Bringing Charter Arguments to the Schoolyard Gate

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The Canadian Charter of Rights and Freedoms has, over the past twenty years, brought widespread changes to the Canadian legal and social landscapes. Whether in the political spectrum, alighting debates over changing values such as the regulation of same-sex marriage, or in the criminal courtroom, reigning in the use of police power, there is no doubt that the protections and freedoms contained in the *Charter* have greatly affected the way we understand and defend our rights. A recent decision of the Supreme Court of Canada (S.C.C.) has resolved the uncertainty about when and where those rights should be argued. The result may bring the adjudication of some of those fundamental rights to the schoolyard gates.

In the fall of 2003 the S.C.C. released two companion decisions, *Nova Scotia (Workers' Compensation Board) v. Martin1* and *Paul v. British Columbia (Forest Appeals Commission)*[2]. Each of these cases involved appeals from administrative tribunals where one of the parties before the tribunal argued that a fundamental *Charter* right had been breached. The question that eventually wound its way to the S.C.C. in each case was who should be deciding on questions of rights; administrative tribunals or the courts. The *Martin* judgment clarifies past case law on the question and sets out a new mandate of accessibility in rights adjudication. The effect of the decision is to relocate *Charter* arguments to the local decision making level to an extent that may surprise, and alarm, some educators.

After *Martin*, it is conceivable that *Charter* arguments will be raised before all sorts of administrative tribunals, including those reviewing student expulsion decisions, labour arbitrations and review boards, tribunals on special education matters, human rights commissions, and innumerable other decision makers. School administrators may be expected to address complicated rights arguments at the initial stages of a dispute. Trustees reviewing an expulsion or suspension decision may find themselves required to decide if a principal's actions, authorized by statute, violated the rights of a student. While some may embrace this opportunity to address *Charter* rights at the initial stages, most educators and administrators will find themselves without the training or expertise to wade into the murky waters of rights debates. Determining when such arguments can be advanced and preparing to respond to *Charter* issues will be yet another concern for schools and boards at the initial stages.

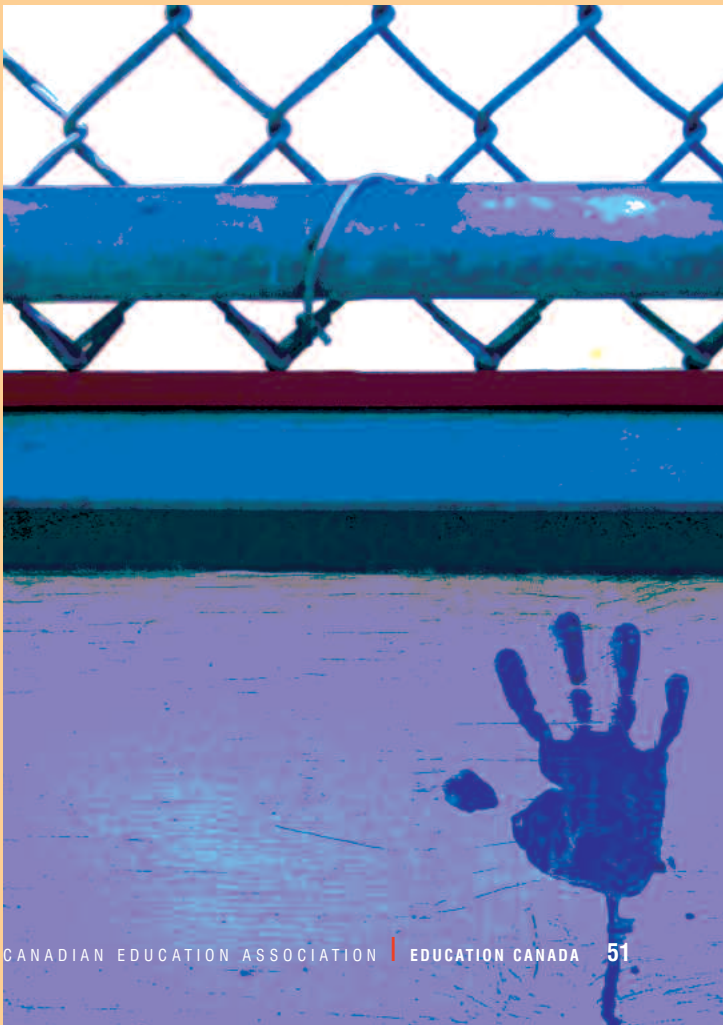
Having raised the possibility of rights claims at any stage of administrative processes, it is important to point out that the S.C.C. did develop a test to determine when and where rights claims are properly adjudicated. Not every administrative tribunal or decision maker will be expected to undertake an analysis of *Charter* rights. Therefore, it is worth understanding this shift in the law and finding out when you might be asked to advance rights, to defend an allegation of a violation, or to decide on the validity of another's *Charter* rights.

The *Charter* includes a wide range of protections and freedoms designed to protect all people in Canada and allow all of us to make concrete claims to protection. But just who do we make those claims to? Historically, rights claims were primarily dealt with by the Courts. As we become more comfortable discussing and understanding rights, that situation is changing. Chief Justice Beverly MacLachlin commented that:

> "[t]he *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception."[3]

As an assurance that our rights will be respected, the *Charter* provides some comfort, but when faced with responsibility for interpreting and applying its guarantees, most of us would regard it as a hot potato. The *Martin* decision provides some guidance as to just who should be tackling these issues.

The dispute in *Martin* arose from two determinations



made by the Nova Scotia Worker's Compensation Board after people had appealed the discontinuation of their temporary benefits under the plan, contending that the section of the act that resulted in the discontinuation discriminated against them and others like them suffering from chronic pain. On appeal, a range of arguments were made about the expertise required to decide the *Charter* issues. The S.C.C. considered these arguments and decided that *Charter* issues should be considered by administrative tribunals because all Canadians should be able to advocate for their rights in the most accessible and affordable forum and should not be required to launch time-consuming and expensive court actions in order to protect their most basic rights. Opting for accessibility, the Court has dropped the hot potato in the hands of informal or administrative decision makers who may not always expect to or be prepared to hear *Charter* arguments.

The legislation that established a tribunal or grants authority to a decision maker also determines whether *Charter* arguments can be considered. Where the legislation clearly requires a body to determine questions of law, the Court has now stated, it must also be expected to determine questions of rights. It is no longer possible to interpret or determine questions of law without being prepared to consider whether that law complies with the *Charter*. A question of law can include such decision as, in the case of the Workers' Compensation Board, entitlement to a benefit. Other issues of law will arise where the legislation authorizing school or employer behaviour is being challenged. In some cases the legislative provisions may not expressly indicate that the tribunal is expected to determine legal issues. Where it is not possible to determine an entitlement without deciding on a question of law, the Court found that the authority to address *Charter* rights is an implied aspect of the decision.

The result of this pronouncement may seem to create a chaotic approach to rights issues with potentially inconsistent decisions on very similar issues. However administrative tribunals are not like courts in all regards. For instance, a decision on a *Charter* right violation made by one panel of a tribunal is not binding, even on other panels of the same tribunal. Secondly, all such decisions can be appealed to the Courts where there will be full scrutiny of the decision. In this way, issues with divergent results will, over time, be addressed by the Courts. Finally, an administrative tribunal does not have the power to declare the legislation inoperative. For example, a panel of trustees assessing an expulsion will not be able to declare the *Safe Schools Act* unconstitutional. That dramatic a move will only be undertaken by the Courts.

Deciding whether or not a *Charter* right has been breached is often only half of the challenge facing the decision maker. Determining the appropriate remedy when a right has been breached carries a level of responsibility that many tribunal members who lack legal training may be reluctant to embrace. Not every tribunal or decision maker will necessarily be equipped with the experience or analysis that will be required to fashion a remedy for a *Charter* violation.

As *Charter* issues are raised at administrative tribunals, school boards and individual decision makers will likely rely heavily on their legal counsel. Whether arguing that a search of a school board office accused with Health and Safety violations was unconstitutional, or responding to a parent's argument that his or her child is entitled to special education benefits, the issues will be complex. Neither the rights claimant nor the decision maker will generally be equipped to deal with these arguments without assistance. Suddenly putting the *Charter* in the hands of the people looks costly as informal hearings designed to be efficient and accessible become increasingly technical with complicated legal arguments.

Whether you are considering making or responding to a *Charter* argument, or being expected to adjudicate on educational services, the responsibility to address *Charter* issues, and potentially to determine whether legislation violates those rights, is now a real possibility. This change, designed to make rights protection accessible, adds greater responsibility to tribunal members selected for their educational expertise, rather than their legal training. ■

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Notes

1 *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur* [2003] 2 S.C.J. No. 54 (*"Martin"*).

2 *Paul v. British Columba* (Forest Appeals Commission), [2003] S.C.J. No. 53 (*"Paul"*).

3 *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at para 70.