, but it is important to point out that the trial decision was released in 2009, 15 years after the incident that formed the basis for the lawsuit. While one of the issues listed in the trial decision related to the *Limitations Act*, R.S.A. 2000, c. L-12, Justice Mahoney noted that the defendants had not raised the limitation period as a defence, and was he was therefore not going to consider the issue. Hamilton was self-represented at trial.

A threshold issue in the case and the one I am most interested in for the purposes of this post was whether the *Charter* applies to the Rocky View School Division No. 41. According to section 32 of the *Charter*, the rights and freedoms it guarantees can only be raised against the Parliament and government of Canada and the legislature and government of each province. This section has been interpreted to mean that the *Charter* only applies to government actors and government action, and not to private actors engaged in private actions (see *RWDSU v. Dolphin Delivery Ltd*., [1986] 2 S.C.R. 573).

In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, the Supreme Court drew an important distinction between government actors and government action. Where an entity is found to be a government actor, the *Charter* will apply to all of that entity's activities, whether they are traditional activities of government or not. The rationale is that the government should not be able to avoid its obligations under the *Charter* simply by engaging in non-traditional activities. Whether an entity is a government actor is to be determined according to the level of routine and regular control that the government exercises over the entity in question. As noted in my previous post, universities have been found to be non-government actors in light of this test (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229), but colleges have been found to be government actors (*Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211)). If an entity such as a college is found to be a government actor, the *Charter* will apply even when it is engaged in activities such as collective bargaining with its employees. If the entity is not a government actor, such as a university, the *Charter* will nevertheless apply when it is engaged in the implementation of a specific government policy or program (e.g. the delivery of post-secondary education). The rationale for the application of the *Charter* to government action is that a government should not be able to avoid the *Charter* by delegating implementation of its policies or programs to non-government actors.

In *Hamilton*, Justice Mahoney held that "the *Charter* does not apply to the administrative actions of the Board of Trustees established under Alberta's *School Act*" (at para. 14). He cited a number of cases in support of this decision, the most influential of which seemed to be *Calgary Roman Catholic Separate School District No. 1 v. O'Malley*, 2007 ABQB 574. In *O'Malley*, the *Charter* was found to be inapplicable to the actions of a school board in seeking to remove one of its

elected trustees for conflict of interest. Justice Peter Clark of the Alberta Court of Queen's Bench saw the school board as a collection of elected officials engaged in self-governance. According to Justice Clark, the school board was "an essentially autonomous body [with] routine or regular control over the day-to-day operations of schools and the Minister of Education can intervene only in extraordinary circumstances" (at para. 131). The *Charter* was thus found to be inapplicable to the board as a government actor. Neither did the *Charter* apply on the basis of government action, as the case was seen to involve the school board's internal policies and administrative regulations on matters of board governance rather than government policies.

These decisions appear to conflict with two recent cases of the Supreme Court of Canada where school boards were found to be subject to the *Charter*. First, in *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, a majority of the Court held that the *Charter* applied to the decision of a school board to refuse to permit a Sikh student to wear his kirpan to school. As noted by Justice Louise Charron, writing for the majority in *Multani*:

> There is no question that the *Canadian Charter* applies to the decision of the council of commissioners, despite the decision's individual nature. The council is a creature of statute and derives all its powers from statute. Since the legislature cannot pass a statute that infringes the *Canadian Charter*, it cannot, through enabling legislation, do the same thing by delegating a power to act to an administrative decision maker (at para. 22).

However, does *Multani* imply that school boards are bound by the *Charter* in all circumstances? The majority's decision is not explicit on the question of whether the school board falls into the government actor or government action category. It is possible to read the decision as one that turns on the exercise of government action, as it appears to be the delegated powers that the school board is acting upon that engage the *Charter* (in this case, the power to develop a policy governing weapons at school). This is the basis upon which Justice Clark distinguished *Multani* in *O'Malley*. *Multani* was not reviewed in *Hamilton*.

The second relevant Supreme Court case is *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86. A majority of the Court resolved the issues in this case on administrative law grounds, and did not decide whether the *Charter* applied to the school board's decision declining to approve the use of books depicting same sex parented families in a Surrey classroom. Two dissenting justices (Gonthier and Bastarache JJ.) did address the question of *Charter* application, and found as follows:

> Although the issue does not appear to have been expressly considered by this Court in the past, in my view, there can be no doubt that the School Board is a branch of government and thus subject to the *Charter* by operation of s. 32. In applying the approach set forth by La Forest J. in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, I find many similarities between the status of elected school boards such as the respondent and that of a municipal council,

> which he addressed in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844. Thus, like a municipal council, the School Board is an elected body endowed by legislation with largely autonomous rule-making and decisional powers. …
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> Here, as was the case of the municipal council in *Godbout*, school boards "are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates they represent . . ., this itself is a highly significant (although perhaps not a decisive) indicium of 'government' in the requisite sense" (para. 51). Moreover, although not directly endowed with taxation powers, they are the beneficiaries of school taxes levied by municipalities on behalf of the province under ss. 107 and 119 *et seq*. of the *School Act*. Finally, and most importantly, school boards "derive their existence . . . from the provinces; that is, they exercise powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves" (para. 51). I believe that these considerations clearly establish the applicability of the *Charter* to the School Board (at para. 121).

According to Justices Gonthier and Bastarache then, school boards are clearly government actors.

Justice Mahoney did not refer to *Chamberlain* in *Hamilton*. Justice Clark did so in *O'Malley*, where he found that the majority in *Chamberlain* had "in obiter disagreed with the minority views on *Charter* application" (at para. 130). While he does not provide a pinpoint reference for this point, he may have been referring to this paragraph of Chief Justice McLachlin's decision for the majority in *Chamberlain*, which is only one of two paragraphs where she mentions the *Charter*:

> I conclude that the Board's decision not to approve the proposed books depicting same-sex parented families was unreasonable because the Board failed to act in accordance with the *School Act*. In light of this conclusion, it is not necessary to consider the constitutionality of the Board's decision. The issues discussed by my colleague concerning whether the appellants have standing and whether the action raises a serious legal question are not, in my view, ones which it is necessary or appropriate to comment on, given that *this appeal does not fall to be determined on the basis of the Charter* (at para. 73, emphasis added).

However, Justice McLachlin also said as follows:

> It is true that, like legislatures and municipal councils, school boards are elected bodies, endowed with rule-making and decision-making powers through which they are intended to further the interests of their constituents. However, school boards possess only those powers their statute confers on them. Here the Act makes it clear that *the Board does not possess the same degree of autonomy as a*

> , which for approval of supplementary materials include acting according to a general regulation and considering the learning objectives of the provincial curriculum. Finally, to ensure that it has acted within its allotted powers, the Board is subject to judicial review in the courts (at para. 28, emphasis added).

This aspect of the majority decision in *Chamberlain* actually supports the view that school boards are subject to the *Charter*, as they are seen not as autonomous bodies but rather as creatures of statute subject to government control.

The earlier cases of *Douglas College* and *Lavigne* are also helpful, yet neither of these cases was referenced in *O'Malley* or *Hamilton*. In *Douglas College*, the Supreme Court considered the application of the *Charter* to a mandatory retirement provision in a collective agreement between a college and the union representing college teachers. The Court noted that the college was a creature of statute, the affairs of which were governed by a board whose members were appointed by the Lieutenant Governor in Council. According to the Court, the Minister "exercise[d] direct and substantial control over the college" by "establish[ing] policy or issu[ing] directives regarding post-secondary education and training, …approv[ing] all by-laws of the Board and provid[ing] the necessary funding." In other words, "the college is simply a delegate through which the government operates a system of post-secondary education in the province" (at para. 4). The same result was reached in *Lavigne*, where the *Charter* was found to apply to the Ontario Council of Regents for Colleges of Applied Arts and Technology as a government actor, and thus to the collective agreement that it had entered into.

In *Hamilton*, Justice Mahoney's reasons for decision on the *Charter* application issue were as follows:

> I find that the *Charter* does not apply to Rocky View as an entity because there is an absence of any significant government control over its day-to-day activities. It cannot be disputed that in Alberta, school boards are statutory bodies performing a public function to educate children at the taxpayer's expense. As outlined in *Eldridge*, the mere fact that an entity performs what may loosely be termed a public function, or the fact that a particular activity may be described as public in nature, will not be sufficient to bring it within the scope of "government" for the purposes of s. 32 of the *Charter*.
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> Put another way, in order for the *Charter* to apply to Rocky View, it must be found to be implementing a specific governmental policy or program. The method used to hire teachers is part of Rocky View's internal school management decision making and cannot be said to be a decision of the government or an activity in which the government is sufficiently involved to make it an act of the government. Accordingly, the decision as to what teacher will be hired cannot be ascribed to the government or characterized as the government exercising its

> coercive power thereby attracting *Charter* scrutiny (at paras. 16-17, emphasis added).

With respect, it appears that Justice Mahoney overstated the level of routine and regular control required to constitute a government actor following Justice Clark in his earlier decision in *O'Malley*. Justice Mahoney also seems to have conflated the government actor and government action components of the test for section 32 of the *Charter*.

The Supreme Court has never gone so far as to say that the government must exercise control over the day-to-day activities of an entity in order for it to be a government actor. If this were the case, it is difficult to see how entities such as colleges or administrative tribunals would meet the government actor test. What is required is "routine and regular control", evidenced through factors such as whether the entity is a creature of statute, how the members that run the entity are selected and by whom, how the governance of the entity operates, to what degree the functions of the entity are overseen and funded by government, etc. Looking at these factors in the context of school boards in Alberta, and adopting the language of *Douglas College*, would we not say that public schools and the boards that operate them are "simply delegate[s] through which the government operates a system of … education in the province"? And that while they "are elected bodies, endowed with rule-making and decision-making powers through which they are intended to further the interests of their constituents", they do not "possess the same degree of autonomy as a legislature or a municipal council", as noted by the majority in *Chamberlain*? It is difficult to see how school boards could not be considered government actors on the basis of these cases.

This conclusion is supported by the provisions of the *School Act*, R.S.A. 2000, c. S-3. The *School Act* requires that all public schools be operated by school boards, which must in turn "ensure that each of its … students is provided with an education program consistent with the requirements of this Act and the regulations" (section 45(1)). Further, school boards "must establish policies respecting the provision of educational services and programs" (section 60(1)(a)). The Minister of Education is empowered to require, authorize and prohibit courses of study, education programs and instructional materials, to prescribe minimum levels of instructional time, and to adopt goals and standards for education in the province (section 39(1)). School boards' powers to develop and offer courses, programs and instructional materials are explicitly made subject to these powers in section 60(2)). The Minister may also make regulations governing evaluation and inspection of teachers, the granting of certificates and diplomas, and for "special needs" education (section 39(3)). The Act requires school boards to have regular meetings and stipulates certain conditions for those meetings around attendance, quorum, voting, record-keeping, etc.

In fact, looking at the *School Act*, one might reasonably conclude that the government does have control over the day-to-day activities of schools and school boards - i.e. education programming and delivery — even though all that is required for *Charter* application is routine and regular control.

If I am correct that school boards such as Rocky View Division 41 are government actors, then the *Charter* will apply to all of the school board's activities, including its labour relations (as was the case in *Douglas College* and *Lavigne*). There is no need at that point to look at the nature of the action itself, as Justice Mahoney did when he found that the *Charter* did not apply to Rocky View because it was not implementing a specific government policy or program.

However, the *Charter* was found to be inapplicable in this case, and there is no tort of discrimination giving courts jurisdiction over private parties on this basis (*Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181; see also *Honda Canada Inc. v. Keays*, 2008 SCC 39). Accordingly, the proper forum for Hamilton's complaint was said to be the human rights regime. As noted above, Hamilton did in fact use that forum when he first complained about Rocky View's actions back in 1995, a complaint which resulted in a non-binding recommendation for compensation and consideration for future employment opportunities. Justice Mahoney writes that "[i]f Mr. Hamilton was not satisfied with this outcome, he ought to have applied for judicial review of the Chief Commissioner's decision" (at para. 22). Yet recall that it was Rocky View that refused to go along with the recommendation for settlement, as it maintained that it had not discriminated against Hamilton. In the end, and while he did not need to do so given his finding on the non-application of the *Charter*, Justice Mahoney agreed with Rocky View's position. He considered and dismissed the claim of discrimination on the merits, as the evidence simply did not support Hamilton's claim of employment discrimination on the basis of age.

While the forgoing discussion on the application of the *Charter* thus appears moot, there will be future instances where the courts will be called upon to assess the application of the *Charter* to school boards. It is to be hoped that those courts will turn to previous Supreme Court case law on this issue, and the implications of the *School Act* itself.