

2008

The Shaky Foundation of “Statutory Platforms”: A Comment on Baier v. Alberta

Robert E. Charney

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Citation Information

Charney, Robert E.. "The Shaky Foundation of “Statutory Platforms”: A Comment on Baier v. Alberta." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 42. (2008).

DOI: <https://doi.org/10.60082/2563-8505.1152>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol42/iss1/6>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

The Shaky Foundation of “Statutory Platforms”: A Comment on *Baier v. Alberta*

Robert E. Charney*

I. INTRODUCTION

While all eyes have focused on the constitutionalization of collective bargaining by the Supreme Court in its *B.C. Health Services*¹ decision, another Supreme Court decision from 2007 also considered a constitutional issue that related directly to the *Canadian Charter of Rights and Freedoms*² and collective bargaining. *Baier v. Alberta*³ was a freedom of expression case and considered the validity of provincial legislation that disqualified schoolteachers from serving as school board trustees. The majority of the Court upheld the validity of this statute, finding that while serving as a school trustee is an expressive activity, the province had no obligation to provide teachers with a “statutory platform for expression” and there was, therefore, no infringement of Charter section 2(b).

While I agree with the result of the majority’s decision, I believe that they erred in seeing this as a freedom of expression case at all. The impugned legislation did not disqualify schoolteachers from speaking; they were free to express their views and opinions on any issues relating

* General Counsel, Constitutional Law Branch, Ontario Ministry of the Attorney General. The views expressed herein are solely those of the author and do not represent the position of the Ministry of the Attorney General of Ontario. I disclose at the outset that I represented the Attorney General of Ontario in its intervention in *Baier v. Alberta*, [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.), and was one of the counsel for Ontario in *Ontario Public School Boards’ Assn. v. Ontario (Attorney General)*, [1997] O.J. No. 3184, 151 D.L.R. (4th) 346 (Ont. Ct. (Gen. Div.)), discussed below. I would like to thank Daniel Engel for his research and editing assistance in the preparation of this paper.

¹ *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.).

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

³ [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.) [hereinafter “*Baier*”].

to education whether or not they were qualified or elected as school board trustees. What the teachers sought was neither a freedom to express their opinions nor a platform of expression, but a right to participate in the management of the schools. While freedom of association may now guarantee the right of workers to bargain collectively, surely freedom of expression does not expand that into a right of workers to sit on both sides of the bargaining table.

II. FACTS

At issue in this case was the constitutional validity of a 2004 amendment to the Alberta *Local Authorities Election Act*,⁴ which set out the qualifications required to be a candidate for and to serve as a school trustee.⁵ Prior to the 2004 amendment, school employees could not run for elections as a school trustee in the jurisdiction in which they were employed (“own employer restriction”) unless they were on a leave of absence. If elected, the employee was deemed to have resigned on “the day the employee takes the official oath of office as an elected official”.⁶ If not elected, the employee could return to work. In 2004, Alberta expanded the “own employer” restriction into a province-wide restriction on school employees serving as school trustees on any Alberta school board. Accordingly, the deemed resignation provision applied even when a school employee is elected to a school board that is not his or her employer.

The legislation was challenged by the Alberta Teachers’ Association, a trio of teachers who were serving as school trustees on school boards that did not employ them, and a teacher who intended to seek election to a school board.

III. THE “STATUTORY PLATFORMS” DOCTRINE

The majority decision, written by Rothstein J., treated this case as a statutory platform case, reiterating a long line of cases starting with *Haig v. Canada*,⁷ which have held that freedom of expression generally only

⁴ R.S.A. 2000, c. L-21 [hereinafter “LAEA”].

⁵ *Id.*, s. 22.

⁶ *Id.*, s. 22(9).

⁷ *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.) [hereinafter “*Haig*”].

imposes a negative obligation on government rather than a positive obligation of protection or assistance. Thus, if the government chooses to establish a specific means or statutory platform for expression, it has no obligation to extend that means or platform to everyone. In *Haig*, the Supreme Court decided that a referendum is a “statutorily created platform for expression” and held that:

A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law.⁸

The Court did, however, leave open the possibility that in “exceptional cases” positive government action could be required under Charter section 2. In *Dunmore v. Ontario*, the Court set out the three factors that were relevant to establishing this exception, which, the Court held, were applicable to section 2 in general:

- (1) Claims of underinclusion should be grounded in fundamental Charter freedoms rather than in access to a particular statutory regime.
- (2) The claimant must meet an evidentiary burden of demonstrating that exclusion from a statutory regime permits a substantial interference with activity protected under section 2, or that the purpose of the exclusion was to infringe such activity. The exercise of a fundamental freedom need not be impossible, but the claimant must seek more than a particular channel for exercising his or her fundamental freedoms.
- (3) The state must be responsible for the inability to exercise the fundamental freedom:

[U]nderinclusive state action falls into suspicion not simply to the extent it discriminates against an unprotected class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms.⁹

In *Baier* the Court refined this test for the specific application of Charter section 2(b):

In cases where a government defending a *Charter* challenge alleges, or the *Charter* claimant concedes, that a positive rights claim is being

⁸ *Id.*, at para. 83.

⁹ *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016, at paras. 24-33 (S.C.C.).

made under s. 2(b), a court must proceed in the following way. First it must consider whether the activity for which the claimant seeks s. 2(b) protection is a form of expression. If so, then second, the court must determine if the claimant claims a positive entitlement to government action, or simply the right to be free from government interference. If it is a positive rights claim, then third, the three *Dunmore* factors must be considered.¹⁰

Thus, the threshold issue in such cases is whether the activity at issue is a form of expression. In this case there were actually two separate activities at issue: (1) being a candidate for trustee; and (2) serving as a trustee. It was conceded by Alberta that the first activity was expressive, while it was acknowledged that “some of the activities of school trustees may be characterized as having an expressive nature”.¹¹ The majority concluded that both activities were expressive activities within the meaning of Charter section 2(b), and both amounted to claims to a positive entitlement or statutory platform for expression.

Having passed the threshold issues, the Court proceeded to the three-part *Dunmore* test and concluded that the appellants were not able to meet the first two of the three factors:

- (1) the claim related to access to a particular statutory regime (school trusteeship) which is not a fundamental Charter freedom; and
- (2) exclusion from that statutory regime did not substantially interfere with school employees’ freedom to express themselves in relation to school board operations or the education system generally.¹²

Accordingly, the Court dismissed the appeal and upheld the constitutional validity of the impugned statute.

The concurring decision written by LeBel J. characterized the teachers’ claim as seeking “a right to participate in a political and managerial function in a democratically elected public body, namely a school board.”¹³ In his view the guarantee of freedom of expression did not protect “a right to run for office as a school trustee and, if elected, to take part in the management of the school board.”¹⁴ While the concurring opinion recognized that “some significant aspects of the role of a school trustee involve the communication of ideas about education and the

¹⁰ *Baier, supra*, note 3, at para. 30.

¹¹ *Id.*, at paras. 31, 81.

¹² *Id.* at paras. 44-45.

¹³ *Id.*, at para. 72.

¹⁴ *Id.*

operation of schools ... that content of expression is not affected by the LAEA Amendments.”¹⁵ Justice LeBel found that the appellants were not being deprived of freedom of expression but rather “a claimed right to take part in the management of Alberta’s local education systems” which, in the view of LeBel J., is not protected by section 2(b) of the Charter.¹⁶

Finally, LeBel J. recognized that:

... nearly everything people do creates opportunities for expression if ‘expression’ is viewed expansively enough. ... At some point, one must question whether the guarantee of freedom of expression should be viewed so broadly that every human activity with a communicative content might be swept under it.¹⁷

Accordingly, since the management of school boards is not a constitutionally guaranteed right under the Charter, he concluded that there was no infringement of section 2(b) without having to consider “the delicate distinction between positive and negative rights”.¹⁸

Justice Fish dissented, concluding that the amendment infringed section 2(b) because Alberta “*removed* the appellants from an *existing* platform of expression to which, like other qualified members of the public, they have long had access”.¹⁹ Furthermore, “seeking and holding office as a school trustee, however, is a *uniquely effective* means of *expressing one’s views on education policy*”,²⁰ and therefore the exclusion of school employees from running “substantially interfered” with their freedom of expression. According to Fish J., any policy justification for this restriction had to be justified under section 1 of the Charter, and the government’s concerns regarding conflict of interest could be met by the “own employer” restrictions, which existed before the 2004 amendment.²¹

¹⁵ *Id.*, at para. 75.

¹⁶ *Id.*, at para. 75.

¹⁷ *Id.*, at para. 76.

¹⁸ *Id.*, at para. 76.

¹⁹ *Id.*, at para. 82.

²⁰ *Id.*, at para. 107.

²¹ *Id.*, at paras. 82, 107-21. In addition, the Court unanimously rejected the appellant’s s. 15(1) claim, holding that the distinction challenged in this case — occupational status — is not an analogous ground of discrimination under that section.

IV. COMMENT

While the statutory platform analysis may be helpful in other contexts, in this case it misses the mark. Not only did the law in issue not substantially interfere with teachers' freedom of expression, it did not interfere with it at all. The statutory platform analysis may make sense in the context of an activity that is exclusively or primarily expressive, such as voting in a referendum. It is ill fitted, however, in the context of an activity — such as working in a particular job — which is only incidentally expressive. While Alberta conceded that some of the activities of school trustees can be characterized as expressive,²² the same concession could be made with respect to virtually every job, from school teacher, to school principal, to being a judge on the Supreme Court. Butchers and bakers often engage in activities that can be characterized as expressive, and most jobs would meet the broad definition of statutory platform posited by the majority. While the expressive activities themselves should be protected by section 2(b), it surely overshoots the purpose of the section to protect not only those expressive activities but also the right to qualify for a particular job.

If the majority's analysis were correct, every *bona fide* qualification for public employment or office and every statutory qualification for private employment would engage the *Dunmore* analysis. For example, a requirement that teachers must have certain academic qualifications or that candidates for election for bencher in the Law Society must be lawyers would limit access to those particular platforms for expression. Similarly, academic and professional qualifications for practising as a health care practitioner limit access to that occupation as a platform for expression. While each of these positions is undoubtedly a uniquely effective means of expressing one's views on a variety of subjects, no one has to be a teacher, a Law Society bencher or a doctor in order to express his or her opinions on any subject (let alone education, law or health care). Therefore, the reality is that no one could ever meet the three-part *Dunmore* test and actually prove a violation of Charter, section 2(b). While there may be no harm in setting up a constitutional test that no one can meet, we must at least call into question the validity, relevance and utility of any legal analysis that creates such an insurmountable hurdle.

²² *Id.*, note 3, at paras. 31, 81.

Even Fish J.’s dissenting opinion seems to recognize that *bona fide* qualifications for a job or office do not infringe on freedom of expression, although he makes little attempt to explain how we know in advance of the section 1 analysis which qualifications infringe section 2(b) and which do not. For example, he states that the:

decisive question on this appeal is whether a legislature which sets up a system of democratically elected boards to administer a fundamental aspect of government activity may then exclude a certain category or group of *otherwise qualified persons* from serving on those boards, without any need to justify that exclusion under s.1 of the Charter.²³ (emphasis added)

Legislation establishing school boards generally imposes a number of qualifications to be eligible for candidacy. Candidates must be Canadian citizens, must be over 18 years of age and must reside in the school district in which they run.²⁴ In jurisdictions with coterminous linguistic or denominational boards (English/French/Catholic) candidates must also meet linguistic and denominational qualifications.²⁵ However, freedom of expression is not limited by citizenship, age, residence, language, or denomination. When Fish J. refers to “otherwise qualified persons” he appears to assume that these other qualifications would not infringe Charter section 2(b), although it is by no means clear why they would not. Non-citizens, for example, could credibly claim to be a “category or group of *otherwise qualified persons*”,²⁶ who should have just as much right to express their opinions regarding education and the operation of the schools as do teachers.²⁷ It is equally unclear why the requirement that a manager not be in a conflict of interest position would not also be a *bona fide* qualification for that position. To be consistent, Fish J. would have to conclude that *any and every* qualification for public office would run afoul of section 2(b) and require justification under Charter section 1.

²³ *Id.*, at para. 86. Justice Fish also refers to “otherwise qualified persons” at para. 95.

²⁴ See, e.g., *Education Act*, R.S.O. 1990, c. E.2, s. 61(1) [hereinafter “EA”].

²⁵ *Id.*, s. 80(7).

²⁶ *Baier, supra*, note 3, at para. 86.

²⁷ Resident non-citizens have a legal right to send their children to public school without payment of tuition. They are not, however, eligible to vote for trustees (or any other elected official at the municipal, provincial or federal level) and are therefore not qualified to run as candidates. See EA, *supra*, note 24, s. 32.

V. THE LABOUR RELATIONS CONTEXT

In order to fully appreciate LeBel J.'s concurring decision, it is helpful to consider the statutory role of school trustees and the special statutory regime that governs teachers' collective bargaining. The primary function of school boards is to manage schools in a particular district.²⁸ As such, the role of trustees on school boards is analogous to that of the senior management in the labour relations context. The board is responsible for hiring and removing teachers and other staff, for establishing the terms and conditions of employment through collective bargaining, for the implementation of collective agreements and for disciplinary or grievance issues. Collective bargaining issues account for approximately 80 per cent of the school board's budget, and because of the special nature of school board collective bargaining, collective agreements made in one school board often have an impact on agreements in other boards.

The *Labour Relations Act, 1995*²⁹ clearly recognizes the importance of workers and management being free from interference from one another, and therefore prohibits either side from participating in the administration of the other. The qualification requirements to serve on school boards in both Alberta and Ontario are based on this common and well-accepted principle. The justification for preventing management from running for positions within a labour union is the same as, and as valid as, the justification for preventing teachers from running for positions on a school board. As the Ontario Labour Relations Board has recognized: "The [Labour Relations] Act attempts to create a balance of power between these two sides by insulating one from the other".³⁰

The insulation of management and labour is not just a valid labour policy, it is a principle with constitutional significance. In the case of *Delisle v. Canada*, the Supreme Court of Canada went so far as to hold

²⁸ EA, *supra*, note 24, at ss. 171(3), 277.2(1).

²⁹ S.O. 1995, c. 1, Sched. A. See:

70. No employer or employer's organization and no person acting on behalf of an employer or employer's organization shall participate in or interfere with the formation, selection, or administration of a trade union ...

71. No trade union and no person acting on behalf of a trade union shall participate in or interfere with the formation of or administration of an employers' organization ...

³⁰ George W. Adams, *Canadian Labour Law: A Comprehensive Text* (Aurora, ON: Canada Law Book Inc., 1985), at 264-68; *Chrysler Canada Ltd.*, [1976] O.L.R.B. Rep. Aug. 396, at para. 12 (O.L.R.B.); see also *Burnaby (District)*, [1974] 1 Can. L.R.B.R. 1, at 3-4 (B.C.L.R.B.).

that management control over an employee association would infringe freedom of association as guaranteed by Charter section 2(d).³¹

The 2004 amendment to the Alberta LAEA³² was by no means the first time that teachers had been disqualified from holding office as school board trustees. Similar disqualifications pre-date Confederation and appear in the *Common Schools Act of 1859*.³³

In fact, the *Baier*³⁴ case was not the first case where Canadian courts had to consider the constitutional validity of a statutory provision that disqualified all school board employees in the province from the right to hold office as a school board trustee. The constitutional validity of such a provision was upheld by the Ontario Court (General Division) in the 1997 case *Ontario Public School Boards' Assn. v. Ontario*.³⁵

When *OPSBA* was first argued before the General Division, two separate but related issues of trustee eligibility were raised. The first, which was almost identical to the issue in *Baier*, was the disqualification of all school board employees from the right to hold office as a school board trustee (section 219(4)(a) of the *Education Quality Improvement Act*³⁶). The second issue was the disqualification of all school board employee spouses from the right to hold office as a school board trustee (section 219(4)(b) of the EQIA³⁷). Both of these provisions were challenged under section 15 of the Charter, and the employee disqualification was also challenged under section 93 of the *Constitution Act, 1867*.³⁸ Interestingly, the Ontario Public School Boards Association

³¹ *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989, at para. 37 (S.C.C.):

Since this Court's decision in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, it is clear that under the trade union certification system, the government may limit access to mechanisms that facilitate labour relations to one employee organization in particular, and impose certain technical rules on that organization. It goes without saying that it must, however, be a genuine employee association that management does not control. Otherwise, there would be a violation of s. 2(d).

³² *Supra*, note 4.

³³ “No teacher shall hold the office of School Trustee or of Local Superintendent.” S.O. 1859, 22 Vict., c. 64, s. 81. This disqualification appears in the *Consolidated Public School Act of 1874*, 37 Vict., c. 28, s. 91 as follows: “No master or teacher of a Public or High School shall hold the office of school board trustee or school inspector.”

³⁴ *Baier, supra*, note 3.

³⁵ [1997] O.J. No. 3184, 151 D.L.R. (4th) 346 (Ont. Ct. (Gen. Div.)), var'd [1999] O.J. No. 2473, 175 D.L.R. (4th) 609 (Ont. C.A.) [hereinafter “*OPSBA*”]. This case is often referred to as the “Fewer School Boards Case” because it dealt primarily with the amalgamation of smaller school boards across the province.

³⁶ S.O. 1997, c. 31 [hereinafter “EQIA”].

³⁷ *Id.*

³⁸ (U.K.) 30 & 31 Vict., c. 3.

did not raise section 2(b) of the Charter, likely because as a coalition of school trustees, they understood that the role of trustee was more than just a platform for expression.

In reliance on the evidence submitted in that case (including the 1991 *Report of the Municipal Conflict of Interest Consultation Committee to the Minister of Municipal Affairs, Municipal Conflict of Interest Review*) the General Division upheld the constitutional validity of both of these disqualifications. The Court held that the purpose of these provisions was to disqualify individuals who had a conflict of interest in a substantial portion of the board's work. School board trustees are the managers of the school board, and a person cannot place themselves on both sides of the bargaining table by being both a manager and a union member. In upholding the school board employee disqualification, the Court relied on the following comments from the 1991 Municipal Conflict of Interest Review:

The intent of these prohibitions is to ensure accountability and impartiality in decision-making on matters affecting the operation of the council, school board, or local board. It embodies the rule that no person can serve as both master and servant.

A substantial number of individuals in the educational field, primarily teachers, hold office on school boards, and the majority of matters considered by school boards relate to educational programs and policies, and labour-related issues which are usually consistent across the province. Consequently, decisions made by one school board often have an effect in another School board jurisdiction, which places these members in a conflict of interest situation. The example cited most often was collective bargaining.³⁹

In addition to the evidence in that case, the General Division relied on the "labour relations reality" reflected in cases like *Benn v. Lozinski*,⁴⁰ which, based on evidence, concluded that the collective bargaining agreements of one board have an impact on the agreements of other boards. In Ontario, the *Teaching Profession Act*⁴¹ declares that every teacher employed by a school board is a member of the Ontario Teachers' Federation (OTF),⁴² and under Part X.1 of the *Education Act*, affiliated bodies of the OTF are the statutory bargaining agents of the

³⁹ *OPSBA, supra*, note 35, at para. 78.

⁴⁰ [1982] O.J. No. 3356, 37 O.R. (2d) 607 (Ont. Co. Ct.) [hereinafter "*Benn*"].

⁴¹ R.S.O. 1990, c. T.2.

⁴² *Id.*, s. 4(1).

teachers.⁴³ Accordingly, a member of the Ontario Teachers’ Federation was in a conflict by reason of his employment in a different board:

As a member of the Ontario Teachers’ Federation the respondent would have an indirect pecuniary interest by reason of being a member of a body that has an interest in a contract that is reasonably likely to be affected by a decision of the local board. I base that finding on the evidence before me of the scale of fees chargeable by the federation in accordance with the salaries of the members. As well the federation is vitally interested in practically all matters in which the local board is concerned. It would be naive to think otherwise. Accordingly, he ought to have availed himself to the provisions of s. 2(1) of the Act and disclosed his interest.

Upon the evidence before me I find that generally a collective bargaining agreement with one class of teachers will invariably affect a subsequent agreement with another class of teachers. The agreement invariably is used as a negotiating lever likely to influence financial and other terms in collective bargaining agreements. I am therefore prepared to find that the respondent was in conflict by reason of being in the employment of a body that has an interest in a contract reasonably likely to be affected by a decision of the local board. I am therefore again of the view that he ought to have disclosed his interest, not taken part in the consideration or discussion of or vote on any question with respect to the contract or attempt to influence the voting.⁴⁴

Similar concerns were identified by the British Columbia courts when they considered the collective bargaining between school boards and teachers’ unions in that province. In the case of *Wynja v. Halsey-Brandt* the British Columbia Court of Appeal held:

On the evidence before him, the trial judge found there was a very close relationship between the BCTF and its individual locals, including the RTA and the VTF, and that as a matter of policy what happens during the collective bargaining process involving one local has a “direct and significant” bearing on negotiations and the terms of subsequent collective agreements entered into by other locals. Everything the locals do during the collective bargaining process is done under the direction and guidance of the BCTF. The result is a close relationship between the terms of employment of teachers in Richmond and the terms of employment of teachers in Vancouver. It is this close relationship

⁴³ *Supra*, note 24.

⁴⁴ *Benn*, *supra*, note 40, at paras. 24-25.

which the trial judge found gave the appellants an interest in the Richmond collective agreement that could monetarily affect them.

.....

I do not propose to review all of the evidence, which was put before the trial judge in affidavit form, and which established the very close working relationship between the BCTF and its various locals, including the VTF and the RTA. I am satisfied that the specific terms of that relationship, as formally recognized in the Constitution and By-Laws of the various associations and in the Members' Guide to the BCTF, are a manifestation of the fact that ... establishing consistent working conditions and terms of employment, a fact which by itself leads inexorably to the very conclusions reached by the trial judge. I am not persuaded that he misconstrued the evidence before him or that the conclusions he reached are unreasonable. Indeed, they seem to me to be a matter of common sense.⁴⁵

The General Division upheld the constitutional validity of both the employee disqualification (section 219(4)(a) of the EQIA) and the employee spouse disqualification (section 219(4)(b) of the EQIA). The Ontario Public School Board Association appealed the employee disqualification issue only on the basis that it infringed section 93 of the *Constitution Act, 1867*. It did not appeal the General Division's findings that section 219(4)(a) did not infringe Charter section 15. The OPSBA did appeal the decision that the employee spouse disqualification (section 219(4)(b)) did not infringe section 15 of the Charter.

The majority of the Ontario Court of Appeal held that the employee spouse disqualification discriminated on the basis of marital status contrary to section 15(1) of the Charter, and that the section 1 evidence did not justify discrimination on the basis of marital status. The Court issued a declaration that section 219(4)(b) was invalid. Justice Brooke dissented, noting that the evidence demonstrated that collective bargaining issues relate "to matters that constitute about 80% of school boards' budgets and affect the efficiency and integrity of a board".⁴⁶ He noted evidence that in some boards up to 50 per cent of trustees are employees or spouses of employees.⁴⁷

⁴⁵ [1993] B.C.J. No. 1154, 102 D.L.R. (4th) 393, at paras. 8, 23 (B.C.C.A.).

⁴⁶ *Ontario Public School Boards' Assn. v. Ontario (Attorney General)*, [1999] O.J. No. 2473, 175 D.L.R. (4th) 609, at para. 84 (Ont. C.A.).

⁴⁷ *Id.*, at para. 84.

The Court of Appeal unanimously upheld the constitutional validity of section 219(4)(a) (employee disqualification), concluding that it did not infringe section 93 of the *Constitution Act, 1867*. The Ontario Public School Board Association did not seek leave to appeal from this decision.⁴⁸

The spousal disqualification provision (section 219(4)(b)) was subsequently repealed in Ontario in 2002,⁴⁹ but Ontario, like Alberta, continues to disqualify all school board employees from holding office as trustees.

VI. CONCLUSION

It is significant that the appellants in the *Baier*⁵⁰ case did not contest the provisions of the Act which disqualified teachers from holding the office of school trustee in the board of their own employer. Accordingly the issue in *Baier* was not whether teachers could be disqualified from serving as school board trustees but rather the proper geographic scope of the disqualification. Given the “labour relations reality” recognized by both courts and government reports, the province-wide disqualification is an appropriate policy response.

Freedom of expression does not guarantee the right to manage a public institution. The position the appellants sought was membership on a board that is responsible for management and control of the schools, entering into the terms of the collective agreement with board employees and the implementation of those collective agreements. While they are, like all persons, free to express their views and opinions on such subjects, they have no right to participate in the actual management of the school boards.

There is a distinction to be drawn between the two activities at issue in this case: (1) running as a candidate; and (2) serving as a trustee. While the latter is primarily a managerial position which, like all jobs, is incidentally expressive, the former is inherently expressive. Candidacy for any public office may accurately be described as a statutory platform

⁴⁸ Ontario sought leave to appeal the decision invalidating s. 219(4)(b) (spousal disqualification). The Supreme Court of Canada dismissed without reasons Ontario’s application for leave to appeal on November 4, 1999: *Ontario Public School Boards’ Assn. v. Ontario (Attorney General)*, [1999] S.C.C.A. No. 425 (S.C.C.).

⁴⁹ S.O. 2002, c. 18, Sched. G, s. 9(1).

⁵⁰ *Baier*, [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.).

for expression, and the majority's statutory platform analysis was legitimately applied to that activity.

In this regard, however, it is important to note that the statutory provisions at issue in the LAEA⁵¹ did not really preclude teachers from being *candidates* for trustee. Like virtually all public servants wanting to run for public office, teachers were only required to request a leave of absence in order to be a candidate, and the employer was required by law to grant the leave of absence.⁵² Should the employee not be elected, he or she had the right to return to work. The purpose of such laws is to prevent public employees from being in a conflict of interest during the election campaign, and from using their public employment to gain some advantage during the campaign. The leave of absence requirement presents a fairly insignificant obstacle to candidacy.⁵³ A close reading of the Queen's Bench decision indicates that the teachers' real concern was not the financial impact of the leave of absence provision, but the financial impact of the deemed resignation upon taking the oath of office.⁵⁴

Finally, both the teachers' arguments and Fish J.'s dissent emphasized that holding office as a school trustee is "a uniquely effective means of expressing one's view on education policy"⁵⁵ and that "service as a trustee [is a] qualitatively different means of expression than simply shouting from the sidelines."⁵⁶ True enough, but service as a trustee is "uniquely effective" and "qualitatively different" precisely because it is management rather than expression. Take away the management powers, and the position of school trustee is no more effective a platform (and perhaps much less so) than being a teacher.⁵⁷

⁵¹ R.S.A. 2000, c. L-21.

⁵² *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched., s. 30; *Public Service of Ontario Act, 2006*, S.O. 2006, c. 35, Sched. A, s. 79.

⁵³ *Jones v. Ontario (Attorney General)*; *Rheaume v. Ontario (Attorney General)*, [1992] O.J. No. 163, 7 O.R. (3d) 22, at 26 (Ont. C.A.).

⁵⁴ *Baier v. Alberta*, [2004] A.J. No. 1003, [2005] 7 W.W.R. 68, at para. 80 (Alta. Q.B.):

Given that there is a significant disparity between a teacher's salary and trustee remuneration, forcing a teacher to resign their employment for the duration of their term as trustee renders illusory any opportunity for teachers to run for office as school trustees under the LAEA Amendments.

⁵⁵ *Baier* (2007), *supra*, note 50, at para. 107.

⁵⁶ *Id.*, at para. 108.

⁵⁷ Even running as a candidate for election for a school trustee is a relatively ineffective platform for expression. School board elections have notoriously low voter turnout. In the municipal elections of 2006, voter turnout across the Greater Toronto Area averaged 39.3 per cent. In a by-election held by the Toronto District School Board in 2002, voter turnout was only 10 per cent.