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Human Resources Digest

# Edu-Law Education H.R. Digest

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SCHOOL BOARDS: TEACHERS

*Grievance / Maternity Rights*

# Maternity leave does not guarantee assignment

The Elementary Teachers' Federation of Ontario (ETFO) brought an application for judicial review of a decision dismissing a grievance by a teacher returning from pregnancy leave in **Elementary Teachers' Federation of Ontario v. Toronto District School Board, [2004] O.J. No. 2886**.

Prior to her pregnancy leave, the grievor taught French in grades 7 and 8. Each year, a staffing model was developed for the school. The principal determined the specific classroom teaching duties of each teacher in consultation with the teacher following the approval of the staffing model. The principal was to consider the preferences, abilities, qualifications and experience of the teachers in assigning teaching duties. Before the grievor went on leave, the principal requested her input but the grievor did not participate in the process, as she was distracted by preparation for the upcoming birth. Upon her return from leave, she was informed that her teaching assignment would be Senior Science. The grievor was formally qualified to teach Senior Science, although she had never done so and did not feel qualified to do so. The Senior French assignment was given to a teacher with more seniority but less experience teaching French. The Union alleged that the school board had violated sections 43(1) and 44 of the *Employment Standards Act*, arguing that the grievor was entitled to return to the same "position", that is, the same teaching assignment, and that assigning the grievor another subject was a reprisal against her for taking the maternity leave.

**The Divisional Court affirmed the decision of the arbitration panel, holding that there was a distinction to be made between the "position" of the teacher at a given school and her "work assignment", which was made on an annual basis.** Section 43 does not guarantee absolute freedom from change. The grievor was entitled to return from her leave to the position of a teacher, not the assignment of teaching French. The collective agreement between the parties clearly contemplated an annual assignment of teaching duties, taking into account the staffing model for the following academic year. Therefore, no teacher had a right to a particular teaching assignment from year to year, nor can it be said that a teacher had a reasonable expectation to continue teaching the same subjects every year.

The standard of review applied to the arbitrator's decision was reasonableness, and the court indicated that it could not be said that the arbitration panel was unreasonable in its characterization of the teacher's position, given the terms of the *Education Act* and the collective agreement. Here, the panel held that there were legitimate reasons for the teaching assignment. There had been a reduction in the number of teachers on staff because of declining enrolment and there were six teachers on staff qualified to teach French, but only two teaching positions in French. The evidence from the principal supported this conclusion, and further, the Board did not act with the intention of penalizing the grievor for her pregnancy leave. As a result, the Court found there was no basis to intervene with the panel's decision.

While a teacher's preference may be taken into consideration in the development of staffing models, a teacher returning from leave is entitled only to the position of teaching and not necessarily to his or her preferred class assignment. This decision affirms the necessary flexibility that Boards have, which may in turn reduce terminations in times of budgetary restraint.

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*Human Rights / Collective Agreements*

# Provisions in collective agreement not discriminatory

At issue in the 2004 unreported decision of **Upper Canada District School Board and OSSTF, District 26** was the provision in the collective agreement providing supplemental employment insurance benefits to adoptive fathers following adoption. The same top-up was not available to biological fathers. The Union grieved on the basis that this difference violated the discrimination provisions of the collective agreement, the Ontario *Human Rights Code* and the *Charter of Rights and Freedoms*.

The Board argued that discrimination must have both an adverse impact on a prescribed ground and that difference in individual treatment must reflect a lack of appreciation of the human dignity of the individual or group. Where a difference in treatment was clearly related to a difference in circumstance, the Board argued there was no discrimination. The Federation sought to equate the custodial entitlement of biological fathers to that of adoptive parents.

The Board argued that the experiences and needs of newly adoptive fathers were qualitatively different than those of a biological father. The "custodial" demand placed on adoptive fathers exceeded the demand placed on biological fathers once the mother's biological concerns regarding childbirth were resolved. As the respective custodial experiences between adoptive and biological fathers were materially different, the difference in treatment is justified and did not amount to prima facie discrimination. The Board also stated that the provisions in the collective agreement that gave rise to preferential treatment of adoptive parents as compared to biological fathers were designed to reflect the special experience of adoptive parents as compared to biological fathers. Finally, any violation under section 15 of the *Charter of Rights and Freedoms* is saved by section 1.

The Tribunal found that the differential treatment between adoptive and natural fathers brought into play one of the enumerated goals of the *Code* and the *Charter*, but that the evidence demonstrated special needs for adoptive fathers as compared to natural fathers when the child was introduced to the home. In dismissing the grievance, the Tribunal held:

"There is a clear ameliorative purpose to the impugned provision in the collective agreement. It is to provide additional benefit to adoptive fathers in recognition of their special needs. the result is not to demean or devalue the worth of natural fathers nor is it to stigmatize them or to give them a feeling of being disadvantaged. The collective agreement reflects nothing more than recognition that one group – adoptive fathers – has different needs than the other

group – natural fathers. The top-up was simply the parties' recognition of those special needs".

Clearly arbitrators may review human rights and *Charter* issues. In the present case the differential treatment was appropriate because it addressed the different needs of the two groups of parents.

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## SCHOOL BOARDS: OFFICERS

*Dismissal*

# Duty of fairness owed

In **Reglin v. Creston (Town), [2004] B.C.J. No. 1218**, the plaintiff, the Director of Financial Services for the Town of Creston, brought a wrongful dismissal suit against the municipality after he was terminated without cause. In addition to damages, the plaintiff sought reinstatement to his employment. The municipality brought an application to dismiss the plaintiff's claims through a summary trial.

At the end of 1999, it had become apparent to the incoming mayor that there were problems at the town hall, which in his opinion stemmed from personality conflicts between the plaintiff and his supervisor. Because of these problems, a committee was set up to investigate staffing issues, including the relationship between the plaintiff and his supervisor. As a result of this investigation, the committee members interviewed separately the plaintiff and his supervisor. The plaintiff also wrote a report detailing his concerns with his supervisor.

The plaintiff's report was critical of his supervisor's management style, and outlined what he considered to be inappropriate actions by the supervisor for personal financial benefits. In the report, the plaintiff expressed concern about his own ability to continue to work with the supervisor. The supervisor had been provided with a copy of the report and was given the opportunity to respond to it before City Council. The plaintiff, however, was given no opportunity to address Council. The Council decided to terminate the plaintiff without cause. The plaintiff found similar work with another municipality within two months of his termination.

The Court explained that, while the law recognizes the right of employers and employees to terminate an employment contract at any time, there are cases in which employees are entitled to procedural fairness in the termination of their employment. The Court examined whether in this case the municipality owed a duty of procedural fairness to the plaintiff, and if they did, whether a hearing was a part of that duty.

Referring to the Supreme Court's decision **Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653**, the Court laid out the test for determining when a general duty of procedural fairness is owed where one is not already required by legislation or contract. The Court looked at three factors to determine if the plaintiff was entitled to procedural fairness in the termination of his employment. First, the Court considered the nature of the decision to be made by the administrative body. Second, the Court reviewed the relationship existing between that body and the individual. Third, the Court determined the effect of that decision on the individual's rights. In *Knight*, Justice L'Heureux-Dubé explained that the duty to act fairly is grounded in the fact that the employer is a public body that derives its powers from statute and must exercise those powers according to the rules of administrative law.

The nature of the decision to terminate the plaintiff's employment was final and the law has recognized that the decision to terminate an individual's employment has a significant effect on their rights. Next the Court examined the nature of the relationship between the municipality and the plaintiff.

The Court reviewed the relevant administrative case law and explained that there are three categories of employment, master and servant, office held at pleasure, office from which one cannot be terminated except for cause. The first category is owed no duty of procedural fairness in termination, whereas the second and third categories, employees are owed a duty of procedural fairness. An employee "holds an office" when their position involves an element of management and has elements of a public or statutory nature.

The Court in this case found the plaintiff held an office. Therefore he was owed a duty of procedural fairness. There was no evidence before the Court that this duty was limited by applicable legislation or by his employment contract.

The Court then examined whether or not the plaintiff was entitled to a hearing as part of the procedural fairness that he was owed. The Court explained that a factor in determining the content of the duty of fairness was whether the office held was one held at pleasure, which required only minimal fairness, or was one from which one cannot be terminated except for cause, which attracts a higher degree of fairness. The Court determined that the plaintiff held his office at pleasure, and that local government officers could be terminated without cause.

Nevertheless, consistent with the *Knight* decision, a hearing was a minimal requirement of fairness in this case, because hearing from the officer facing termination would contribute to the administrative body's knowledge and decision regarding termination.

The Court then examined whether or not the plaintiff had received a hearing. The Court explained that a right to a hearing has two components; a right to know the case against you and a right to present your case to the decision makers. The Court commented that a formal hearing was not required if the officer was aware of the reasons for his dismissal in advance and had a reasonable opportunity to respond. The municipality argued that it had given the plaintiff a hearing by conducting interviews with the plaintiff during the investigation into the staffing problems and by considering the plaintiff's report about his supervisor during that same investigation. The Court rejected this position because the interviews occurred before the termination of the plaintiff was contemplated, and because the plaintiff was never given a copy of his supervisor's reply to his report nor was he given an opportunity to appear before the municipal council to reply to the allegations made by his supervisor.

The Court found that the only reasonable remedy for the denial of the hearing was damages. The Court increased the plaintiff's pay in lieu of notice by four months, for a total of eight. The Court then explained that the compensation the

plaintiff had already received and any income earned during the first four month period would have to be deducted from the eight month award. However, the Court went on to state that, it would not be just to deduct the plaintiff's earnings during the second four month period as that would nullify the financial benefit of the award to the plaintiff and would negate the intended effect of the award as a sanction against the municipality.

In Ont. Reg. 309, Part 2, section 8 deals with suspension or dismissal of a supervisory officer, and clearly indicates that the supervisory officer must be given reasonable information about the reasons for the suspension or dismissal and an opportunity to make submissions to the board, either orally or in writing. The Regulation was amended in 1993 to effectively remove the requirements for a "hearing" pursuant to the *Statutory Powers Procedure Act* (SPPA). However, the issue still remains as to whether the SPPA will apply in any event which would be additional process for any supervisory officer subject to suspension or dismissal.

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## COLLEGE OF TEACHERS: DISCIPLINE

*Judicial Review*

# OCT appeals decision of its tribunal

The Ontario College of Teachers (OCT) in **Ontario College of Teachers v. Webb, [2004] O.J. No. 1134**, appealed the penalty decision of its Discipline Committee to the Divisional Court. The respondent, Webb, was found guilty of professional misconduct. The Committee directed the Registrar to suspend her certificate of qualification and registration for one year. Seven months of the suspension was to run in concurrence with a suspension imposed by Webb's employer. The Committee directed that the remaining five months would be suspended if Webb fulfilled certain conditions.

The Court dismissed the appeal, holding that the standard of review of the Committee's penalty decision was reasonableness. The Committee directed its mind as to whether the revocation was an appropriate penalty and decided otherwise. On the facts of this case, the Court held that the Committee's determination was reasonable. The Court noted that the intent of the Committee was to impose a penalty that removed the respondent from the classroom for a period of one year. However, since the Committee was faced with a situation where the respondent had been kept out of the classroom for a period of seven months pursuant to the discipline proceedings held by the School Board, the panel crafted the penalty recorded.

In cases where the College of Teachers has suspended a certificate for discipline purposes, the Court's role will be to look to the overall intent of the Discipline Committee, and evaluate the penalty crafted on a reasonableness standard. Thus, the College's decision need not be correct, only reasonable.

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# Suspension not out of time; OCT had jurisdiction

The appellant, a teacher, appealed to the Divisional Court in **Bhadauria v. Ontario College of Teachers, [2004] O.J. No. 2468**, a decision by the Discipline Committee of the Ontario College of Teachers made in March of 2003 ruling in favour of a suspension. In 1989 the appellant wrote two letters to the then out-going director of the Toronto Board of Education and directed copies of the letter to other members of the Board. The letters were offensive and unprofessional. As a result of writing those letters, the Board terminated the appellant's employment as a teacher. The grievance procedure initiated by the appellant went to the Supreme Court of Canada, which upheld the employer's decision to terminate. The Court held that,

"There can be no doubt that the opinions expressed and the wording used in the letters of Mr. Bhadauria constituted very significant if not extreme misconduct. These letters did not simply express dissatisfaction with working conditions; they were threats of violence. The fact that they may have been written outside the hours of teaching duty cannot either excuse or alleviate the seriousness of the misconduct."

There were three main arguments on the appeal. The appellant's first ground of appeal was that his conduct in writing the letters was purely a matter of "labour relations" and not a matter of discipline. As such, the College would have no jurisdiction to deal with the complaints because they were not matters of discipline and therefore could not constitute professional misconduct. The Court held that this ground was without merit as the Supreme Court could not have been more clear in stating that the two letters constituted "*significant if not extreme misconduct*". The issue had been fully considered by the Supreme Court and there could be no doubt that the letters constituted professional misconduct.

The appellant's second argument was that the new legislation, the *Ontario College of Teachers Act*, did not specifically authorize the College to deal with discipline matters arising out of conduct that occurred before the College came into existence and the College was without jurisdiction. The Court rejected this argument finding that, to suggest the College was without jurisdiction to deal with discipline matters arising before the College was created but not reported until after its existence, was to provide immunity to members for misconduct in circumstances where non-members would be held accountable. This, the Court noted, would be an absurd result and could not reasonably have been the intent of the legislation.

The appellant's third argument dealt with unreasonable delay. The Court noted that the misconduct had occurred in October and December of 1989, but was not reported by the Board to the College until July of 1999, almost ten years after the first letter was sent. A second delay occurred because of the College, which had received the report of misconduct in 1999 but, did not make a Request to initiate an investigation until January, 2000, almost five months later. In addition, the decision was not referred to discipline until May, 2002, almost three years since the initial report to the College. The appellant grieved his termination almost immediately after it occurred, and proceeded all the way to the Supreme Court, where the termination was upheld in February of 1997. The

Court found that it was reasonable for the Board to wait until the decision by the Supreme Court before reporting the misconduct to the College however; there was no basis for the subsequent two year delay. While the College's delay was inexcusable, the Court held that the delays were not prejudicial to the appellant to the point of abuse of process. The College's decision was upheld by the Court.

It is evident from this case that even in cases of extreme delay, the delay alone is insufficient to demonstrate abuse of process. Situations in which abuse of process can be found will be extremely rare, particularly if there is no prejudicial effect on the party raising the argument.

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## HUMAN RIGHTS COMMISSION: JURISDICTION

*Jurisdiction Over Labour Case*

# Jurisdiction of Human Rights Commission recognized in labour case

In **Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General), [2004] S.C.J. No. 34**, the Supreme Court of Canada found, by a majority of five to two, that the Quebec Human Rights Tribunal, as opposed to a labour arbitrator, was entitled to jurisdiction over a dispute that arose due to alleged discrimination in the negotiation of a collective agreement.

A group of teachers had brought a complaint to the Quebec Human Rights Commission alleging discrimination based on age in violation of the Quebec *Charter of Human Rights and Freedoms*. In an attempt to adopt cost-cutting measures the teachers' union and the Province of Quebec had modified a collective agreement which provided that teachers would not receive credit for experience acquired in 1996-97 when determining salary increments or seniority. This provision affected a minority group of mainly younger teachers who had not yet reached the highest pay scale. The Commission investigated and brought the complaint before the Quebec Human Rights Tribunal, which had jurisdiction over human rights matters and the responsibility of interpreting and applying the Quebec *Charter*. In response, the Attorney General of Quebec, the school boards and the union filed a motion requesting that the Tribunal decline jurisdiction on the basis that under the *Labour Code* the dispute properly fell under the exclusive jurisdiction of a labour arbitrator. The Tribunal rejected this motion. However, the Quebec Court of Appeal subsequently reversed the Tribunal's decision and found that the dispute should be resolved by a labour arbitrator under the collective agreement. The Commission appealed on behalf of the complainant teachers to the Supreme Court.

Writing for the Majority of the Supreme Court, Justice McLachlin explained that the case would be decided by determining whether the Quebec Human Rights Tribunal could be barred from hearing a complaint of discrimination because the *Labour Code* gave a labour arbitrator exclusive jurisdiction over the dispute. In determining this issue the Majority looked at two issues; first the relevant statutory provisions and second, the nature of the dispute.

When looking at the relevant statutory provisions and the arbitrator's jurisdiction therein, the Majority looked at s.100 of the *Labour Code*, which provides that the arbitrator is competent to resolve all grievances under the collective agreement. A "grievance" is defined in the *Code* as a disagreement about the interpretation or application of a collective agreement, in other words matters arising out of the operation of the agreement. The Quebec *Charter* gives responsibility for investigating alleged violations of its provisions to the Commission, and at s. 111 grants a large jurisdiction over human rights matters to the Tribunal. The jurisdiction granted to the Tribunal under the Quebec *Charter* however is not exclusive. The Quebec *Charter* also permits the Tribunal to refuse to act where the complainant has pursued other remedies and permits that the Tribunal's jurisdiction may be concurrent with the jurisdiction of another adjudicative body.

To determine the nature of the dispute and whether it fell within the exclusive jurisdiction of the arbitrator, the Majority explained that the essential character of the dispute had to be examined. The Majority found that the essence of the dispute was therefore the pre-contractual negotiation of the agreement. It noted that previously the courts had recognized that disputes arising out of the formation of a collective agreement could raise issues that did not fall within the jurisdiction of the labour arbitrator. While the *Labour Code* authorizes an arbitrator to interpret and apply any Act where it is necessary to settle a grievance, in this case the dispute was essentially about the formation and validity of the agreement.

The Tribunal had been asked to declare that the provision of the collective agreement violated the equality provisions of the Quebec *Charter*, and the Majority explained that this is exactly within the mandate of the Tribunal. Therefore, the Tribunal was entitled to exercise its jurisdiction under the Quebec *Charter* over the complaint.

The Majority also explained that the Tribunal was correct in not refusing jurisdiction on the basis that the complainants could have asked their local union to file a grievance on their behalf because, firstly, the nature of the dispute was not a grievance under the collective agreement, but rather the complainants alleged the agreement itself was discriminatory; secondly, it appeared that, because they were affiliated with one of the groups that had negotiated the agreement, the local unions were opposed to the complainants in interest; thirdly, if the unions had filed a grievance the labour arbitrator would not have had jurisdiction over all of the parties to the dispute, namely the provincial organizations and the Minister who had agreed to the provision; and fourthly, the Tribunal would have been better suited to hear the dispute than a labour arbitrator because the provision affected hundreds of teachers.

The Majority found that the Tribunal had jurisdiction over the dispute and rejected the argument that the labour arbitrator had exclusive jurisdiction in this matter. The appeal was allowed and the matter was remitted to the Quebec Human Rights Tribunal.

In the dissent opinion Justice Bastarache explained that the dispute did not focus on the negotiation process, which had led to the new provision in the collective agreement, but rather the alleged discrimination arose from the application of that provision. Having found that the dispute arose from

the application of the provision, the Minority concluded that the dispute fell under the exclusive jurisdiction of a labour arbitrator pursuant to the jurisdiction granted to them under the *Labour Code*.

The Minority explained that in this case, although the dispute concerned the right to equality, the essence of the dispute should not be determined by the nature that right alone. Rather, the dispute should be examined in the context of the claim, which was the determination of seniority for the purpose of calculating wages. In that context, the dispute fell squarely within the scope of the collective agreement. The Minority went on to explain that even if it were characterized as a human rights dispute, because a labour arbitrator can enforce rights and obligations created by human rights legislation, the dispute would fall under the labour arbitrator's exclusive jurisdiction.

The Court continues to affirm the pre-eminence of human rights legislation. In Ontario the *Human Rights Code* has supremacy over other provincial legislation, and all employers must follow the *Code*.

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## WORKPLACE COMPENSATION: CLAIM

*Appeal*

# Medical opinion evidence not enough

In **Canada Post Corp. v. Nova Scotia (Workers' Compensation Appeals Tribunal), [2004] N.S.J. No, 242**, Canada Post appealed a decision by the Workers' Compensation Appeals Tribunal that recognized the grievor's claim for benefits on the basis that he was disabled by stress which he suffered as a result of ongoing workplace harassment. The Nova Scotia Court of Appeal found that the appropriate standard of review was correctness and that the Tribunal had made two errors in allowing the claim.

The first error arose in the Tribunal's approach when it found that the question of causation in this case was a matter exclusively for medical expert opinion. The Court stated that expert opinion evidence is often of great assistance in determining questions of causation, but it is neither necessary nor necessarily dispositive. The Tribunal's role in determining whether or not an injury arose out of and in the course of employment was not to simply be attorned to the opinion of experts, but rather, the Tribunal should have determined the issue by reviewing all of the relevant evidence before it. The Tribunal should not simply have accepted the medical reports filed. The Court also noted that evidence about the actual workplace was always relevant and should have been weighed, particularly since the evidence about the nature of the workplace before the Tribunal was conflicting. The Court held that the Tribunal should have weighed all the evidence and approached causation as a practical question of fact, which could best be answered by ordinary common sense.

A second error arose when the Tribunal found that neither the nature of the workplace incidents nor the reaction of other employees to the incidents was relevant to the question of causal link between the workplace incidents and the grievor's psychological condition. The Court stated that the critical determination was whether the workplace contributed to the stress or whether the stress caused the workplace incidents. The fact that certain incidents were or were not stressful, objectively viewed, and the related question of whether other workers found the incidents stressful, while not necessarily dispositive of the issue of causation, was nonetheless relevant to that question. For example, if the incidents in themselves did not appear to be particularly stressful and the vast majority of other workers did not find them to be so, those facts could support an inference that it was the grievor's psychological condition that gave rise to the workplace incidents rather than the other way around. Conversely, if the incidents appeared to be stressful and other employees found them to be so, an opposite inference could be supported. The weight to be given to such evidence in reaching a conclusion about causation was for the trier of fact; however, the Court found that it was an error of law to simply dismiss such evidence as irrelevant and refuse to consider it. Because the Tribunal wrongly approached the issue of causation and ignored relevant evidence in reaching its conclusion, its decision was set aside.

This decision highlights the need to take into consideration the context of the workplace when making determinations with respect to disability on the basis of stress. A tribunal cannot overlook evidence that may describe the workplace, the nature of the work and the reactions of other employees in the same workplace.

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## SCHOOL BOARDS: EMPLOYEES

*Human Rights / Charter / Candidacy*

# Unconstitutional to prevent teachers from running as trustees

In **Baier v. Alberta, [2004] A.J. No. 1003**, the Applicants brought an application in Alberta challenging the constitutionality of proposed amendments to the *Local Authorities Elections Act* (LAEA) on the grounds that they violate rights of school board employees protected under sections 2(b), 2(d) and 15(1) of the *Charter of Rights and Freedoms*. The LAEA Amendments were to come into force on September 20, 2004 and the case was heard on September 2, 2004 by way of early application. As a result, the Alberta Court of the Queen's Bench focused its decision only on the section 2(b), freedom of expression rights.

The LAEA Amendments preclude the Applicants and all employees employed by school districts and divisions, charter school and private schools (collectively referred to as "school board employees") from seeking nominations as school trustees anywhere in Alberta unless they take an unpaid leave of absence from their employment and resign from their employment if elected. The Amendments expanded the existing provisions of the LAEA, which restricted school board employees from seeking nominations as school trustees only in the jurisdiction in which they were employed.

The Applicants, certified teachers in three different school boards in Alberta, also serving as school trustees, argued that

the LAEA Amendments effectively denied school board employees, particularly teachers, the right to seek nomination for office of school trustee anywhere in Alberta which was an infringement of their freedom of expression rights. Teachers who resign their employment to hold the office of the school trustee and who wish to continue to practice their profession have virtually no other options for gainful employment as the LAEA Amendments prohibit teachers from working for their primary employers. The Respondent argued that school board employees remained free to express their views on topics relevant to school board operations in a number of different ways, and that the legislation merely excludes an employee from one particular means of expression.

There were three main issues before the Court, the first was whether running for office was protected by the right of freedom of expression. The scope of the freedom of expression right has been broadly interpreted by the Supreme Court of Canada and extends to as many activities as possible. Any activity that conveys or attempts to convey its meaning is prima facie covered by the s. 2(b) guarantee unless the expression is communicated in a manner that excludes protection. Running for office is a similar form of expression as the right of public servants to support a candidate in an election, which is protected by s. 2(b). The Court found that running for office is an avenue for members of the public to participate in political and social discussion and decision-making. It is an activity which is clearly meant to convey meaning and therefore falls within the ambit of s. 2(b). The Court also noted that while the government is not required to provide for province-wide school board elections as a platform of expression, once it has chosen to do so, it must do so in a manner that does not infringe upon the Applicants' *Charter* rights, including their freedom to express themselves by running for office.

The second issue before the Court was whether the LAEA Amendments infringed the Applicants' freedom of expression. Trustees are required to excuse themselves from discussing and voting on matters when conflicts of interest arise, the result being that, with respect to budget issues, the most important decisions were being made by less than a full complement of the board. The Court found that although the intent of the Amendments, to protect the democratic process by ensuring the business of school boards can be carried on without concerns about conflicts of interest, did not impair the Applicants' freedom of expression, the effect of the provisions might. In the long term, the economic consequences of the LAEA Amendments were so onerous that they "rendered illusory" the ability of the Applicants and other teachers to sit as school trustees. In order to teach in Alberta, teachers are limited to employment within a school district or division, a charter school or a private school. Only a small number of teachers may have the opportunity to seek employment with Alberta Learning or a university. As a result, teachers would be required to live on the remuneration paid to school trustees during their term of office. Given the significant disparity between a teacher's salary and a trustee's remuneration, forcing a teacher to resign his or her employment for the duration of their term as trustee renders illusory any opportunity for teachers to run for office as school trustees under the LAEA Amendments. The restrictions on school board employees were province-wide and affected the ability of teachers to practice their profession within Alberta. The Court found that the LAEA Amendments amounted to a total ban of the teachers' expressive rights.

The last issue before the Court was whether the LAEA Amendments, having been found to infringe the Applicants' freedom of expression rights, were demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*. The Amendments sought to protect members of the public from possible recusals by trustees from school board decisions. The affected members of the public, could not be considered a vulnerable or disadvantaged group. In addition, there was no evidence that the public perceived the current legislative scheme governing school trustees to be insufficient in addressing the problem of conflicts.

In this case, the Court accepted the argument that the objective of the legislation, insofar as it related to avoiding conflicts of interest, recusals and under-stacked boards, was one of substantial importance in a democratic society. However, the Court held that while there is a rational connection between limiting the conflicts of interest and restricting the ability of school board employees to seek nominations as school trustees anywhere in Alberta, the LAEA Amendments were the most impairing measure of the freedom of expression rights that could have been legislated.

The Court found that the deleterious effects of depriving the Applicants and other school board employees of a form of political expression outweighed the beneficial effects of avoiding conflicts of interest, which could be addressed in a less impairing manner. As a result, the Court held that the LAEA Amendments were not reasonable nor justifiable in a free and democratic society and could not be saved under section 1 of the *Charter*.

The decision in *Baier* recognizes that while conflicts of interest are serious, the rights of individuals to express themselves by running for trustee cannot be eliminated to avoid conflicts.

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*Candidacy continued...*

# Restrictive policy prohibiting candidacy struck down

In a 2004 unreported decision, **Nova Scotia Government v. Nova Scotia Public Service Housing Assessors**, the Deputy Minister of Service issued a Policy Statement and Directive imposing significant limitations on civil servants employed in the Assessment Services Division who wished to become candidates for municipal office. In particular, the policy set out that any employee who intends to be a candidate for municipal office must apply to the Conflict of Interest Commissioner prior to the close of nominations for an opinion as to whether a conflict of interest might exist between the employee's current employment responsibilities and their position as a member of council for the municipality. If the Commissioner was to conclude that a conflict would exist, which was found to be a virtually inevitable conclusion given the Rationale set out in the Policy, the employee would then be required to take an unpaid leave of absence to run and for the duration of holding the office, if they were successful. The Union filed a grievance on its own behalf, and on behalf of all bargaining unit employees in the Assessment Services Division, alleging that the Policy was contrary to the Civil Service Master

Agreement.

The arbitrator noted that the Policy sought to impose the same regime on bargaining unit employees in the Assessment Services Division who are running for municipal office as currently existed for all civil servants seeking provincial or federal office. The distinction set out in the *Civil Service Act*, which distinguished between running for provincial or federal office and running for municipal office, would largely be abolished with respect to bargaining unit employees in the Assessment Services Division. No other group of civil servants had been singled out in this fashion and the question was whether such differential treatment could be lawfully justified. The arbitrator also noted that while an employer is entitled to implement a policy unilaterally, the policy must not be inconsistent with the collective agreement. Section 41 of the *Civil Service Act* conferred on all bargaining unit employees, other than those excluded by regulation, the right to seek and hold municipal office. This right was only limited to the extent that candidacy for, or service in, municipal office would interfere with the performance of the employee's duties or conflict with the interests of the Crown.

The arbitrator held that on four grounds the Policy significantly derogated from the right of bargaining unit employees to seek and hold municipal office pursuant to section 41. First, the Policy purported to exclude whole classes of bargaining unit employees from running for municipal office while remaining actively employed in the Assessment Services Divisions unless they applied to the Conflict of Interest Commissioner to determine whether or not their candidacy constituted a conflict of interest. Under section 41, the mechanism for excluding classes or groups of employees from municipal office was by regulation, not departmental policy. Second, the Rationale of the Policy sets out certain facts, which, if accepted, would essentially guarantee a finding that it would be a conflict of interest for employees in the Assessment Services Division to seek or hold municipal office. Third, the Policy left it to the Commissioner to decide whether or not an employee would be in conflict of interest if he or she were to run for municipal office. Under section 41, however, the question of conflict of interest would initially be decided by the Employer and any resulting dispute would be resolved pursuant to the grievance procedure in the collective agreement. In effect, the Policy supplanted the normal dispute resolution mechanism agreed to by the parties and mandated by the collective agreement. Finally, the Policy defined conflict of interest as including a perceived conflict. Section 41, on the other hand, defined conflict of interest as "a conflict with the interests of the Crown". Consequently, the Policy had broadened the definition beyond that which was intended in section 41.

Given the evidence available, the restrictions on political activity contained in the Policy could not be argued to be reasonably necessary, especially as they applied to the support staff in the Assessment Services Division. Past history demonstrated that conflict of interest concerns had been accommodated when assessors served as municipal councillors. There was no suggestion that such accommodations had caused undue hardship to the Employer and no convincing reason was offered as to why they should not continue. As a result, the arbitrator concluded that the Policy was inconsistent with the collective agreement and must be declared invalid.

In this case, the arbitrator employed a "minimal impairment" analysis to evaluate the derogation from employees' rights as set out in the collective agreement. The arbitrator applied an undue hardship standard on the Employer, to accommodate the desire of employees to run for municipal councillor positions. These concepts were borrowed from human rights decisions and *Charter* cases. It is interesting to see these concepts used in other forums for other purposes, and it highlights the impact that the *Charter* and human rights law have had in Canada.

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