Correctness for Charter questions? York Region District School Board v. Elementary Teachers' Federation of Ontario

June 28, 2024

Overview

A recent decision from the Supreme Court of Canada, *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22, determined that the *Charter* applies to Ontario public school boards as they are inherently governmental under the framework set out in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, and that Ontario public school employees are protected from unreasonable search and seizure in their place of employment under s. 8 of the *Charter*. It is incumbent upon administrative decision-makers, such as the arbitrator in this case, to fully engage with the *Charter* rights arising from the facts before them, even if these rights are not raised by the parties themselves. Where they fail to do so, the majority determined that a correctness standard of review applies such that the arbitrator's decision had to be quashed.

Background and procedural history

Facts

The Elementary Teachers' Federation of Ontario (the Union) filed a discipline grievance on behalf of two elementary school teachers who had received written reprimands (the Grievors). On the Union's instruction, the Grievors kept notes about their workplace concerns, and did so in an online log stored in the cloud of their personal email accounts, but accessed from their School Board computers. The principal heard about the possible existence of the log and conducted an unsuccessful IT search of School Board devices. He later entered the classroom of one of the Grievors to find her open laptop. He touched the mouse pad to find the log open on screen, which he scrolled through and photographed. The principal conferred with the School Board and agreed to seize both Grievors' laptops. The principal sent the photos of the log to the School Board, which issued the reprimands.

Arbitration decision

The arbitrator considered whether the Grievors had a reasonable expectation of privacy in the log. While the Union submitted that the School Board violated the Grievors' right to privacy without reasonable cause, it did not explicitly allege an infringement of *Charter* s. 8 nor request a *Charter* remedy.

The arbitrator dismissed the grievance, finding that there had not been an unreasonable breach of privacy. She drew on *Charter* s. 8 jurisprudence (particularly *R v. Cole*, 2012 SCC 53, a criminal case decided in the school employment context), as well as arbitral jurisprudence, which calls for a balancing between an employee's privacy rights and an employer's interests and management rights. She found that the Grievors had an objectively reasonable but diminished expectation of privacy in the log, which was in plain view, and in terms of subject matter did not touch on their biographical core. Conversely, in conducting his searches, the principal was acting in accordance with his duties under s. 265 of the *Education Act*, R.S.O. 1990, c. E.2.

Divisional Court decision

The Union sought judicial review of the arbitrator's decision. Applying reasonableness review, a majority of the Divisional Court, in reasons written by O'Bonsawin J. (as she then was), concluded that the arbitrator's determination was reasonable considering s. 265 of the *Education Act*, privacy jurisprudence, and the fact that the log did not go to the Grievors' biographical core. Importantly, the majority determined that the proper framework for analysis was not s. 8 of the *Charter*, but rather the rights of employers and employees under the collective agreement.

In dissent, Sachs J. also applied reasonableness review, finding that the Grievers had s. 8 rights in their workplace, but that whether those rights had been infringed fell within the category of constitutional questions reviewable on a standard of reasonableness. Justice Sachs reasoned that, while the arbitrator did not directly reference the framework set out in *Doré v. Barreau due Québec* , 2012 SCC 12, this was, in effect, the framework she had used in her analysis. Nevertheless, Sachs J. found that the arbitrator's decision was unreasonable as she had misunderstood the nature of s. 8 of the *Charter* and was therefore not able to conduct a proper balancing. Specifically, the fruits of the search—being the principal's incidental finding of the log—could not be used to justify any further search, nor were such searches justified by the *Education Act* or permitted by the plain view doctrine. Moreover, the arbitrator's finding regarding the Grievors' subjective expectation of privacy was inconsistent with her finding that the contents of the log did not touch upon the Grievors' biographical core.

Court of Appeal decision

The Union appealed to the Court of Appeal for Ontario, which unanimously allowed the appeal and quashed the arbitrator's decision, finding that s. 8 of the *Charter* applied (although the Court of Appeal deemed it unnecessary to determine which branch of *Eldridge* was engaged), and that the Grievors had a reasonable expectation of privacy. The Court of Appeal determined that the arbitrator's factual findings were entitled to deference, but that the question of whether the Grievors had a reasonable expectation of privacy was reviewable on a correctness standard. Rather than relying on *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, to make this determination, the Court of Appeal curiously relied on the SCC's decision in *R v. Shepherd*, 2009 SCC 35, which concerned appellate rather than administrative

standards of review. Overall, the Court of Appeal concluded that the Grievors had a reasonable expectation of privacy; the arbitrator erred in interpreting and applying s. 8 law; and the arbitrator reached an unreasonable decision.

SCC decision

The School Board appealed to the SCC, which upheld the Court of Appeal's decision—albeit for somewhat different reasons—and dismissed the appeal.

At issue was (1) the applicable standard of review, (2) whether the *Charter* applies to public school boards in Ontario, and (3) whether the arbitrator's decision should be set aside. Rowe J.'s majority reasons (writing for himself, Wagner C.J., and Côté, Kasirer and Jamal JJ.) and Karakatsanis and Martin JJ.'s concurring reasons differ in their conclusions regarding the applicable standard of review, but unanimously agreed that the *Charter* applies, and that the arbitrator's decision should be set aside. Justice O'Bonsawin, who authored the majority decision in the Divisional Court, did not take part in the appeal.

Standard of review

Both the majority and concurring opinions found that, as a constitutional question of general application, *Vavilov*'s presumptive reasonableness standard was rebutted such that the question of whether the *Charter* applies to school boards was to be determined on a correctness standard (although the arbitrator did not consider this question).

Moreover, the majority agreed with the Court of Appeal that the arbitrator's decision is reviewable on a correctness standard, as "the issue of constitutionality on judicial review — of whether a *Charter* right arises, the scope of its protection, and the appropriate framework of analysis — is a 'constitutional question' that requires 'a final and determinate answer from the courts'" (para. 63, citing *Vavilov* at paras 53 and 55). In arriving at this conclusion, the majority held that the category of "other constitutional matters" reviewable for correctness pursuant to *Vavilov* should not be unduly narrowed. They stated that a line of jurisprudence—affirmed by the present case—supports the conclusion that correctness is the standard of review applicable to whether *Charter* rights are engaged, and if so, whether they have been infringed. That said, the majority confirmed that administrative decision-makers retain the power to determine *Charter* questions, and that no separate recourse to courts is needed. Rather, it is incumbent upon administrative decision-makers to proactively and explicitly address *Charter* issues that manifest themselves on the facts before them, regardless of whether these are disregarded by the parties (the SCC made the same point in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, where they held that decision-makers must address *Charter* values even if they are not raised by parties).

Conversely, the minority reasoned that the majority's approach goes beyond *Vavilov*'s intended exceptions to presumptive reasonableness review. Individualized *Charter* decisions that are intrinsically linked to a specific factual and statutory context do not engage the same concerns that motivated *Vavilov*'s correctness exception for constitutional questions—namely, upholding the rule of law by guarding against potential inconsistencies. In the present case, the minority regarded the arbitrator as

being faced with questions that were grounded in the particular factual and statutory context, meaning that her decision should be reviewed on the presumptive reasonableness standard.

Curiously, neither set of reasons engage with the *Doré* framework, confirmed by the SCC approximately six months ago in *Commission scolaire francophone des Territoires du Nord-Ouest* notwithstanding that the present case dealt with the application of *Charter* rights by an administrative tribunal. In that case, citing *Vavilov*, a unanimous SCC saw no reason to depart from the reasonableness standard of review applicable to discretionary administrative decisions that limit *Charter* protections.

Charter application to school boards

Prior to this decision (save for Gonthier J.'s dissent in *Chamberlain v. Surrey School District No. 36,* 2002 SCC 86), the SCC had assumed, without going through the exercise in *Eldridge,* that the *Charter* applies to public school boards, and the Crown had conceded this point in cases following *Chamberlain*. In the present case, the majority stated that it was time to determine the issue, but as it relates to Ontario public school boards specifically, leaving for another day the question of *Charter* applicability to private schools and to public school boards in other provinces.

The majority noted that school boards serve a public function as a manifestation of government. Accordingly, the minority agreed with the majority's holding that, considering the purpose of the *Education Act* and the inherently governmental function of public education, Ontario public school boards are government by nature—the first branch of *Eldridge*—and accordingly the *Charter* applies to all of their actions. The principal in this case was acting in his capacity as a delegated agent of the School Board, thus his actions were constrained by the *Charter*.

Review of arbitrator's decision

Both the majority and minority opinions held that the arbitrator's decision should be set aside—the majority on a correctness standard, and the minority on a reasonableness standard.

The majority found that the arbitrator's reasons were plagued by a fundamental error, as she failed to appreciate the *Charter* dimensions of the searches conducted by the principal, and was therefore unable to fully and adequately engage "with the gravity of the alleged violations of the Charter right at issue" (para 68). The majority reasoned in this way despite the fact that the parties did not explicitly allege any *Charter* infringements before the arbitrator. The majority held that the arbitrator should have *explicitly* conducted a s. 8 analysis—a flexible framework, in this context properly informed by the collective agreement—rather than proceeding entirely within the arbitral framework that examined the Grievors' privacy rights through a common law lens alone (an analysis under which the arbitrator also erred, as observed by Sachs J. in dissent at the Divisional Court, as well as the Court of Appeal).

The concurring opinion closely followed Sachs J.'s dissent at the Divisional Court. Karakatsanis and Martin JJ. held that, although the arbitrator's reasons were informed by the *Charter* s. 8 framework "as a touchstone" (para 112), her decision was inconsistent with the principle of content-neutrality at the core of s. 8, and therefore

unreasonable. The assessment of the Grievors' reasonable expectation of privacy cannot depend on what the log actually contained; rather, what mattered was the *potential* for the search to reveal information touching on the Grievors' biographical core, which tends to be the case for information contained on Internet-connected devices.

Obiter

The majority concluded that the arbitrator erred in law. The proper remedy would have been to set aside the arbitrator's decision and send the matter back for redetermination. However, as the written reprimands had been removed from the Grievors' files in 2018 under the terms of the collective agreement, the matter was now moot such that remission was not warranted. The majority simply set the arbitrator's decision aside, and would have left it at that, however noted that extensive submissions had been made regarding s. 8 and the privacy rights of school employees. The majority concluded that there was utility in providing some "general guidance" on these issues, though was clear to note that it was entirely in *obiter*.

The majority noted in *obiter* that, in the employment context, an employer's operational realities, policies and procedures, including employment relations under the terms of the collective agreement, can be relevant in determining both the reasonableness of an employee's expectation of privacy under *Charter* s. 8, and of an impugned search. While criminal s. 8 decisions may assist in determining the existence and scope of a reasonable expectation of privacy in the employment context, the balancing analysis is context-dependent and will differ where liberty is not at stake. Arbitral jurisprudence regarding privacy in the employment context can still properly inform s. 8 analysis. The majority's commentary left the door open to the possibility of a finding that s. 8 of the *Charter* was not violated in the employment context, as distinct from the criminal context.

Key takeaways and commentary

- The *Charter* applies to Ontario public school boards, including in their capacity as employers, as they are governmental in nature. Given the increasing extent to which governments are engaged in the regulation of various entities, the trajectory of this decision and the SCC's recent decision in *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 (which found that the *Charter* applies to self-governing First Nations) may indicate that the SCC is inclined to apply the *Charter* more broadly.
- Employees of government or government-adjacent employers (falling under the *Eldridge* framework) have *Charter* rights in the context of their employment relationship, including the right to be free from unreasonable search and seizure.
- This is one of few recent cases where the SCC has applied a correctness standard of review. While *Charter* rights ought to be framed consistently, it is unclear how reviewing courts will be able to do so in the abstract, without considering the particular factual scenario at play in each individual case before a decision-maker.
- Administrative decisions involving *Charter* rights might now be reviewable on a standard of correctness, despite the SCC's recent confirmation of the *Doré* reasonableness framework in *Commission scolaire*, and *Vavilov*'s underlying

rationale for correctness review only in cases where the rule of law demands a final and consistent answer (or where legislation dictates otherwise). This decision generates confusion regarding the *Doré*/*Commission scolaire* reasonableness framework, and if/how the present case can be distinguished therefrom. Going forward, it will be interesting to see whether courts apply the correctness standard only to administrative decisions that do not explicitly engage with the *Charter* where they should (as was the case here), or to all administrative decisions that adjudicate *Charter* rights, as the SCC majority suggests in this case.

- The SCC intensified the requirement from *Commission scolaire francophone des Territoires du Nord-Ouest* (which dealt with *Charter* values) that it is incumbent on administrative decision-makers to proactively address *Charter* rights where they arise on the facts, even if the parties do not expressly allege any *Charter* infringement. It is a heavy burden on decision-makers to determine whether there is a *Charter* element at play—with no room for error given the correctness standard of review—in each of the many cases before them, particularly because an explicit analysis is required and reviewing courts are not able to supplement a decision-maker's reasons.
- *Charter* s. 8 analysis is flexible and can be hybridized with arbitral jurisprudence considering workplace privacy.

For a review of the implications of the SCC's decision specific to school boards, please refer to BLG's companion bulletin, prepared by our colleagues John-Paul Alexandrowicz, Melissa L. Eldridge, and Callum Hutchison, which can be accessed here.

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