Public Law

"Discussions around delegated authority and what it means to perform a 'public function' are likely to permeate Charter application decisions in the years ahead."

What was the most interesting development of 2024, and why?

In 2024, after a long period of uncertainty (and some jurisprudential friction), the Supreme Court of Canada turned its mind to the Charter's application to quasi-government entities.

Section 32 of the Charter limits its application to Parliament and the government of Canada, and the legislature and government of each province. For almost thirty years, the 1997 Supreme Court case of *Eldridge v British Columbia (Attorney General)* has been the leading case on the interpretation of section 32.

The Court in *Eldridge* outlined two branches for the application of the Charter:

1. If an entity is part of government because it is governmental in nature or substantially controlled by government, then the Charter applies to all its activities; or
2. If an entity is not formally part of government but performs governmental activities, then those activities are subject to the Charter.

With governments' expansion of delegated authority in recent years, however, more questions have been raised about what constitutes "government" for the purposes of Charter applicability.

The Supreme Court provided some additional clarity in March 2024 in *Dickson v Vuntut Gwitchin First Nation*. Here, the Court held that the Charter applied to a self-governing Indigenous community in the Yukon. The Court concluded that the First Nation was a government "by nature" under the first branch of *Eldridge*, based on its unique governing characteristics such as its adoption of democratic elections, general taxation power, and ability to make and enforce binding laws within its territory.

The Supreme Court addressed Charter applicability again in September 2024 in *York Region District School Board v Elementary Teachers' Federation of Ontario*. In *York Region*, the Court found that public school boards in Ontario are "manifestations of government" for the purposes of section 32, also under the first branch of *Eldridge*.

The Court's confirmation that First Nations governments like Vuntut Gwitchin First Nation and public school boards in Ontario are "government" for the purposes of section 32 is an important development in Charter applicability jurisprudence. What's more, the Court has now firmly established that all actions carried out by these entities are subject to Charter scrutiny.

What is the key takeaway for organizations on Charter applicability this year?

Courts have been homing in on whether, how, and to whom the Charter applies. *Dickson* and *York Region* provide helpful contextual clues about what constitutes "government" for the purposes of section 32 that can help determine whether similar entities should also be operating with a view to their constitutional responsibilities under the Charter.

Organizations that function like or instead of the government — such as public school boards in Ontario, human rights commissions, and provincial transit authorities — should consider whether their activities may make them subject to the Charter.

Private organizations that perform specific government functions, such as private schools or transportation services, should review their activities to determine if the Charter applies to them under the second branch of the *Eldridge* test. This process can be challenging, as discussed below.

What developments do you anticipate on Charter applicability in the year(s) ahead?

Discussions around delegated authority and what it means to perform a "public function" are likely to permeate Charter application decisions in the years ahead. The Court's comments in *Dickson* and *York Region* (especially those in dissent and concurrence) suggest that further litigation on the application of the Charter to other quasi-government entities is only a matter of time.

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