

## School Board Update

### ***In Camera* Deliberations of Teacher Dismissal can be Subject of Testimony, Supreme Court of Canada Rules**

**Date:** March 30, 2016

On March 18, 2016, the Supreme Court of Canada issued [\*Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval\*](#) (*Laval*), a significant decision on whether a union can subpoena members of a school board's executive committee to testify about their *in camera* deliberations regarding a teacher's dismissal. The Court held, in the specific context of the collective agreement between the union and the school board in question, that the executive committee members could be compelled to testify at such an arbitration.

This decision is an important cautionary tale for directors and trustees of school boards. In this *School Board Update*, we review *Laval* and its immediate significance for school boards.

## Facts

"B" was a vocational training instructor employed by a Quebec school board, the Commission scolaire de Laval (Board). His employment was governed by a collective agreement between the Board and the Syndicat de l'enseignement de la région de Laval (Union).

In 2009, B's principal asked him to send a written declaration describing his criminal record to the human resources department. The Quebec *Education Act* contains a scheme for verifying criminal records in relation to employees whose criminal records are relevant to their job functions for their board.

B indicated in his declaration that he had been convicted of a variety of weapons and drug charges during the 1980s and 1990s and that he had applied for a pardon, which he expected to obtain within a few months of the declaration. The Director of Human Resources was of the opinion that B's record was relevant to his job functions, but according to the *Education Act*, the final decision had to be made by the Board's Executive Committee.

The Executive Committee then held a special meeting to determine whether B's criminal record was relevant to his functions, and if so, whether to cancel his employment contract. B attended the meeting with a Union representative. The Executive Committee began the meeting "partially *in camera*", meaning the public was excluded, and heard from B. Then the Executive Committee excluded B and his representative from the meeting and deliberated on B's judicial record "totally *in camera*". After deliberating, the Committee, sitting in public, adopted a resolution to

terminate B's employment contract.

The collective agreement between the Union and the Board stated that an employment relationship may be terminated "only after thorough deliberations at a meeting of the board's council of commissioners or executive committee called for that purpose."

The Union grieved B's dismissal. The Union opened its case by summoning three members of the Board's Executive Committee who had been present for the *in camera* deliberations. The Board objected to the testimony, arguing that the motives of the individual members were irrelevant and that the members should be shielded from testifying about the deliberations due to 'deliberative secrecy'. The Union argued that the testimony was relevant and necessary to the proceedings.

## Judicial History

The arbitrator issued an interim decision that allowed the Union to compel the testimony of the Executive Committee members on what had been said *in camera*. The collective agreement expressly required "thorough deliberations", and the arbitrator considered it necessary to know the substance of the deliberations in order to determine whether the Board had acted in compliance with that requirement.

The Quebec Superior Court quashed the arbitrator's decision on a motion for judicial review. The testimony on the substance of the deliberations was barred, except for testimony regarding the formal process.

The Quebec Court of Appeal allowed the Union's appeal and restored the arbitrator's interim decision, holding that the collective agreement gave the arbitrator the power to examine both the procedure and the substance involved in the dismissal.

## The Supreme Court of Canada

The issue before the Supreme Court of Canada was whether the Union could examine members of the Board's Executive Committee on their *in camera* deliberations regarding B's dismissal. The Court had to consider whether two principles were relevant to the case at hand: the principle that the motives of a legislative body are "unknowable" and the principle of deliberative secrecy. Further, if the testimony was allowed, the Court would have to consider what, if any, limits would apply to the testimony.

### Were the motives of the Executive Committee "unknowable"?

Based on prior Supreme Court case law, the Board argued that the actual motives of any public board that makes any decision through collectively reached written resolutions are simply unknowable. Unlike courts, the *reasons* for their chosen course of action did not have to be

reduced to writing. All that mattered was the ultimate decision. Consequently, any subpoenaed testimony regarding reasons would be of no value.

The Supreme Court disagreed. Justice Gascon, writing for the majority, stated that the traditional avoidance of adjudicative inquiries into “unknowable” motives was limited to public acts of a *legislative* nature. In the case at hand, the Board was acting in its role as a private employer when the Executive Committee adopted a resolution to dismiss B from his teaching position under a procedure set out in a collective agreement. Generally, the dismissal of public sector employees is governed by contract law and employment law and not by public law relating to governmental functions. The Court found that the arbitrator’s decision that he needed to know the substance of the *in camera* deliberations in order to determine whether they had been “thorough” was reasonable.

### **Were the motives of the Executive Committee shielded by the principle of deliberative secrecy?**

The Board further argued that the members of the Executive Committee, when legally deliberating *in camera*, were shielded by the principle of deliberative secrecy, and thus could not be compelled to testify about those deliberations.

Again, the Court disagreed. Deliberative secrecy was held to be a core principle of *judicial* independence that shields *judicial* decision-making processes from review by other branches of government. While this principle extends to administrative *tribunals*, it does not extend to every *administrative* entity that is required to perform decision-making functions.

In the case at hand, the Board was acting as an employer when it made the decision to dismiss B from his employment and was not acting as a quasi-judicial decision-maker. The principle of deliberative secrecy did not apply.

### **Should limits be placed in advance on the questions that may be asked of the Executive Committee members?**

Having determined that the Executive Committee members could be compelled to testify, the Court concluded that pre-emptive limits should not be placed on the questions that could be asked of them on examination in advance of the arbitration. Rather, decisions as to relevance and admissibility should be left for the arbitrator to make as the hearing unfolded.

While not providing guidance on specific questions, Justice Gascon suggested that, as is commonly the case, the decision would involve a balancing of interests:

[72] ... An employee is clearly entitled to examine and confront those who decided to dismiss him about the circumstances of their decision and the details of the process that led up to it. ...

[73] ... Of course ... this does not amount to an authorization to survey the states of mind of the decision makers to find out how each one's individual thoughts evolved over the course of their deliberations. Nor does it authorize a fishing expedition or redundant examinations of all of them. ...

## Conclusion

In reaching its decision in the *Laval* case, the Supreme Court of Canada expressly relied on the language of the collective agreement that guaranteed a right to “thorough deliberations”. This obviously made it easier to accept the arguable (if not the clear) relevance of evidence concerning the “deliberations” in question. However, it is unlikely that this case will be confined to such rare situations. Rather, wherever a union or teachers’ federation asserts that any board decision is tainted by an improper motive or process, the *Laval* case will likely surface in support of a demand for *in camera* information.

Accordingly, this decision represents an important reminder for school board directors and trustees that the substance of discussions that initially occur legally “behind closed doors” may be exposed in the course of future legal proceedings. This can include, at a minimum, demands for the production of minutes and individual notes taken at *in camera* meetings, and may go so far as to compel the testimony of committee members and others in attendance.

While the scope of the adjudicative inquiry will depend on the wording of any relevant collective agreement, *Laval* serves as an important reminder that what happens in the board room may not ultimately stay in the board room. Trustees and senior school board officials will need to govern themselves with this consideration in mind.

For more information on this decision, please contact [Michael A. Hines](#) at 416.864.7248 or your regular [Hicks Morley lawyer](#).

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