Mandatory Retirement Cases: Part I

APPLYING THE *CHARTER*: WHAT IS GOVERNMENT?

Katherine Swinton

The mandatory retirement cases delivered by the Supreme Court of Canada in December, 1990 were awaited anxiously by those concerned about the impact on employment opportunities and policies for both younger and older workers.[1] What many may not have known was that there was another important issue in these cases — the scope of the *Charter*'s application, its reach beyond the actions of the legislature and the public service.

There has been much debate since the entrenchment of the *Canadian Charter of Rights and Freedoms* about the scope of its application, particularly whether it applies to private action. Section 32(1) provides that the *Charter* applies to Parliament, the legislatures of the provinces, and the "government" of Canada and each province. Many academics have argued that the purpose of this section is to sweep government action under the *Charter*, but they contend that private action is caught, as well, because s. 52(1) of the *Constitution Act, 1982* provides that the constitution is the supreme law, and any law inconsistent with it is of no force and effect.

The Supreme Court rejected the argument that the *Charter* applies to private action in *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, a case in which a union argued unsuccessfully that an injunction restraining secondary picketing violated the *Charter*'s guarantee to freedom of expression.[2] McIntyre J., writing for the majority, held that s.32 of the *Charter* specified the actors to which it would apply — the "legislative, executive and administrative branches of government".[3] Excluded from its scrutiny would be private action, and it would apply to the common law only if that type of law was the basis for some government action.

While the Court in *Dolphin* gave some definitive answers about the scope of *Charter* application, it necessarily left open many questions. In particular, it left future cases to determine what is governmental action. There are a myriad of institutions constituted by Canadian governments, ranging from independent administrative tribunals (such as labour relations boards), to Crown corporations (such as the CBC), to business corporations. Government is also closely involved in many activities through funding, as in education or assistance to industrial enterprises, and through extensive regulation of behaviour (for example, in the financial instruments area). While it enacts laws in the legislatures and issues regulations through Cabinet, it also delegates powers of regulation and policy-making to various entities, such as school boards. Even if *Dolphin* resolved that the *Charter* does not apply to the private sector, it left open the issue of which of these many entities are so intertwined with government that they come under *Charter* scrutiny. And are all actions of government caught, even contracts?

All that McIntyre J. told us in *Dolphin* was that the *Charter* would apply to "many forms of delegated legislation, regulations, Orders in Council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the legislatures."[4] It was not until the four mandatory retirement cases that the Court had an opportunity to revisit the application issue in detail, and to explain and extrapolate from McIntyre J.'s statement.[5] While the Court determined that the *Charter* applies to a college in British Columbia *(Douglas)*, it does not apply to universities in Ontario and British Columbia *(McKinney, Harrison)* nor to the Vancouver General Hospital *(Stoffman)*. In the course of those decisions, the Court both reaffirmed its decision in *Dolphin* and gave further guidance as to what is government action.

LaForest J., writing for the majority in each case, was clearly well aware of the criticisms of *Dolphin's* public/private distinction for, in *McKinney*, he explained the rationale for restricting the *Charter*'s application to government. Historically, bills of rights have been directed at governments, because these institutions can enact rules that bind the individual. "Only government requires to be constitutionally shackled to preserve the rights of the individual", he wrote, for private institutions can be regulated by government. He also suggested that the application of the *Charter* to all private action would diminish individual freedom, since large areas of settled law and individual choices made through contract would be subject to judicial oversight. He also expressed concern that the Courts would be given an impossible burden if they must scrutinize all private action, as well as government action. Finally, he argued that there are more flexible means available to government, such as human rights legislation and tribunals, to deal with private action that infringes others' rights.

He then turned to the question whether universities were a part of government. His reasons do not give a precise set of criteria that will lead to easy determination whether an entity is part of government. Indeed, it would be impossible to do so, for these determinations rest on context and require a close examination of the statutory infrastructure and method of operation of each institution. LaForest J. did, however, give some indication of the factors that are *not* determinative. For example, the mere fact of incorporation or creation by statute does not make the entity "government", a conclusion that was important in order to protect private corporations from the *Charter*'s reach through an indirect route. Secondly, he held that the fact that an entity is subject to judicial review of some of its decisions is not conclusive, nor is the fact that it performs an important public service, that it is subject to extensive government regulation, or that it receives extensive financial assistance from the public purse. At the same time, he stated that

the *Charter* is not limited to entities which discharge functions that are "inherently governmental in nature".

If these had been the indicia adopted — regulation, public service, government funding, statutory creation — the universities and the hospital in *Stoffman* would have been subject to the *Charter*. All are created by government, funded heavily by it, perform important public functions in the areas of education and health care, and are subject to a degree of government oversight. However, for LaForest J., what separated these institutions from government was their independent decision-making authority. In the case of the universities, although there was extensive government funding, the Lieutenant-Governor in Council had a role in structuring the governing body, and there was a degree of government oversight in the implementation of new programmes, the universities remained self-governing institutions, left to manage their own affairs and to allocate the funds received from government and other bodies. In the words of Beetz J. from an earlier case, which LaForest J. adopted, "statutes incorporating universities do not alter the traditional nature of the institution as a community of scholars and students enjoying substantial internal autonomy". Under the present structure, the government has no power of legal control over university operations, especially in regulating the terms of employment of academic staff.

Similarly, the Vancouver General Hospital, despite extensive government funding and supervision, including ministerial approval of the by-laws of the hospital's board, was a self-governing institution because the routine, day-to-day control was left to the board of the institution.

In contrast, *Douglas/Kwantlen* resulted in a finding that a British Columbia college was part of government. A key difference between this and the other cases is the fact that the college was, by statute, an agent of the Crown, which indicates a close degree of control by the government. Moreover, LaForest J. found a much greater degree of government control of the governing structure and programme here, including a board constituted entirely of government appointees holding their seats at pleasure. Like the other institutions, it was also extensively funded by government.

Wilson J. took a contrasting approach to LaForest J. in all of these cases, and she was joined by Cory J. in all and L'Heureux-Dube J. in *Stoffman*. She was critical of what she described as LaForest J.'s "narrow" approach to the issue, arguing that it rested on an American doctrine of constitutionalism which sees government as a necessary evil and "the minimal state as an unqualified good". This is not fair to LaForest J., as he points out, for his reasons in this and other cases on the merits of constitutional challenges indicate a large measure of deference to the legislative will — hardly an indication of hostility to state action.

In *McKinney*, Wilson J. not only embarked on a lengthy consideration and defence of *Dolphin*; more importantly for future cases, she adopted a framework of three tests (which Cory J. endorsed in each case) to apply when an entity is not self-evidently part of the legislative, executive or administrative branches of government: the control test (whether one of these branches exercises general control over the entity), the government function test (whether the entity performs a traditional function of government or a function which, in more modern times, is recognized as a responsibility of government), and a government entity test (whether the entity acts pursuant to statutory authority specifically granted to it to further an objective that government seeks to promote in the broader public interest). The tests are not cumulative — that is, an affirmative answer to one is a strong, but not conclusive, indicator that the entity is part of government, while a negative answer to all is not determinative that the *Charter* is inapplicable.

Applying these tests to each of the fact situations, she decided that each entity was part of government. She gave much greater significance to the degree of government control and funding than LaForest J. As well, she was influenced by the fact that the institutions perform an important public service, while LaForest J. rejected a "public purpose" test for the application of the *Charter* as "fraught with difficulty and uncertainty".

Some will criticize the Court for the uncertainty continuing to surround the application issue following these cases. Yet this criticism is unfair and asks for an impossible degree of precision in a grey area of *Charter* application. The Court has given us some important guidance, not only with the regard to the institutions in these cases, but others as well. It has also indicated that certain activities will come within *Charter* scrutiny, for both LaForest and Wilson JJ. stated that restrictions on rights do not escape *Charter* scrutiny just because they are included in a contract or collective agreement. Government can restrict rights not only by legislation, but by administrative action or contract as well.

The Supreme Court has affirmed that the *Charter* is a document which speaks to government. Defining what is "government" is not an easy task, as many political scientists and policy analysts will attest. We can only proceed on a case by case basis, using the framework that the Court has begun to set out.

Katherine Swinton, Faculty of Law, University of Toronto.

1. *McKinney* v. *University of Guelph*; *Harrison (Connell)* v. *University of British Columbia; Stoffman v. Vancouver General Hospital* and; *Douglas/Kwantlen College Faculty Association v. Douglas College* (all decided December 6, 1990).
2. (1986), 33 D.L.R.(4th) 174 (S.C.C.).
3. *Ibid.* at 195.
4. *Ibid.* at 198.
5. The Court also discussed application issues, in much less detail, in *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R.(4th) 416 (application to the order of an adjudicator determining a complaint of wrongful dismissal under the *Canada Labour Code*), *British Columbia Government Employees' Union v. A.G. B.C* (1988), 53 D.L.R.(4th) 1 (application to contempt order) and *Black v. Law Society of Alberta* (1989), 58 D.L.R. (4th) 317 (application to regulations of law society).