# Arbitrator Rules Requirement For Updated Pastoral Reference Was Reasonable To Ensure Catholicity Of Education

**March 20, 2019**

In a decision dated September 24, 2018, Arbitrator Brian Etherington ruled that Durham Catholic District School Board (Board) was permitted by law to impose a requirement for an updated pastoral reference for curriculum chair postings. Arbitrator Etherington decided, however, that the Board violated the collective agreement requirement to consult with the Ontario English Catholic Teachers' Association (Union) before altering the terms of the applicable Administrative Procedure on hiring curriculum chairs. The particular provision required the Board to engage in "significant consultation" with the Union on the administrative procedure and not to alter the policy prior to concluding the consultation.

## Background

The grievance was initially filed by the Union in 2012. The Union alleged that a job posting for an interim curriculum chair position in Canadian and World Studies at a secondary school of the Board violated the collective agreement provision and Board policy for appointing curriculum chairs, and the Ontario Human Rights Code, by requiring an updated pastoral reference. The Union further alleged that this requirement was a change in long-standing practice, but this estoppel argument was abandoned at the arbitration hearing.

The Administrative Procedures in dispute concerned applications for curriculum chair positions. These Administrative Procedures were amended over time to include a requirement that the applicant be a practicing Catholic committed to upholding the Catholic philosophy within the school community, and an express requirement for pastoral references from any short-listed candidates. The Union alleged that the Board violated the collective agreement by failing to consult before making amendments to the Administrative Procedures policies. As noted, Arbitrator Etherington upheld this aspect of the grievance and concluded that the Board altered the Administrative Procedure before commencing meaningful consultation with the Union.

## *Human Rights Code*

The interesting aspect of this decision is the discussion of denominational rights of school boards and the preference that can be given to practicing Catholics in promotions. The Arbitrator noted that the Board and the Union agreed on the law concerning denominational rights under section 93 of the Constitution Act, 1867 (Constitution) and the Ontario Human Rights Code (Code) provisions on discrimination on the basis of religion in employment.

Section 93 of the Constitution Act, 1867 sets out the rights of each province to make laws relating to education, subject to the proviso that they cannot prejudicially affect any right or privilege with respect to denominational schools. As noted by the Arbitrator,[1] to engage s. 93(1) of the Constitution Act 1867, the following factors have to be established:

(a) there must be a right or privilege affecting a denominational school;
(b) enjoyed by a particular class of persons;
(c) by law;
(d) in effect at the time of the Union;
(e) and which is prejudicially affected.

There has been extensive judicial consideration of the denominational rights of Catholic school boards in Ontario and how the section 93 guarantee is translated into the power to hire teachers and impose religious qualifications for employment or promotion. The Ontario Court of Appeal has confirmed in several decisions that Ontario Catholic school boards have the right to prefer practicing Catholics when making employment decisions relating to teachers.

# The Decision

The question for the arbitrator in this case was whether the updated pastoral reference requirement was reasonably necessary to ensure the catholicity of the education provided by the Board. The Board relied on cases relating to denominational cause for dismissal in support of its position that a requirement to live in accordance with the tenets of the Catholic faith as a condition of employment is reasonably necessary.

The Union appeared to take the position that an updated pastoral reference is not necessary as a means by which to prove a candidate is a practicing Catholic. Arbitrator Etherington dispensed with that argument by noting that an updated pastoral reference is reasonably reliable because:[2]

…The priest is an expert in what it means to be a practicing Catholic and the candidate can choose the priest at their parish. The priest also has an opportunity to observe the candidate in the Church community and provide objective third party evidence of the candidate's participation in the Church community. The evidence of both the employer witnesses and Dr. Trafford showed that many of the questions on the PR form used by the Board would allow the priest to provide evidence of the candidates' participation in the church and the extent to which they are practicing Catholics in their community.

In Arbitrator Etherington's view, it did not make sense to review a pastoral reference provided by a candidate on hiring many years earlier as a reliable indicator of whether a candidate continued to be a practicing Catholic with an active faith commitment.

An interesting argument raised by the Union was the fact that Catholic school boards do not have a uniform practice on religious qualifications for employment or promotion. Arbitrator Etherington reviewed the denominational rights case law and determined that there was no requirement of unanimity or consensus among an entire religious faith in order for beliefs or practices to be protected. In fact, he concluded that insisting on total uniformity or consensus across the province on religious qualifications for employment or promotion before there could be protection under section 93 of the Constitution and section 24 of the Code would undermine such protections.

Although Arbitrator Etherington declared that the Board had violated the collective agreement obligation to engage in meaningful consultation prior to altering its Administrative Procedure, he did not order a remedy. The decision provides the parties an opportunity to agree on appropriate remedial measures, none of which have been publicly reported at the time of this writing.

Comment
This decision is yet another in a long line of jurisprudence affirming the denominational rights of Catholic school boards to impose conditions and requirements of employment relating to practicing the Catholic faith. It will be relied upon in the event of any future challenge of an employment decision based on preference for Catholic teachers.

1 Unpublished Decision, pp. 117-18

2 *Ibid.*, p. 120

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