NOVA SCOTIA COURT OF APPEAL
Citation: *O'Hara v. Nova Scotia (Education)*, 2008 NSCA 62

Date: 20080703
Docket: CA 288846
Registry: Halifax

Between:

Gary O'Hara, Deborah Brunt, Grace Walker,
Bridget Ann Boutilier, Debra Barlow and Wade Marshall

Appellants

v.

The Honourable The Minister of Education

Respondent

Judges:	MacDonald, C.J.N.S.; Saunders and Fichaud, JJ.A.
Appeal Heard:	June 3, 2008, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of MacDonald, C.J.N.S.; Saunders and Fichaud, JJ.A. concurring.
Counsel:	Brian P. Casey for the appellants Edward A. Gores, Q.C. for the respondent

Reasons for judgment:

[1] Throughout 2005 and 2006, there was open hostility among certain members of the Halifax Regional School Board. This culminated in the Minister of Education's decision to strip authority from all thirteen members. They were replaced with an appointed one-person Board.

[2] Seven deposed members asked Supreme Court of Nova Scotia Justice M. Heather Robertson to quash the Minister's decision. In essence, they feel that they are the victims of an unfair process that, in any event, led to an unreasonable decision. Justice Robertson disagreed and dismissed their application. Six of those seven Board members now appeal to this court.

[3] For the reasons that follow, I would dismiss this appeal because, simply put, the Minister’s decision was, at its core, not about sanctioning Board members. Instead, it was about protecting a quality education for Halifax's school children. Placed in this context, it cannot be said that the Minister proceeded unfairly or that her decision was otherwise unreasonable.

BACKGROUND

[4] The six appellants along with the then seven other Board members were elected to office in October of 2004. The problems leading to the Minister's action began in 2005. Initially, two separate issues involving Board members Bernadette Reid and Peggy Draper subjected the Board to significant public criticism.

The Bernadette Reid Incident

[5] In 2005, Board member Reid owned a company that sold goods portraying the African culture to two Board operated schools. Her husband was an administrator at one of these schools. Certain Board members complained on the public record that her actions were improper because they represented a conflict of interest. Ms. Reid responded by asserting that her rival Board members were motivated by racism. The Board commissioned a legal opinion which was unfavourable to Ms. Reid. This prompted the Board, at its October 26, 2005 meeting, to call for a formal inquiry. The incident was a highly publicized affair. In fact, the Board issued its own press release:

October 26, 2005

Board requests Attorney General to conduct public inquiry

At the October 26, 2005 meeting of the Halifax Regional School Board, the board passed the following motion:

WHEREAS the Halifax Regional School Board by motion of June 29, 2005, undertook a complete investigation into the activities of Board member, Bernadette Hamilton-Reid.

AND WHEREAS the investigation report prepared by Grant Machum of Stewart McKelvey Stirling Scales has found that Board member Reid breached her fiduciary duties of loyalty and good faith to the Halifax Regional School Board and, further, engaged in breach of trust and misconduct.

THEREFORE, I move, in accordance with Section 12(1)(a) of the *Municipal Conflict of Interest Act* that the Board receive the report and request that the Attorney General appoint an inquiry into the breach of fiduciary duty, breach of trust and misconduct of Bernadette Reid for the purpose of determining whether Ms. Reid should be removed from her position as a member of the Halifax Regional School Board.

Under the Municipal Conflict of Interest Act, a school board can request the Attorney General to conduct an inquiry into any "alleged malfeasance, breach of trust or other misconduct on the part of a member."

The board considered the Machum report *incamera*. On the advice of external legal counsel the report was not publicly released.

The Peggy Draper Issue

[6] In early 2006, the Board was again distracted; this time by Board member Peggy Draper. She had missed three consecutive meetings and there was a controversial push to have her removed. Her seat was ultimately declared vacant at the February 22, 2006 Board meeting, after a motion excusing her absences was defeated. The Board then lost its quorum and could not complete its normal agenda that evening. The Board secretary wrote to the relevant ministers with the news:

Dear Ministers:

> At the February 23, 2006 board meeting of the Halifax Regional School Board, a Motion was brought pursuant to Section 52 of the *Education Act* and three consecutive absences from meetings by School Board member Peggy Draper.
>
> The Motion stated:
>
> > "Pursuant to section 52 of the *Education Act*, the reasons for Board member Peggy Draper's absences from three consecutive regular meetings of the school board are considered reasonable and satisfactory to the Halifax Regional School Board."
>
> The Motion was defeated by a vote of 4 - 6.
>
> According to Section 52 of the *Education Act*, where there is no reasonable excuse satisfactory to the school board, "the school board shall declare the seat of that member vacant ... and the school board shall forthwith call an election to fill the member's seat pursuant to the *Municipal Elections Act*."
>
> The Halifax Regional School Board therefore declares former school board member Peggy Draper's seat to be vacant and requests a special election be called to fill the seat representing District 2 of the Halifax Regional School Board in accordance with the process set out in Section 13 of the *Municipal Elections Act*.

[7] The then Minister of Education, the Honourable Jamie Muir, was at this time also receiving considerable negative public feedback. In response to the entire situation, on February 28, 2006, he wrote a comprehensive directive to all Board members. In setting out his concerns, the Minister did not mince his words:

> As the Minister of Education, I am writing to express my concern about the ongoing lack of decorum during meetings of the Halifax Regional School Board. The public has entrusted you to manage the educational welfare of 55,000 students and you are charged with the responsibility to manage the school board's $350 million budget. Because of your growing level of inability to conduct the business of the Board in an orderly fashion, it appears to me and to many others that you are not fulfilling that trust.
>
> In ordinary circumstances, I would not have to write this letter. I find myself to be in a very difficult position. However, I share the frustration of many parents who have written or approached me expressing their concern regarding the Board's behavior and the impact it is having on staff and students.

> I believe it is important for Board members to realize the seriousness of the situation and the risk to which they are putting the proper functioning of the Board. In particular, I understand that the Board's Committee of the Whole lost its quorum at its meeting on January 11, 2006 and at a regular Board meeting on February 22, 2006. As a result, those meetings were adjourned shortly after they began. In view of the fact that the Board must deal with important educational and financial matters on an ongoing basis, staff of my Department have reviewed the minutes of the meetings held since September, 2005, as well as, the Board By-laws. They have brought a number of concerns to my attention.
>
> Given the concerns of parents and my own disappointment in the Board's recent behaviour, I have no other choice but to issue the following Ministerial directives that must be adopted. I expect them to be implemented no later than March 31, 2006. If these directives are not met, please be advised that I will be in a position to exercise my authority in accordance with Section 68(2) of the Education Act.

[8] The Minister also took the opportunity to address an earlier controversy over seating arrangements at meetings:

> Seating Plan
>
> Staff noted from the January 11 Board minutes, that the meeting was adjourned due to the loss of a quorum as a result of a disagreement over the seating plan. Notwithstanding your earlier resolution, I view the seating plan as a matter relating to how business is conducted and should, therefore, be a provision of the Board's By-laws in according with King-Kerr's Rules of Order.
>
> Therefore, I direct you to comply with the following protocol and amend the Board By-law accordingly by March 31, 2006.
>
> The Board shall devise a seating plan based upon random selection and the Board members shall remain seated in accordance with the seating plan for all Committee of the Whole, regular and special meetings of the Board for the remainder of the term of office.

[9] The Minister also directed training, mediation and other steps to preserve order at future meetings. Finally and central to this appeal was his directive to have all members reaffirm their Code of Ethics, which the Board itself had drafted:

> Reviewing the nine requirements under the Board's Code of Ethics, it appears that a number have been breached by more than one Board member.
>
> It is important that the public have every assurance that the Board is carrying out its responsibilities and exercising its authority under the Education Act.
>
> I direct that the Board reaffirm by resolution the Code of Ethics contained in Section 1.0 of the By-laws. The Board shall forward the resolution to me by March 31, 2006.
>
> I fully expect you, both as a group and individually, to observe not only the Code of Ethics but those provisions of the newly amended By-laws which speak generally to the decorum of the debates.

[10] In closing his letter, the Minister made it clear that these directives would be considered part of their performance standards and that he **would** remove their authority should they not be complied with:

> Further, regarding the future conduct of the Board, failure to meet the previously referred to performance standards will cause me to exercise my authority under Section 68(2) of the Act which states, "I may appoint a person to carry out such responsibilities and exercise such authority of the school board as the Minister determines and in such manner as the Minister determines and, to the extent the Minister determines, the school boards ceases to have such responsibilities or authority."

[11] Board members appeared to react promptly. On March 9, 2006, the Chair wrote the Minister confirming steps towards full compliance. This included each Board member's reaffirmation of the Code of Ethics:

> Dear Mr. Muir,
>
> Re: Directives from the Department of Education
>
> I am pleased to inform you that on March 8, 2006 at an Emergency Board meeting, the Halifax Regional School Board amended the bylaws with respect to quorum and a seating plan. *The Board also reaffirmed its Code of Ethics for Board members. Please find attached the amended bylaws and the motion of reaffirmation which was passed by all members present for your review.*

> The location of regular meetings for the remainder of the term will be in the Board Chambers at the Halifax Regional School Board at 90 Alderney Drive.
>
> Also, training opportunities in procedures and best practices in public sector governance continue to be explored.
>
> The Halifax Regional School Board is committed to refocusing on working in the best interest of students.
>
> [Emphasis added.]

[12] Things appeared to operate more smoothly from that point. In fact, by the end of July 2006, new Minister, the Honourable Karen Casey commended the Board members for their progress:

> This will acknowledge receipt of the By-laws of the Halifax Regional School Board dated March 8, 2006, pursuant to Section 67 of the *Education Act.*
>
> I commend the Board for their prompt attention in incorporating the ministerial directives. I am also pleased to hear from Dr. Alan Lowe, Regional Education Officer, that the meetings of the Board are proceeding in a very professional and productive manner. . . .

The Fall of 2006 - More Problems

[13] The progress unfortunately was to be short lived. During an October 26th public meeting regarding potential school closures on peninsular Halifax, negative comments about the Board were attributed to fellow Board member Lynn MacGregor. Although the appellants challenge their accuracy, Ms. MacGregor purportedly said words to the effect that the Board was just a rubber stamp for senior staff.

[14] Then, at the November 29th meeting, the Board's African Nova Scotian representative, Douglas Sparks, introduced two motions to investigate fellow Board members Wade Marshall and Grace Walker for "possible impropriety". This reportedly led to an intense, sometimes personal, debate that revealed "old divisions and resentments".

[15] This strife culminated in a nasty verbal altercation in the Board lounge as members gathered in advance of the December 6, 2006 meeting. Senior staff advisor Judy White described the unfortunate event, which was also observed by at least one media representative:

> . . .
>
> - I left the Chambers to get the Board Members to come into the Chambers.
> - As I entered the hallway, I could hear raised voices and I went into the lounge.
> - Board Member Sparks was sitting at the table eating and it appeared that he and Board Member Brunt were arguing.
> - Board Member Barlow also appeared to be involved in the "debate".
> - Board Members Berkers, Boutilier, Watts were also in the room.
> - I thought I should leave and I backed out and started to close the door.
> - I realized that neither the Chair nor the Board Secretary was in the room and the members were starting to scream at each other.
> - I returned to the Chambers to get the Chair and Board Secretary to come to the lounge.
> - On my way back into the room, Board Member Boutilier was exiting the area and said “I have had all I can take.”
> - As I reentered the room, I heard the word "racist" and then both Board Member Brunt and Sparks continued to argue.
> - Board Member Sparks indicated that someone had told him that Board Members were talking about him and Board Member Reid at the Holiday Inn the previous week.
> - He stated that the Board Members were racist.
> - Board Member Brunt denied this vehemently.

- Voices continued to raise to the point that Board Members Brunt and Sparks were screaming at each other.

- The Chair and Board Secretary entered the room and I went to close the door.

- I saw Board Member Walker coming down the hall and indicated that she should probably not come in. She returned to the chambers.

- Two members of the Senior Staff (Bell and Cainen) were coming down the hall and I told them not to come in.

- I returned to the room where the Chair was attempting to get Board Members to calm down.

- At that point I also approached the members to see if I could help.

- The door opened and Mr. Cainen called me over.

- He indicated that Rick Conrad [media representative] was standing outside the window writing things down.

. . .

[16] Not surprisingly, the media was quick to respond by highlighting the Board's ongoing divisiveness. For example, here is an editorial from the December 8th edition of *The Chronicle Herald*:

> Slow to learn
>
> The reality show known as the Halifax regional school board has developed a new dysfunctional plot twist, just in time for the holiday season.
>
> The same group that earlier this year bitterly bickered over seating at meetings, to the point some members stormed out, forcing premature adjournments - and provoking then education minister Jamie Muir into giving the board a public tongue-lashing - are at it again.
>
> This time, accusations of racism were apparently levelled by some members against others on the board, sparking more heated shouting matches that could be heard by reporters despite closed doors.

> It seems the mediation sessions ordered by Mr. Muir for board members after previous embarrassing public blowups, conducted by the Nova Scotia Human Rights Commission earlier in 2006, have failed to end the divisiveness that has plagued this group since the 2004 elections.
>
> Personality conflicts - which seem to be fuelling at least part of the ongoing conflicts and tension - are not unique to the Halifax school board. All organizations, sooner or later, have to deal with less than optimal interpersonal relationships. Putting professional duties ahead of one's personal likes and dislikes, however, is the mark of true professionalism. From what's been reported and observed, it seems at least some members have forgotten that wise adage.
>
> If the board - which seems to split into two opposing camps on most votes and debates - can't find a way to rise above these personal conflicts, they will be failing the 55,000 students and 5,000 staff they've been elected to oversee.
>
> Once again, we urge all school board members to step back and consider the damage they have been doing to their image, and their effectiveness, as an important public body. The board's new chairman has scheduled a retreat for all members in January. It's past time that board members cleared the air with each other.

[17] These latest incidents prompted Minister Casey to act decisively. On December 19th, she stripped all Board members of authority and assigned Mr. Howard Windsor as a one-person replacement Board. In her press briefing, she gave her reasons, concentrating on what she viewed as the ongoing "feuding":

> As Minister of Education it is my responsibility to ensure that the public school system works effectively and efficiently in this province.
>
> My duty is to the children in our schools.
>
> I also have a responsibility to the teachers who deliver that education and to the other school and board employees who together support the school system.
>
> To meet my those duties and obligations, I must be confident that a school board is operating smoothly, and that it is focused on its duties.
>
> As you all know, the elected members of the Halifax Regional School Board have struggled to maintain a professional working relationship.

> Last February the Deputy Minister presented them with a number of Ministerial directives and performance standards designed to help them stay focused on their priorities.
>
> They were directed to amend their by-laws, and to re-affirm their Code of Ethics, which required them to respect one another and to respect each other's opinions and differences.
>
> Members of the board have failed to comply with the following sections of their Code of Ethics:
>
> - A member has contravened Sec. 1.01 by failing to respect the decision of the majority, and not seeking changes to a board decision through ethical and constructive channels, and;
>
> - Several members have also violated Sec. 1.03, requiring that they at all times show respect for others and that they work with fellow board and staff members in a spirit of cooperation regardless of personal differences of opinion, and that they treat all with mutual, courteous respect.
>
> I believe it is obvious, that this board continues to struggle. They have failed to put their feuding behind them, and I believe this inability to rise above their differences has compromised their effectiveness.
>
> It is my opinion, the board has failed to meet the performance standards set out under Section 64 of the Education Act.
>
> I am exercising my authority under Section 68 of the Act. Effective immediately, I am assigning responsibilities and authority of the elected membership of the Halifax Regional School Board to a one-person board, who will carry out the responsibilities and exercise the authority under the Act.

[18] The next day, Minister Casey made it official by writing each member, highlighting breaches of their Code of Ethics:

> This is to advise that I have exercised my authority under subsection 68(2) of the *Education Act*. . . .
>
> On February 28, 2006, the previous Minister of Education sent directives to the Board members including expected performance standards relating to the Code of Ethics. In a letter to the Board dated April 5, 2006, my predecessor reaffirmed

that the Code of Ethics (Section 1.0 of the By-laws) forms part of the performance standards for the Board pursuant to Subsection 64(6) of the *Education Act*.

In my opinion, members of the Halifax Regional School Board have failed to meet the performance standards set out in Section 64 of the *Education Act* in that they have failed to comply with the following sections of the Code of Ethics:

> 1.01 Respect the decision of the majority ... reserving the right to seek changes to these decisions in the future through ethical and constructive channels;
>
> 1.03 At all times show respect for others in my verbal and non-verbal language and work with fellow board and staff members in a spirit of cooperation regardless of personal differences of opinion, treating all with mutual courteous respect and encouraging the free exchange of diverse views.

It has come to my attention that the Board continues to struggle. Board members have failed to show respect for the decisions of the majority and have failed to treat each other with respect, and I believe this failure to adhere to the *Code of Ethics* has compromised the effectiveness of the Board.

Effective December 19, 2006, Howard Windsor has been appointed to carry out all the responsibilities and exercise all of the authority of the Halifax Regional School Board until the next school Board election in 2008.

GROUNDS OF APPEAL

[19] The appellants list the following grounds of appeal:

The Learned Chambers Judge erred in law, or made a mixed error of fact and law:

1. in failing to find that the Minister breached the duty of fairness she owed to the defendants;

2. in finding that the Board had legal authority to enact a Code of Ethics which applied outside of Board meetings, the breach of which could lead to their dismissal;

3. in finding the actions of a few Board members could justify the dismissal of the entire Board;

4. in finding that a single standard of review applied to each of the different decisions made by the Minister, and that the standard of review was patent unreasonableness;

5. and on such further grounds as counsel may advise and this Honourable Court may permit on the hearing of the Appeal.

[20] However, in written and oral argument, the appellants presented the issues this way:

1. Duty of Fairness

2. Comments by individuals are not a “carrying out by the Board”

3. Code of Ethics Stops at the Board Room Door

4. Protected Speech

5. The Standard of Review

[21] In framing the issues this way, the appellants essentially say this:

> They were denied a fair hearing because the Minister's decision was based on erroneous facts and had they been afforded the opportunity of a hearing to correct the record, the result would have been different. (Issue # 1). The Minister's directives applied to Board members, only when they were carrying out their legislated responsibilities which, in turn, were limited to their actions during actual Board meetings. In other words, because the MacGregor and Sparks incidents occurred outside of this limited arena, the Minister would have no jurisdiction to act. (Issue # 2). For the same reason the duty to comply with the "Code [of Ethics] stops at the board room door". (Issue #3). In any event, the Minister had no jurisdiction to act because the impugned comments represent free speech protected by our *Charter of Rights and Freedoms.* (Issue #4). Finally, because these issues go to the Minister's jurisdiction to act as she did, the Chambers judge erred by not holding her to a *correctness* standard. (Issue #5).

[22] I would recast the issues somewhat while, of course, in the process addressing all those issues raised by the appellant. I would simply ask: Did the Chambers judge err when she,

a. found no breach of procedural fairness;

b. accorded the Minister's decision deference;

c. failed to find the Minister's decision to be unreasonable, or

d. rejected the appellants' *Charter* submission?

ANALYSIS

[23] I will now address each of these four questions in order.

1. *Procedural Fairness*

[24] Let me begin with this basic premise. The Minister owed the appellants a duty to proceed fairly. She made an administrative decision that significantly affected their interests. That is sufficient to trigger the basic duty. See **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817 at ¶ 20, and **Cardinal v. Director of Kent Institution**, [1985] 2 S.C.R. 643 at ¶ 14.

[25] The nature of this duty, of course, depends on the specific facts of each case. While not exhaustive, L'Heureux-Dube, J., in **Baker**, *supra*, lists five of the more common factors to be considered. They are:

(a) the nature of the decision being made and the process followed in making it;

(b) the nature of the statutory scheme and the “terms of the statute pursuant to which the body operates”;

(c) the importance of the decision to the individuals affected;

(d) the legitimate expectations of the person challenging the decision, and

(e) the choices of procedure made by the decision-maker.

[26] Because the concept of procedural fairness involves an assessment of the *process* leading to the impugned decision (as opposed to the decision itself), a standard of review analysis is not triggered. Fichaud, J.A. of this court in **Creager v. Provincial Dental Board of Nova Scotia**, 2005 NSCA 9, explains:

> ¶ 24 Issues of procedural fairness do not involve any deferential standard of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74 per Arbour, J.; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paras. 100-103 per Binnie, J. for the majority and at para. 5, per Bastarache, J. dissenting. As stated by Justice Binnie in *C.U.P.E*, at para. 102:
>
> > The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.
>
> This point is also clear from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Justice L'Heureux-Dubé (paras. 55-62) considered "substantive" aspects of the tribunal's decision based on the standard of review determined from the functional and practical approach but (para. 43) considered procedural fairness without analyzing the standard of review.

[27] Thus it was up to Robertson, J. to assess the process followed by the Minister and to decide whether, in the specific circumstances of this case, the Minister acted fairly. It falls in turn to us to determine whether the judge was correct in her analysis.

[28] In her approach, Robertson, J. alluded to all five factors suggested in **Baker** before concluding that the Minister proceeded fairly in the circumstances. She reasoned:

> ¶ 83 In the circumstances of this case the Minister's decision is more administrative than judicial, highly fact driven and discretionary. There were no other relevant procedural requirements to consider. Although the Minister's decision did affect the lives of these board members, they had ample notice from February 2006 that any further breaches would cause the Minister to exercise her powers under s. 68. The Board could not have had any legitimate expectation that any other procedure would be involved. Accordingly, I do not consider this to be

> a circumstance in which the Minister failed to meet a duty of fairness. This case is distinguished from the situation in *Knight v. Indian Head School Division*, [1990] 1 S.C.R. 653 upon which the applicants have relied.

[29] I agree with Robertson, J.'s conclusion substantially for the reasons she has articulated. I would however add this.

[30] By express statutory language, the Board is accountable to the Minister. Section 64(1) of the *Education Act*, S.N.S. 1995-96, c. 1 ("*Act*") provides:

> 64 (1) *A school board is accountable to the Minister* and responsible for the control and management of the public schools within its jurisdiction in accordance with this Act and the regulations.
>
> [Emphasis added.]

[31] Furthermore, by express statutory language, the Minister may establish performance standards with which the Board must comply.

> 64 (6) A school board, in carrying out its responsibilities under this Act, shall meet education program, service and performance standards established by the Minister. 1995-96, c. 1, s. 64; 2002, c. 5, s. 9; 2004, c. 3, s. 17.

[32] In his February 28, 2006 directive, the Minister set very clear performance standards. Included was a reaffirmation of the Board's Code of Ethics and, as noted, each and every member by resolution confirmed this obligation without protest.

[33] Furthermore, the Minister gave each member fair warning that if his standards were not met, he *would* invoke his authority under s. 68 of the *Act* to remove their authority. His warning and his basis for acting could not be set out more clearly:

> Further, regarding the future conduct of the Board, failure to meet the previously referred to performance standards *will* cause me to exercise my authority under Section 68(2) of the Act which states, "I may appoint a person to carry out such responsibilities and exercise such authority of the school board as the Minister determines and in such manner as the Minister determines and, to the extent the Minister determines, the school boards ceases to have such responsibilities or authority."

[Emphasis added.]

[34] Finally, there can be no question that some Board members breached the Code of Ethics after the February 2006 directive. While the appellants may challenge the details of the MacGregor incident, the Sparks matter unquestionably represented an unfortunate display of hostility and acrimony. It symbolized a return to the divisiveness that had dogged the Board for the preceding year. To find an obvious breach, the Minister had to look no further than s. 1.03 of the Code of Ethics:

> 1.03 At all times show respect for others in my verbal and non-verbal language and work with fellow Board and Staff members in a spirit of cooperation regardless of personal differences of opinion, treating all with mutual courteous respect and encouraging the free exchange of diverse views.

[35] Now the appellants say that all this is irrelevant because the Code applies only to their behaviour during Board meetings. In other words, as one of the Minister's performance standards under s. 64(6), *supra*, compliance with the Code applied only when they were *carrying out [their] responsibilities under this Act*, which, in turn, extended no further than their participation at meetings. In their factum, they explain:

> ¶ 88 In this case, the Court is entitled to enquire whether there is any legal authority for the Board to enact the Code of Ethics, and what the limits of that authority are. The plaintiffs say that the Board is authorized to pass by-laws which, among other things, regulate conduct at Board meetings (including the Code of Ethics), but that there is no legal authority for the Board to enact legislation governing the conduct of individual Board members apart from meetings - that such a by-law is ultra vires the Board.
>
> ¶ 89 Any doubt about the matter is removed by s. 64B of the Act which explicitly notes that the Board has no authority to pass by-laws except as authorized by the Act; by-laws regulating conduct apart from meetings are therefore *ultra vires* the Board:
>
> > Unauthorized activity
> >
> > 64B For greater certainty, a school board shall not engage in or carry out any activity that is outside the authority, powers, duties and

> responsibilities of the school board pursuant to this Act and the regulations.
>
> ¶ 90 It follows from this discussion that the Board has no authority to enact a by-law regulating the conduct of Board members apart from meetings, because the Education Act does not give that authority.
>
> . . .
>
> ¶ 95 The February 28, 2006 directive from the Minister of Education did not expand the legal powers of the Board under the Education Act. In the first place, the Minister cannot direct the Board to do something which is ultra vires the "authority, duty and powers of the School Board under the Act". Accordingly, his direction that the Board reaffirm the Code of Ethics must be a direction to reaffirm a Code of Ethics that applies to "the Board's proceedings" or "meetings of the Board".

[36] I cannot accept this submission. Respectfully, it completely ignores the fact that the Board itself first drafted and approved this Code of Ethics. They chose expansive language. For example, s. 1.03 could not be broader: "*at all times show respect for others* ...". Then in the Spring of 2006, all Board members, including the appellants, reaffirmed their commitment to adhere to this Code. If they wished to challenge the Minister's authority to incorporate their compliance with the Code as performance standard, they should have done so back then. Instead they complied without question or protest.

[37] Furthermore, the practical repercussions of this submission respectfully defy logic. Would this mean that, hypothetically, members would be insulated from all types of outrageous or insulting behaviour that would serve to destroy public confidence in the Board as long as they behaved properly during meetings? I think not. This would certainly defy the *Act*'s provision making the Board accountable to the Minister.

[38] Furthermore, it is not as though the disputes in question involved some unrelated subject matter. Instead, the hostility flowed directly from their roles as Board members; i.e., allegedly pandering to Board staff and allegedly making decisions based on racism.

[39] The appellants further submit that it was improper for the Minister to countenance a result that sanctions innocent members for the misbehaviour of others. In their factum, they explain:

> ¶ 73 Individual Board members cannot bind the Board. An individual Board member has no special powers or authority not possessed by a member of the general public, apart from the entitlement to speak and vote at Board meetings. What MacGregor says at a public meeting organized by Leonard Preya is not an action of the Board and the opinions and actions of Sparks are not actions of the Board either.
>
> ¶ 74 As a result, if MacGregor and Sparks were guilty of misconduct, it cannot be said that misconduct was "a carrying out of the responsibilities of the Board under the Act". Without that, there is no breach of s. 64 entitling the Minister to remove the Board's authority. Section 64(6) only applies to the Board's discharge of its responsibilities, not the individual actions of individual Board members.
>
> ¶ 75 The logic of the Education Act - and in particular, the fact that the Board has no disciplinary authority over Board members for conduct apart from meetings - reinforces the conclusion that only actions of the Board should be eligible for Ministerial censure.
>
> . . .
>
> ¶ 82 The Minister removed the Board's responsibilities because of her conclusion Sparks and MacGregor were in breach of the Code of Ethics. As a matter of law, their failures do not amount to a carrying out of the Board's responsibilities under s. 64, and cannot therefore be grounds for the Board's dismissal.

[40] Again, I disagree. I have already concluded that under s. 64, the phrase *carrying out its responsibilities under s. 64(6) this Act*, involves more than attendance at meetings. Furthermore, I disagree with the appellants when they write: "The logic of the Education Act ... reinforces the conclusion that only actions of the Board [during meetings] should be eligible for Ministerial censure." The "logic"of the *Education Act* is not to insulate board members from sanction. Instead its object is to provide quality education for Nova Scotia students:

> 2 The purpose of this Act is to provide for a publicly funded school system whose primary mandate is to provide education programs and services for

> students to enable them to develop their potential and acquire the knowledge, skills and attitudes needed to contribute to a healthy society and a prosperous and sustainable economy.

[41] Thus as highlighted in **Baker,** *supra,* it is important to identify the true nature of the Minister's decision. It was not, as the appellant suggests, to punish Board members for bad behaviour. Instead, her concern was to preserve public confidence in Nova Scotia's largest school board so that the *Act*'s object of ensuring quality education could be preserved. In other words, the fundamental issue involved not the Board members but the school children.

[42] In short, the Board members, after reaffirming their Code of Ethics, had ample warning that a breach would cause the Minister to invoke s. 68(2) to remove their authority. Following a lapse in hostility, the same old problems seemed to re-emerge. When placed in this context, the Minister was not obliged to afford Board members a further hearing, as the appellants have urged.

[43] Thus, in the circumstances, the Chambers judge cannot be faulted for concluding that the Minister proceeded fairly.

2. *According the Minister's Decision Deference*

[44] The appellants suggest that the Chambers judge erred in law by according the Minister's decision deference. For the following reasons, I disagree.

[45] At the outset, I acknowledge that the amount of deference, if any, that the judge owed to the Minister's decision is a question of law. In other words, Justice Robertson would have to be correct when deciding the appropriate standard upon which to review the Minister's decision. See **Dr. Q. v. College of Physicians and Surgeons (British Columbia),** 2003 1 S.C.R. 226 at ¶ 43.

[46] When the judge considered this issue, the state of the law at that time offered her a continuum of three options. At one end, she could apply a correctness standard of review meaning that the Minister would be offered no deference and therefore the Minister's decision would have to have been correct. At the other extreme was patent unreasonableness reserved for those decisions offering the highest level of deference so that the Minister's decision would not be disturbed unless it was seen to be patently unreasonable. In the middle was reasonableness

simpliciter which meant deference to the extent that the Minister's decision would not be disturbed unless it was found to be unreasonable.

[47] Since Robertson, J.'s decision however, the Supreme Court of Canada in **Dunsmuir v. New Brunswick**, 2008 SCC 9, has directed that the two categories offering deference (reasonableness *simpliciter* and patent unreasonableness) be blended into the one general category of reasonableness. So now reviewing bodies must apply either the correctness standard which allows for no deference or the revised reasonableness standard offering deference.

[48] In any event, Robertson, J. found patent unreasonableness to be the appropriate standard. She wrote:

> ¶ 58 In my view, even if one looked to this decision in isolation of the overall legislative scheme, the lowest standard of review that could be considered is one of "reasonableness simpliciter."
>
> ¶ 59 Using that standard, I would find the Minister's interpretation was reasonable and beyond my review.
>
> ¶ 60 In any event I believe the respondent is missing the point, that adherence to the Code of Ethics was a directive made by the Minister. She was exercising her lawful discretion to make the directive. Ultimately she felt the Code had been breached by a group of board members. The discretion she exercised is deserving of a high degree of deference by this Court.
>
> ¶ 61 I believe review by a standard of patent unreasonableness, is therefore more appropriate when one looks at the Minister's actions in light of the broad purposes of the *Act* and in light of the fact the decision is made by a Minister of the Crown exercising ultimate discretion.

[49] By according the Minister the highest level of deference, the judge therefore surely would have applied a reasonableness standard had she been operating in our post-**Dunsmuir** world. Therefore, superimposing **Dunsmuir**, the issue for us becomes whether the judge was right to accord the Minister's decision deference as opposed to applying a correctness standard, as the appellants suggest.

[50] For the following reasons, I believe that the judge was right to grant the Minister's decision deference and that reasonableness is the appropriate post-**Dunsmuir** standard.

[51] Let me begin by addressing the appellant's call for a correctness standard. Their submission takes us right back to *s. 64(6)* of the *Act* and their basic assertion that the impugned activity did not represent a breach of the Minister's performance standards because (not taking place during a meeting), it did not involve *carrying out its [the Board's] responsibilities under this Act.* As such, s. 68(6) of the *Act* is not triggered and the Minister acted without jurisdiction. Therefore, because jurisdictional issues generally involve questions of law, a correctness standard should have been applied.

[52] This submission, however, is based on a premise that I have already rejected. The Code of Ethics was breached. Compliance with this Code was a performance standard that was therefore breached. This in turn triggered the Minister's jurisdiction to act under s. 68(6). Thus, as the appellant's premise crumbles, so does the submission. In fact, the appellants acknowledge as much in their factum:

> ¶ 146 If the breach of the Code of Ethics by a Board member is legally capable of amounting to a failure by the Board, then the Minister's decision that it did so in this case is entitled to deference.
>
> ¶ 147 The purpose of giving the Minister discretion is so that she can decide what amounts of a "failure". To use an analogy, in some courses "50%" is a pass mark, in some "60%" is required, and in others something else is necessary. The Minister has the right to decide when failure has occurred and (without going through the analysis) her decision cannot be reviewed unless it is patently unreasonable. *If the breach of the Code of Ethics by one member can amount to a failure of the Board to meet an Education performance standard, the Minister's decision that it did in this case is entitled to deference*.
>
> [Emphasis added.]

[53] Despite the appellants' concession, I will nonetheless briefly explain why I feel deference to the Minister's decision is warranted under a **Dunsmuir** analysis.

[54] In the past, we were invited to take a pragmatic and functional approach when deciding if a decision under review was entitled to deference. While the

concept remains basically the same, **Dunsmuir** suggests that this label should be abandoned. Instead we should simply engage in a context driven standard of review analysis:

> ¶ 63 The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

[55] In the process, we should consider four relevant factors, noting that some factors may on their own be determinative:

> ¶ 64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[56] In applying these factors to this case, I am led quite readily to the deferential standard of reasonableness. Let me explain. While there is no privative clause insulating the Minister's decision, the remaining three factors coalesce convincingly towards a reasonableness standard. For example, the Minister's purpose is to balance the interests of a number of groups including - students, parents, teachers, administrators, and school board members. Consistent with the *Act*'s objective, her primary focus in this case is the students' interests. Furthermore, her decision was both fact-based and highly discretionary. This factor alone attracts significant deference. Again, this is highlighted in **Baker**, *supra*:

> ¶ 53 ... In my opinion, these doctrines incorporate two central ideas -- that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker’s jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative

> agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. ...

[57] Finally, by virtue of her experience and position, the Minister brought a level of expertise to the issue. For all of these reasons, she was entitled to deference.

3. Was the Minister's decision unreasonable?

[58] The Supreme Court in **Dunsmuir** describes reasonableness this way:

> ¶ 46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?
>
> ¶ 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> ¶ 48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact

> imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, per L'Heureux-Dubé J.; *Ryan*, at para. 49).
>
> ¶ 49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[59] Of particular relevance to this appeal, the Supreme Court, since **Dunsmuir**, has described the concept of reasonableness in the context of a ministerial decision. In **Lake v. Canada (Minister of Justice)** 2008 SCC 23, LeBel, J., for the Court, explains:

> ¶ 41 Reasonableness does not require blind submission to the Minister's assessment; however, the standard does entail more than one possible conclusion. The reviewing court's role is not to re-assess the relevant factors and substitute its own view. *Rather, the court must determine whether the Minister's decision falls within a range of reasonable outcomes.*
>
> [Emphasis added.]

[60] Applying this guidance, in my view the Minister's decision was not unreasonable. The record reasonably supports her conclusion that in the Fall of 2006, the internal strife had returned thereby potentially jeopardizing the Board's ability to properly function. The Minister was entitled to expect compliance with

s. 1.03 of the Code *at all times*. After all, they had recently reaffirmed it and it was a document that they in fact created. It was equally reasonable for the Minister to be troubled by the MacGregor and Sparks episodes. In fact, the Sparks incident occurred within minutes of a meeting and just down the hall from the boardroom. In short, removing the authority of all members in the face of these challenging circumstances was well "within a range of reasonable outcomes".

4. The Charter Issue

[61] In the alternative, the appellants maintain that the Code of Ethics should be interpreted so as to maximize their *Charter* right to free speech. In other words, limiting the application of the Code to behaviour during actual Board meetings reflects this *Charter* value. They explain it this way in their factum:

> ¶ 102 There is a second aspect to the determination whether the comments made here are a breach of the Code of Ethics. The appellants argue that the particular comments here - a criticism of the Board as a rubber stamp for staff, and of individuals as racists - must in any event be protected speech. Although on their face, the comments might appear to violate the Board's Code of Ethics, that Code must be read in a way which is consistent with Charter values and in that light the comments are protected. Because the comments are not a breach of the Code of Ethics read in that light, the basis for the removal of the Board's authority does not exist.

[62] The problem with the appellants' submission is this. The presumption of interpreting legislation so as to protect *Charter* values is limited to circumstances where the subject provision (the Code of Ethics) is otherwise ambiguous. For example, Iacobucci, J., for the Supreme Court of Canada in **Bell ExpressVu Limited Partnership v. Rex**, [2002] 2 S.C.R. 559, states:

> ¶ 28 Other principles of interpretation – such as the strict construction of penal statutes and the "*Charter* values" presumption - only receive application where there is ambiguity as to the meaning of a provision. ...
>
> ¶ 29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte, supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" [cite omitted]. By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney*

> *General)*, [1999] 1 S.C.R. 743, at para. 14 is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".
>
> ¶ 30 ... It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (*Willis, supra*, at pp. 4-5).

[63] In this case, there is nothing ambiguous about s. 1.03 of the Code which directs board members to "*at all times* show respect for others".

CONCLUSION AND DISPOSITION

[64] I see no reason to disturb the Chambers judge's ruling. However, before concluding, I want to briefly identify a concern raised by the Minister. It involves the content of the record before the Chambers judge and now before us. Specifically, the appellants have filed affidavits which the Minister says represent a *back door* attack of her decision. In reality, the facts they allege were never part of her decision making process. The Minister therefore has urged us to ignore these affidavits. In light of the ultimate outcome of this appeal, there is no need to address this issue.

[65] I would dismiss the appeal but, in the circumstances, without costs.

MacDonald, C.J.N.S.

Concurred in: