



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
COURT OF APPEAL**

**Citation:** *Young et al. v. Newfoundland and Labrador English  
School District*, 2017 NLCA 39

**Date:** June 23, 2017

**Docket:** 201601H0084

**BETWEEN:**

ANTHONY YOUNG, RUDY MERCER,  
NATASHA DROVER and NANCY RODRIGUES      APPELLANTS

**AND:**

NEWFOUNDLAND AND LABRADOR ENGLISH  
SCHOOL DISTRICT      RESPONDENT

**Coram:** Welsh, White and Hoegg JJ.A.

**Court Appealed From:** Supreme Court of Newfoundland and Labrador  
Trial Division (G) 201601G3738  
(2016 NLTD(G) 147)

**Appeal Heard:** May 11, 2017

**Judgment Rendered:** June 23, 2017

Reasons for Judgment by Welsh J.A.

Concurred in by White and Hoegg JJ.A.

**Counsel for the Appellants:** Daniel W. Simmons Q.C.

**Counsel for the Respondent:** Ian C. Wallace

**Welsh J.A.:**

[1] At issue in this appeal is whether the Board of the Newfoundland and Labrador English School District, comprised of appointed rather than elected trustees, had authority to order the closure of Whitbourne Elementary School.

**BACKGROUND**

[2] As a result of reorganization in 2013, four school boards with defined areas of jurisdiction in the Province were replaced with one English School District Board for the entire Province. Nine trustees were appointed to the Board on September 1, 2013 by Order-in-Council. An additional seven trustees were appointed on October 4, 2013.

[3] On April 16, 2016, the Board decided to close Whitbourne Elementary School effective September 1, 2016. Following judicial review by a judge of the Trial Division, that decision was set aside on July 29, 2016. The applications judge considered two issues: first, whether the Board, comprised of appointed trustees, had authority to decide that the school would close; and, second, whether the Board satisfied the duty to give the parents an adequate opportunity to make representations about the proposed closure. On the first issue, the judge determined (2016 NLTD(G) 147):

[23] Based on the foregoing, I therefore find that the appointed Board was duly constituted, and that it had the authority to vote on the school closure. ...

[4] Nonetheless, relying on the second issue, the judge concluded that the Board's decision to close the school could not be given effect:

[109] ... I have found that the parents were therefore denied the opportunity to make meaningful representations on a significant issue being considered by the Board. As a result, the Court hereby grants the order in the nature of *certiorari* quashing the Board's decision to close Whitbourne Elementary School made on April 16, 2016.

[5] The four appellants (the "Parents"), parents of children attending the school, appeal the decision on the first of these issues, that is, the authority of the Board to close the school. They submit that the judge erred on the basis that the appointed trustees could not make that decision because the legislation required an election of trustees, which had not been held. They

submit that this impediment to the Board's authority would also apply to a subsequent decision by the appointed trustees, on September 20, 2016, to order closure of the school effective September 1, 2017. It is unusual to appeal a decision on one issue where a party has succeeded for other reasons. However, in this case, it was important for the Parents to obtain a decision on the question of the Board's authority to close the school since the appointed Board, after hearing representations from the Parents, could, and did, proceed again to order closure of the school.

[6] An election to replace the appointed trustees was held on November 22, 2016. The Parents concede that the elected Board would have authority to consider the closure of the school. However, if the Parents' appeal is successful and the elected Board wishes to close the school, it will be necessary for that Board to provide the Parents with an opportunity to make representations.

## **ANALYSIS**

### The Legislation

[7] Section 57(1) of the *Schools Act, 1997*, SNL 1997, c. S-12.2, provides for the dissolution of school boards:

The Lieutenant-Governor in Council may by order dissolve a board on a specified date and that board shall be considered to be dissolved on that date.

Pursuant to section 57(5), a successor board is the successor in law with the attendant rights and obligations.

[8] In this case, an order was made under section 57(1) dissolving the four existing boards effective September 1, 2013.

[9] Section 59(1) of the *Act* provides for the appointment of trustees in particular circumstances:

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.

(Emphasis added.)

Section 59(2) provides that section 53 of the *Act* applies with the necessary changes to the appointment or election of a board.

[10] Section 53 deals with boards and trustees generally:

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

(2) Each board is a corporation.

(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.

(6) The trustees shall elect from among their members a chairperson and other officers, and the chairperson shall hold office until the next annual general meeting of the board.

(7) A person shall not be elected or serve as a trustee where that person ...

(8) The chairperson, or in his or her absence, the vice chairperson or a chairperson elected for that meeting ... shall have the same right to vote as other trustees.

(9) Where a vote is tied, the question shall be considered as resolved in the negative.

(Emphasis added.)

[11] Section 60 of the *Act* requires a board to adopt a constitution regarding its duties and responsibilities. A newly constituted board has six months to accomplish this. The constitution must be approved by the minister before it becomes effective. Under section 60(2)(c), the constitution “shall include provisions respecting the description of zones”.

[12] Section 54 of the *Act* addresses the delineation of zones:

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.

[13] In a press release issued by the Provincial government, dated September 24, 2013, since zones had not yet been established by the Board, the public was advised that trustees being appointed to the new Board “were selected based on regional levels of student enrolment, and on ensuring broad geographic representation”.

[14] Sections 75 and 76 of the *Act*, respectively, set out the duties and powers of a board. Section 76(2) deals separately with the authority to close a school:

Notwithstanding section 75 or subsection (1) of this section, a board may close a school only after the parents of students affected have been given an opportunity to make representations to the board.

[15] Section 118 of the *Act* authorizes the Lieutenant-Governor in Council to make regulations, among other things, “(c) respecting the election and appointment of trustees”. The *School Board Election Regulations, 1998*, NLR 146/97, address the details of how an election is to be held. Section 39 of the *Regulations* provides for the minister to prescribe dates, including for an election:

Notwithstanding subsections 7(1) and (2), 8(1) and (4), section 10, subsections 12(2) and (3), section 13 and subsection 34(1), the minister may, with the approval of the Lieutenant-Governor in Council, set dates and prescribe time periods for the purposes of these regulations.

[16] Section 7 of the *Regulations*, duties of the Board, is the only one of the provisions mentioned in section 39 that may be relevant for purposes of this case. Subsection (1) deals with appointing a returning officer and determining the number of polling divisions; subsection (2), with

designating polling stations and appointing a deputy returning officer and poll clerk; and subsections (3) and (4), with coordinating with municipal elections. None of these duties extends to setting a date for an election.

[17] Rather, section 3(1) of the *Regulations*, until repealed on August 16, 2016 by NLR 43/16, provided for set election dates:

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.

[18] Finally, the Orders-in-Council appointing the two sets of trustees stated that, pursuant to section 59 of the *Act*, the named persons were appointed as trustees effective September 1 or October 4, 2013 as the case may be, “until the next general school board elections”.

#### Interpretation and Application of the Legislation

[19] It is clear from reading the *Schools Act* and the *School Board Election Regulations* as a whole, and section 53(1) of the *Act* in particular, that the legislative intention is that the Board is to be comprised of trustees elected by zone. Election is consistent with democratic principles underlying the expectation that those affected by governmental decisions will have a voice in choosing the decision-makers. However, in the *Act*, the legislature has allowed for the appointment of trustees in specified situations. Indeed, in this case, the appointment of trustees upon the creation of a new district is not challenged. Rather, it is the length of time before an election was held to which the Parents object.

[20] Relying on section 3(1) of the *Regulations*, the Parents submit that an election, to be held on the first Tuesday in November 2013, was mandated “unless the minister otherwise directs”. The Board submits that it was not realistically possible to hold the election on that day and that, in any event, the minister had given the necessary direction.

[21] The first difficulty in concluding that an election could have been held on the first Tuesday in November 2013 is determining when the Board was constituted. The first nine trustees were appointed on September 1<sup>st</sup>, but an additional seven were appointed on October 4<sup>th</sup>. The timelines for a school board election set out in the *Regulations* could technically have been met if the critical date is September 1<sup>st</sup>, but could not have been met if October 4<sup>th</sup> is the relevant date. Because the zones would be an important component in

ensuring local or regional representation on the Board, it is difficult to conclude that it was the intention that the zones would be established before the appointment process had been completed on October 4<sup>th</sup>. This factor supports the inference that it was not possible to hold an election on the first Tuesday in November 2013.

[22] In any event, the Board submits, the September 24, 2013 press release constituted notice from the minister which would amount to compliance with section 3(1) of the *Regulations*, that is, a direction from the minister overriding the requirement for an election on the specified date. The press release stated:

The Newfoundland and Labrador English School Board will soon be at full strength, with 15 trustees in place. The Honourable Clyde Jackman, Minister of Education, announced today that seven individuals will be added to the board, joining the eight members of the School Board Transition Committee who became trustees of the school board on September 1. The new trustee appointments will be effective as of the board meeting on October 4.

...

Minister Jackman noted the additional trustees were selected based on regional levels of student enrolment, and on ensuring broad geographic representation. The trustees will serve until an election in 2014, an exact date for which will be determined in consultation with the new board chair and the Newfoundland and Labrador School Boards Association.

(Emphasis added.)

[23] The first question is whether the statement in the press release is sufficient to constitute a direction by the minister as contemplated by section 3(1) of the *Regulations*. There is nothing in the *Act* or *Regulations* specifying the method to be used. A press release is not the method the citizens of the Province would expect to be used by a minister to give a direction that overrides the operation of legislation, including subordinate legislation. Generally, a press release would be characterized simply as a notice to the public. For the reasons that follow, it is unnecessary to determine whether the press release was sufficient to constitute a direction by the minister to the Board. However, I would caution that this is not a desirable approach and may not prove sufficient should the issue come before the courts in the future.

[24] Even assuming the press release was sufficient to constitute a direction by the minister under section 3(1) of the *Regulations*, the direction was that the appointments would have effect “until an election in 2014”. There is no evidence that the minister followed with a subsequent direction when the election did not occur in 2014. Indeed, the election was not held until November 22, 2016. This failure resulted in a conundrum for the Board.

[25] The Board had no authority to call or set a date for an election. That was in the hands of the government (section 53(3) of the *Act*). On the other hand, the business of the Board in operating the school system had to continue. However, the date specified in the *Regulations* for holding the first election had passed and the *Regulations* did not specify a procedure that would apply in a situation such as this. It was, in fact, a failure of government and the minister to comply with the legislation.

[26] There were clear options available under the *Act* and *Regulations*. Section 3(1) of the *Regulations* could have been repealed when an election was not set for a date in 2014, or the minister could have issued a subsequent direction in proper form.

[27] The failure to call an election must be considered in light of several factors, including the following. First, the clear legislative intention is that the school board is to be an elected board (section 53). Second, while section 59(1) allows for the appointment of a board when a new district is created, it may be inferred that the intention is that an election should be held within a reasonable time. The size of the district, encompassing the entire Island and Labrador, and the legislative directive that the board must determine zones to ensure representation for various regions, is particularly telling. Third, the Board had no power to remedy the situation by calling an election since that authority was reserved to government. Fourth, the question of whether a school should be closed is of critical importance to the parents of children attending that school. It is an issue of a different kind when compared with the responsibility of the Board generally to exercise the powers and duties set out in sections 75 and 76 of the *Act*.

[28] Particularly with respect to the last of these factors, the Parents submit that section 76(2) of the *Act* confirms that the power to close a school is of a special type. On the one hand, it may be inferred that the purpose of this subsection is to reiterate for the board the requirement, endorsed by the courts, that parents must “have been given the opportunity to make

representations [regarding the closure of a school] to the board” (section 76(2) of the *Act*). Alternatively, as submitted by the Parents, the subsection may be interpreted to confirm the special nature of a determination to close a school.

[29] Regardless of which interpretation is adopted, I am satisfied that section 76(2) must be construed so as to ensure that parents will have a fair opportunity to challenge the Board’s decision to close the school attended by their children. This must include not only the opportunity to make representations to a board, but also, to make those representations to a board that is constituted so as to ensure that their representations are appropriately considered.

[30] The legislation provides for this. Subject to section 59(1) of the *Act* and compliance with the relevant provisions of the *Election Regulations*, section 53 of the *Act* specifies that the Board will be elected. Section 54 requires the Board to divide the district into zones “[f]or the purpose of ensuring that all parts of a district are represented by trustees”. The delineation of zones is intended to achieve the election of trustees who will represent that zone on the Board, and is supported by section 4 of the *Regulations* which provides, in relevant parts:

(2) An elector is entitled to vote in only one zone established by a board.

(3) For the purpose of subsection (2), the zone in which an elector is entitled to vote shall be the zone in which the person is ordinarily resident.

[31] The election of trustees on this basis has the effect of confirming to parents that, when section 76(2) of the *Act* is engaged due to the potential closure of the school attended by their children, their voices will be heard by a trustee who is familiar with their zone. Where the *Act* and *Regulations* authorize the government and a board to proceed in the absence of an election, compliance with those provisions is essential in order to override the fundamental premise that parents will be represented by a trustee elected for their zone. That did not occur in this case due to the failure of government to comply with section 3(1) of the *Regulations*.

[32] In the result, I accept the Parents’ submission that the Board, comprised of appointed trustees, did not have authority to order the closure of the Whitbourne Elementary School. Potential closure of the school is a

matter of special concern to the Parents for which they have the right to make representations to a properly constituted board.

### **SUMMARY AND DISPOSITION**

[33] For the reasons set out above, the applications judge erred in determining that the appointed Board had authority on April 16, 2016 to order the closure of the Whitbourne Elementary School. The above analysis would also apply to the decision of September 20, 2016, though that decision was not before this Court on appeal. If the Board that was elected on November 22, 2016 wishes to close the school, it will be necessary for that Board to provide the parents of children attending the school with an opportunity to make representations.

[34] Consistent with the decision of the applications judge in the Court appealed from, I would order that the Parents will have their costs under column 3 of the scale of costs.

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B. G. Welsh J.A.

I Concur: \_\_\_\_\_

C. W. White J.A.

I Concur: \_\_\_\_\_

L. R. Hoegg J.A.