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Regional Health Boards Not Subject to the *Charter* as an Employer ~ So says British Columbia Arbitrator

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In *York Region District School Board v Elementary Teachers' Federation of Ontario*,¹ the Supreme Court of Canada held that Ontario public school boards are “inherently governmental” for the purpose of the *Canadian Charter of Rights and Freedoms*.² Thus, the actions of an Ontario public school board – including actions taken as an employer – are subject to *Charter* scrutiny.³

Following this decision, there was concern it would expand the scope of organizations considered to be “inherently governmental” and thus bound by the *Charter* in their role as an employer.

In *Health Employers Association of British Columbia on Behalf of Multiple Employers v British Columbia Nurses' Union*,⁴ a British Columbia arbitrator held that, unlike Ontario public school boards, the British Columbia health boards at issue were not “inherently governmental” and thus not subject to the *Charter*. One key reason for this distinction was the Ontario school boards were elected bodies whereas the British Columbia health boards were not.

This decision is one of the first to address whether the *York Region* decision extends the *Charter* to apply to other public or quasi-public sector employers. Perhaps it is a sign of decisions to come.

What happened?

During the COVID-19 pandemic, the British Columbia Provincial Health Officer required health care employers to require employees to provide proof of vaccination against COVID-19 in order to attend at work. As a result, multiple British Columbia health care employers placed unvaccinated nurses on an unpaid leave of absence or terminated their employment.

¹ [2024 SCC 22](#) [York Region].

² [The Constitution Act, 1982, Schedule B to the Canada Act 1982 \(UK\), 1982, c 11](#) [Charter].

³ For more information, see our July 2024 Briefing Note: [Ontario Public School Boards are Bound by the Charter Teachers are protected from unreasonable search and seizure in the workplace](#).

⁴ [2024 CanLII 140618](#) (BC Arb) (Jacquie de Aguayo) [Health Employers Association of British Columbia].

The British Columbia Nurses' Union filed several hundred individual grievances as well as an "Industry Wide Application Dispute" (collectively, the "Grievances"). The Grievances challenged the decisions made by a cross-section of health care employers represented by the Health Employers Association of British Columbia ("Health Employers Association").

The union argued that seven of the employers represented by the Health Employers Association, including five regional health boards⁵ (collectively, the "Health Employers") were subject to the *Charter*, just like Ontario public school boards were found to be in *York Region*. By way of illustration, one of the Health Employers was the Vancouver Coastal Health Authority, a regional health board that, as an employer, operates hospitals including Vancouver General Hospital.

The union alleged the Health Employers violated nurses' *Charter* rights to freedom of religion, life, liberty, and security of the person, freedom from unreasonable search or seizure, and equality. The Health Employers Association argued the *Charter* did not apply.

To whom does the *Charter* apply?

The *Charter* applies to government, specifically the "Parliament and government of Canada" and "legislature and government of each province."⁶

However, in *Eldridge v British Columbia (Attorney General)*,⁷ the Supreme Court of Canada found the *Charter's* ambit goes even further to include some public or quasi-public institutions if they are acting as part of the government:

There are myriad public or quasi-public institutions that may be independent from government in some respects, but in other respects may exercise delegated governmental powers or be otherwise responsible for the implementation of government policy. When it is alleged that an action of one of these bodies, and not the legislation that regulates them, violates the *Charter*, it must be established that the entity, in performing that particular action, is part of "government" within the meaning of s. 32 of the *Charter*.⁸

Therefore, if an entity is "inherently governmental," or if an activity carried out by the entity can be ascribed to government, the entity may be bound by the *Charter*. It was on the former basis the Supreme Court of Canada found Ontario public school boards bound by the *Charter* in their role as an employer.

The arbitrator's decision

In the British Columbia decision, the arbitrator found the *Charter* did not apply to the Health Employers in their capacity as an employer. In reaching this conclusion, the arbitrator highlighted that "public" is different from "governmental," and the *Charter* only applies to the later:

⁵ Vancouver Coastal Health Authority, Vancouver Island Health Authority, Interior Health Authority, Fraser Health Authority, and Northern Health Authority.

⁶ *Charter*, *supra* note 2 at s 32.

⁷ [1997 CanLII 327 \(SCC\)](#).

⁸ *Ibid* at para 36.

[T]he mere fact that legislation and government establish much of the environment in which an entity operates is not a sufficient basis for finding it is a ‘governmental’ entity under section 32 of the *Charter*. In order for the *Charter* to “apply to institutions other than Parliament, the provincial legislature and the federal and provincial governments” an entity “must truly be acting in what can accurately be described as a ‘governmental’ – as opposed to a merely ‘public’ – capacity.”⁹

The arbitrator acknowledged that public healthcare in British Columbia is “among the largest, most complex and most expensive social programs administered by the provincial government,”¹⁰ and that the overarching responsibility for the healthcare system rested with the Minister of Health. The arbitrator also noted the system is widely viewed as public and operates within a comprehensive and interconnected statutory and regulatory framework. Nevertheless, the public nature of the healthcare system did not make the Health Employers “governmental.”

One key difference between the Health Employers in this decision, and the school boards in the *York Region* decision was that the Health Employers, unlike the school boards, were not publicly elected:

In this case, the [Health Employers] are not, by their very nature, governmental, in the sense that their governing boards are not elected by, or accountable to, the public; nor do they exercise delegated powers such as levying taxes or establishing and enforcing laws within their grant of authority.¹¹

Further, the arbitrator noted the Health Employers were autonomous from the government in relation to their status as employers, despite the fact they owed their existence and funding to the government and were subject to ministerial authority. The Health Employers controlled internal management of employees, subject to statutory requirements.

What’s next?

The *Health Employers Association* decision is a positive development for public and quasi-public sector employers in that the arbitrator drew a distinction between “governmental” and “public,” holding the *Charter* did not apply to the latter, only the former. While this arbitration decision is not binding on other arbitrators or courts, it may be a harbinger of similar decisions involving public or quasi-public sector employers. We will keep readers informed.

To learn more and for assistance contact your Sherrard Kuzz LLP lawyer, Alex Munoz, or info@sherrardkuzz.com

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⁹ *Health Employers Association of British Columbia*, *supra* note 4 at para 90, citations omitted.

¹⁰ *Ibid* at para 25.

¹¹ *Ibid* at para 99.

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