

2016 01 H 0084

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN

ANTHONY YOUNG, RUDY MERCER,
NATASHA DROVER and NANCY RODRIGUES

APPELLANTS

AND

NEWFOUNDLAND AND LABRADOR ENGLISH
SCHOOL DISTRICT

RESPONDENT

APPELLANT'S FACTUM

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Index

	Page
Part I – Overview	1
Part II – Concise Statement of Facts	2
Part III – Issue	3
Part IV – Argument	3
Part V – Order Sought	12
Index to Authorities	13

Part I – Overview

1. The appellants are parents of children affected by the decision of the respondent to close Whitbourne Elementary School (the “School”).
2. The appellants applied to the Trial Division under Rule 54 of the *Rules of the Supreme Court, 1996*, for an order in the nature of certiorari quashing the decision of the respondent to close Whitbourne Elementary School that had been made on April 14, 2016 and ordering the respondent to give parents of children affected by the proposed closure, including the plaintiffs, an opportunity to make meaningful representations to a properly constituted board of trustees of the respondent in accordance with the requirements of section 76(2) of the *Schools Act, 1997*.
3. The appellants argued that the school closure decision was void because the respondent failed to hold an election of trustees on November 5, 2013 as required by law, specifically by the *School Board Election Regulations, 1998*. The appellants argued that the trustees who voted to close the School on April 16, 2016 were without statutory authority to do so.
4. The appellants also argued that the school closure decision, if not void, must be set aside for failure of the respondent to respect the right of the parents of children affected by the closure to have a fair and meaningful opportunity to influence the decision of the respondent by making representations to the trustees as required by section 76(2) of the *Schools Act, 1997*, and the common law.
5. Madame Justice Marshall found that the appointed board of trustees was duly constituted, and that it had the authority to vote on the school closure. She refused to quash the school closure decision on the basis of lack of authority of the Board.
6. Justice Marshall also found that the respondent had breached section 76(2) of the *Schools Act* by failing to disclose information to the appellants on a timely basis, and that the appellants were therefore denied the opportunity to make meaningful representations to the board of trustees. She granted an order in the nature of certiorari quashing the respondent’s decision to close the School made on April 16, 2016.

7. On September 20, 2016 the respondent trustees again voted to close the School, this time effective June 2017. At the time of that vote the board of trustees was comprised of the same members who had been trustees when they previously voted to close the School on April 16, 2016, with no election having been held since their appointment.
8. This appeal is from the decision of Madame Justice Marshall's refusal to quash the school closure decision on the basis of lack of authority of the trustees. Although the decision of April 16, 2016 was set aside for other reasons, and although the school closure decision made September 20, 2016 was not the subject of the application in the Court below, the appellants ask that this Court reverse the decision of the learned Applications Judge and declare that the trustees who voted to close the School on April 16, 2016 were without statutory authority to do so. The appellants rely upon the respondent to respect such a ruling and to acknowledge that it would be equally applicable to the decision made September 20, 2016.

Part II – Concise Statement of Facts

9. The Board was created on September 1, 2013. On that date by Order-in-Council the Lieutenant-Governor in Council made the *School Boards Dissolution Order, 2013* that dissolved the school boards for districts 1, 2, 3 and 4. One of those boards was the Eastern School District that until then had responsibility for Whitbourne Elementary School.

Reference: OC2013-203, Tab 11

10. On the same date by Orders-in-Council the Lieutenant-Governor in Council made the *Boundaries of School District Order, 2013* that states that the respondent Newfoundland and Labrador English School District covers the entire province. By a second Order-in-Council nine trustees were appointed to the board of the respondent. They were Lorne Wheeler, Goronwy Price, Donald Brown, John George, Milton Peach, Nada Bordon, Guy Elliott, Kim Cheeks and George Sheppard. On October 4, 2013 seven more trustees were appointed. They were John McCarthy, Eric A. Snow, Fred G. Douglas, Rick Martin, Newman Harris, Wayne Lee and Gary Blaikie.

Reference: OC2013-231, Tab 12
OC2013-252, Tab 13
OC2013-261, Tab 14

11. On November 5, 2013 elections for school board trustees were required to be held, but were not.
12. The minutes for the meeting of the trustees held on March 5, 2016, when the motion was made to close the School, and the meeting held on April 16, 2016, when the motion to close the School was approved, show that the trustees were, with the exception of two resignations, the same persons who had been appointed by the Orders-in-Council noted above.

Reference: Exhibit 10 to the affidavit of Anthony Young, Appeal Book Tab 7
Exhibit 28 to the affidavit of Anthony Stack, Appeal Book Tab 12

13. The April 16, 2016 decision of the trustees to close the School was set aside by Madame Justice Marshall on July 29, 2016.
14. The minutes of the meeting of the trustees held on September 20, 2016 are a matter of public record, posted on the respondent's website. There had been no change in the composition of the board of trustees on that date when they again voted to close the School.
15. It is also a matter of public record that an election to replace the appointed trustees of the respondent was held on November 22, 2016.

Part III - Issue

16. The issue is whether the trustees of the respondent had the authority under the *Schools Act, 1997* to make a decision under section 75 or 76 of that *Act* to close the School.

Part IV – Argument

17. Section 59 of the *Schools Act, 1997* permits the appointment of trustees when a new school district is created. It reads as follows:

59. (1) Where

- (a) a new district is created;
- (b) all the trustees of a board are dismissed;
- (c) a trustee position is vacant; or
- (d) a board does not have a sufficient number of trustees for a quorum, the Lieutenant-Governor in Council shall
- (e) appoint a board or a trustee; or
- (f) order that there be an election of a board or of a trustee.

(2) Section 53 applies, with the necessary changes, to the appointment or election of a board or of a trustee under this section.

Reference: *Schools Act, 1997*, SNL1997 c. S-12.2, sec. 59, Tab 8

18. Section 59(2) makes the provisions of section 53, which addresses election of trustees, applicable where trustees have been appointed to a new district under section 59(1)(a). Section 53(1), (3), (4) and (5) reads as follows:

53. (1) There shall be a school board elected for each district.

(3) A board shall be elected at the time and in the manner directed by the minister subject to the approval of the Lieutenant-Governor in Council.

(4) The number of trustees to be elected for each district shall be set and may be changed by order of the Lieutenant-Governor in Council.

(5) Where fewer trustees are elected to a board than the number required by an order made under subsection (4), the Lieutenant-Governor in Council shall appoint those trustees necessary in order to satisfy the order.

Reference: *Schools Act, 1997*, SNL1997 c. S-12.2, sec. 53, Tab 8

19. Section 54 provides for the establishment of zones within a school district to ensure that “all parts of the district are presented by trustees.” It reads:

54. For the purpose of ensuring that all parts of a district are represented by trustees, the board shall divide the district into 2 or more zones and shall define the boundaries of those zones.

Reference: *Schools Act, 1997*, SNL1997 c. S-12.2, sec. 54, Tab 8

20. The scheme of the *Act* is thus that school boards are to be composed of elected trustees from geographically defined zones. A trustee is the representative of the interests of the schools, children and parents in the zone to which he or she is elected. The scheme is similar to municipal government in this province. In each case the Legislature has delegated some of the powers and functions constitutionally allocated to it to a subsidiary level of government, the representatives of which are elected by those who are affected by the decisions the trustees make.
21. Both the legislation governing municipalities and cities in the province on the one hand and the *Schools Act, 1997* on the other reserve limited powers to the responsible minister to appoint councillors or trustees, but the underlying theme is one of delegation to a democratically elected body. As Justice Orsborn stated in *Tracey et al. v. Board of Education of Avalon East et al.*, “The Board is elected to operate the schools in a particular district; its members are accountable to the electorate.”

Reference: Tracey et al. v. Board of Education of Avalon East, 167 Nfld & PEIR 262, 1998 CanLII 18759 (NL SCTD), para. 6, Tab 6

22. Section 118(1)(c) of the *Schools Act, 1997* gives the Lieutenant-Governor in Council the power to make regulations “respecting the election and appointment of trustees”, pursuant to which the *School Board Election Regulations, 1998* have been made.

Reference: *Schools Act, 1997*, SNL1997 c. S-12.2, sec. 118, Tab 8
School Board Election Regulations, 1998, NLR 146/97, Tab 9

23. Those *Regulations* reinforce the representative capacity of the trustees elected to a school board. Section 4 provides that in order to vote in an election of trustees, a person must be ordinarily residence in the school district or have a child enrolled in a school in the district. Electors vote in the zone in which they reside, or if they do not reside in the district they vote in the zone in which their child goes to school. Section 6 says that a candidate for trustee must be ordinarily resident in the zone in which they stand for election. There is thus a real connection between a zone within a district, the parents of children who go to school in that zone, and the trustee or trustees elected to represent that zone.

Reference: *School Board Election Regulations, 1998*, NLR 146/97, sec. 4, 6, Tab 9

24. The *Regulations* place the responsibility for the conduct of elections, including the appointment of a returning officer, filing of nominations, establishing polling stations and counting votes on the respondent, and establish fixed dates for elections. Regulation 3(1) reads:

3. (1) An election of trustees to a board shall be held on November 3, 2009, and afterward on the first Tuesday in November every four years, unless the minister otherwise directs.

Reference: *School Board Election Regulations, 1998*, NLR 146/97, sec. 3, Tab 9

25. Section 11(2) of the *Interpretation Act* states that “the word ‘shall’ shall be construed as imperative”. Use of the word “shall” in regulation 3(1) therefore means that the Board has no discretion concerning the holding of fixed date trustee elections. Elections can only be deferred upon receipt by the Board of a direction from the minister to do so.

Reference: *Interpretation Act, RSNL1990 c. I-19*, sec 11, Tab 7

26. Elections of trustees to the Eastern, Nova Central, Western and Labrador school districts were held on November 3, 2009. No election of trustees has been held since then. The next election was required by the *Regulations* to be held on November 5, 2013 “unless the minister otherwise directs”.

27. Although the Eastern District had been dissolved and the defendant Board created on September 1, 2013, there is no provision in the *Act* or *Regulations* to restart the running of the 4 year period between elections because of the creation of a new district. The Lieutenant-Governor in Council has the power to temporarily appoint trustees, but only until the next scheduled election. That is exactly what was done by OC2013-252 and OC2013-261 both of which appointed trustees to the defendant Board only “until the next general school board elections”.

Reference: OC2013-252, Tab 13
OC2013-261, Tab 14

28. The trustees appointed on September 1, 2013 and October 4, 2013 could therefore only continue to hold office, and the respondent board could only continue to be lawfully constituted, if the minister, prior to November 5, 2013, gave a direction to the respondent that elections were not to be held on that date. The “minister” is defined in section 2(k) of the *Schools Act* as the “minister appointed under the *Executive Council Act* to administer this Act”. The *Department of Education Notice, 2003*, made under the *Executive Council Act*, assigns responsibility for the *Schools Act, 1997* to the Minister of Education.

Reference: *Schools Act, 1997*, SNL1997 c. S-12.2, sec. 2, Tab 8
Department of Education Notice, 2003, NLR 75/03, Tab 10

29. The *Regulations* do not specify the form that the minister’s direction must take. The appellants submit that the statutorily mandated election of trustees to a board charged with administering the education of children is a matter of significant importance engaging democratic principles beyond those that might apply to most cases of the exercise of ministerial discretion. Accordingly the appellants submit that the minister’s direction should be made clearly, unambiguously and publicly. In the absence of such a direction given to the respondent, the respondent is obliged by the *Regulations* to hold the election as scheduled.
30. The respondent board provided no evidence of any communication from the Minister of Education to the respondent directing it not to hold an election of trustees on November 5, 2013, given either before or after that date. The respondent filed four affidavits.
31. The affidavit of Anthony Stack, Associate Director of Education for the respondent, did not address the issue.

Reference: Affidavit of Anthony Stack, Appeal Book Tab 11

32. The affidavit of Genevieve Dooling, Deputy Clerk of the Executive Council placed in evidence OC2013-252 and OC2013-261 which appoint trustees to the defendant Board, but only until “the next general school board elections.” Those orders-in-council did not change the requirement for the Board to hold the fixed date election of trustees on November 5, 2013.

Reference: Affidavit of Genevieve Dooling, Appeal Book Tab 13

33. The affidavit of Sandra Barnes, Clerk of the House of Assembly, had placed in evidence five excerpts from the Proceedings of the House of Assembly. On April 24, 2013 Mr. Clyde Jackman, then Minister of Education, informed the House that the trustees appointed to the respondent Board were a temporary transition committee and that at the end of the process there would be an elected board. This excerpt precedes the election date set by the *Regulations*, but does not either give any direction to the Board or state that the elections would not be held as scheduled.

Reference: Affidavit of Sandra Barnes, Appeal Book Tab 14

34. The remaining four excerpts all post-date the scheduled election date.
- a. On June 2, 2014 Minister of Justice Mr. Darin King informed the House that the trustees had been appointed on an interim basis and that a date for school board elections would be set in the future.
 - b. On May 6, 2015 Minister of Fisheries and Aquaculture Mr. Vaughn Granter informed the House that the defendant Board had submitted a draft constitution and that the Minister of Education would “review that and have it under his consideration for a time for the elections in the future.”
 - c. On March 10, 2016 Minister of Education Mr. Dale Kirby informed the House that the Government was committed to holding school board elections within 12 months of having been elected, but “we’re not going to rush it.”
 - d. On March 16, 2016 Minister Kirby repeated his previous comments to the House and said the “previous administration made no preparation for a school board election; now they want it done instantly. That simply cannot be done.”
35. None of these statements were a direction to the Board, or any evidence of a direction to the Board, to not hold the elections that had been required on November 5, 2013. None of the statements were directed to the Board. They were responses to questions asked in the House of Assembly. The first two statements were made by ministers with no

responsibility for the *Schools Act, 1997*. Only the latter two statements were made by the Minister of Education, Mr. Kirby. In his statements he acknowledged that trustee elections had not been held, but did not say that the Minister of Education had directed that they not be held. Instead, the Minister acknowledged the lack of authority and accountability of the trustees. His statement on March 10, 2016 was in response to a question from NDP MHA Gerri Rogers:

Ms. Rogers: Mr Speaker, I ask the minister: How could he allow this appointed board, with no moral authority and accountability to the people of the community, to make these crucial decisions? When will he do the right thing and call an election of school board trustees?"

36. The Minister replied, agreeing with the position put forward by Ms. Rogers:

Mr. Kirby: Thank you, Mr. Speaker.

Again, it gives me great pleasure to know that now the NDP, after three years, has decided this is an important issue. I'm not sure if it's so that they can make a bit of political hay about it at the expense of parents and students in the Member's constituency, *but I'm glad they've come around to our way of thinking on this.* [Emphasis added.]

37. An expression of intention by the Minister of Education to hold elections at some time in the future is a remedial measure, to put right something that has been done wrong, and is not in any way evidence that a direction had previously been given to not hold the elections when due.

38. The affidavit of Carla Foote placed in evidence a press release from the Minister of Education from September 24, 2013 announcing the appointment of the trustees. It contains the statement that, "the trustees will serve until an election in 2014 ..." It does not state that a direction had been given to the respondent to not hold the election mandated for November 5, 2013. The press release itself is not a direction to the respondent. Even if it were, there was no election held in 2014 and another direction would have been required in order to avoid having the terms of the appointed trustees lapse before they made the decisions to close the School.

Reference: Affidavit of Carla Foote Appeal Book Tab 15

39. Had a direction to postpone the election been given to the respondent it should have been an easy matter to produce it for the Court. The only conclusion to be drawn from the failure of the Board to adduce any evidence of a direction from the Minister of Education to the Board is that the Minister gave no such direction. The election was simply not held, in contravention of the *Regulations*.
40. Regulation 3(1) is, as described above, part of a comprehensive scheme providing for democratic governance of the school system. A failure to comply with such a fundamental aspect of that scheme as holding elections for trustees on the date fixed by regulation must have consequences. The decision to close a school has special significance, as is recognized by section 76(2) which grants parents a right to be heard by the trustees. When the Board voted on April 16, 2016 to close Whitbourne Elementary, it was not lawfully constituted as required by the *Act* and *Regulations*. The result is that the school closure decision made on April 16, 2016 was void.

Authorities: *Canadian Encyclopaedic Digest Administrative Law* III.4.(c).(iii).A, tab 1

Park v. Ponoka (County No. 3) Subdivision and Development Appeal Board, 2001 ABCA 142 (CanLII), paragraphs 13 to 16, tab 2

Parlee v. College of Psychologists of New Brunswick, 2004 NBCA 42 (CanLII), paragraph 25, tab 3

Practice and Procedure Before Administrative Tribunals, Macauley and Sprague, updated to 2013, pages 5-1 to 5-5, 5-18 to 5-18.3, tab 4

Sterling Crane v. International Association of Bridge, Structural and Ornamental Iron Workers. Local 771, 1992 CanLII 8165 (SK QB), tab 5

41. The learned Applications Judge accepted that if the respondent board was not duly constituted, then it lacked authority to vote on the school closure and the decision by the respondent board would have to be set aside.

Reference: Decision, para. 9, appeal Book Tab 2

42. The learned Applications Judge further held that the *Schools Act, 1997* allowed for the appointment of trustees to hold office until the election of replacement trustees and that a direction to not hold an election did not have to be given before the scheduled date. She agreed with the respondent's submission that the statement made in the Orders-in-Council appointing the trustees that they would hold office "until the next general school elections" amounted to a direction to the respondent to not hold the election mandated by the *Regulations* for November 5, 2013.

Reference: Decision, paras. 15 to 21, appeal Book Tab 2

43. The learned Applications Judge found that there had been an implicit direction to the respondent from the Minister to not hold the election.

Reference: Decision, para. 22, appeal Book Tab 2

44. With respect, the Judge was in error. The *Schools Act, 1997* in section 59(1) does allow for the appointment of trustees when a new board is created, but it does not state that those trustees can continue to hold office after the date mandated by the *Regulations* for an election. Nor is there anything about the scheme of the *Act* that would make that a reasonable inference.

45. There is nothing in the language or the scheme of the *Act* or *Regulations* which suggests that the Minister can retroactively direct that an election not be held if the date for it has passed. Section 3(1) of the *Regulations* says "unless the Minister otherwise directs." This is prospective language, not retrospective. Retroactive legislation can change the legal consequences of a past event, but it cannot change the event. Even then it must be clearly expressed. An election is an event. Whether or not it has been held is a fact. The Minister's power is more tightly circumscribed than the Legislature's and is limited to exactly and only what he has been empowered to do by the section 3(1).

46. Finally, it was an error to find that section 3(1) authorized the Minister to implicitly direct that the election not be held. The respondent, as well as the appellants, were entitled to clear direction from the Minister, not equivocal communications that merely imply a

course of action for something as fundamental to democracy as whether an election is to be held or not.

Part V – Order Sought

47. The appellants request a declaration that school closure decision made on April 16, 2016 be declared void due to the lack of statutory authority of the appointed trustees to make that decision.

Respectfully submitted this 28th day of February 2017.

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Index of Authorities

Appendix A – Case Authorities

<i>Canadian Encyclopaedic Digest Administrative Law III.4.(c).(iii).A</i>	Tab 1
<i>Park v. Ponoka (County No. 3) Subdivision and Development Appeal Board, 2001 ABCA 142 (CanLII)</i>	Tab 2
<i>Parlee v. College of Psychologists of New Brunswick, 2004 NBCA 42 (CanLII)</i>	Tab 3
<i>Practice and Procedure Before Administrative Tribunals, Macauley and Sprague, updated to 2013, pages 5-1 to 5-5, 5-18 to 5-18.3</i>	Tab 4
<i>Sterling Crane v. International Association of Bridge, Structural and Ornamental Iron Workers. Local 771, 1992 CanLII 8165 (SK QB)</i>	Tab 5
<i>Tracey et al. v. Board of Education of Avalon East, 167 Nfld & PEIR 262, 1998 CanLII 18759 (NL SCTD),</i>	Tab 6

Appendix B – Statutory and Regulatory Authorities

<i>Interpretation Act, RSNL1990 c. I-19</i>	Tab 7
<i>Schools Act, 1997, SNL1997 c. S-12.2</i>	Tab 8
<i>School Board Election Regulations, 1998, NLR 146/97</i>	Tab 9
<i>Department of Education Notice, 2003, NLR 75/03,</i>	Tab 10
OC2013-203	Tab 11
OC2013-231	Tab 12
OC2013-252	Tab 13
OC2013-261	Tab 14