Teachers Reduced to Idle Monologues in the Wilderness

On June 29, 2007, the Supreme Court of Canada decided Baier v. Alberta [1]. The petitioners, four teachers and the Alberta Teachers' Association, claimed that amendments to the Local Authorities Election Act (LAEA) violated their s. 2(b) Charter right to freedom of expression and their s. 15(1) equality rights. The amendments, enacted in 2004, required all school employees to resign or take a leave of absence if they ran for, and were elected as, trustees to municipal school boards.

The Alberta Court of Queen's Bench ruled in favour of the petitioners, holding that the legislation violated s. 2(b) and was not justified as a reasonable limit under s. 1 of the Charter. The Court of Appeal reversed the decision, and the Supreme Court upheld their ruling in an 8 to 1 decision; Justice Fish dissented while Justices LeBel, Bastarache, and Abella concurred with the majority's decision but for different reasons.

The majority of the Court held that the right to freedom of expression was not violated. The Court explained that there is no s. 2(b) right of access to "statutory platforms," such as the political platform provided to a school trustee under LAEA [2]. Only in exceptional cases will s. 2(b) impose a positive obligation on the government to protect or assist an expressive activity. To qualify as an exceptional case, the petitioner must satisfy the three criteria established in Dunmore v. Ontario [3]:

1. The claim must be grounded in fundamental Charter freedoms rather than in a claim to access a particular statutory regime.
2. The claimant must establish the exclusion from the regime that permits a substantial interference with the exercise of that freedom.
3. The state must be truly responsible for that interference.

The Court found that although the statutory right under LAEA to be a school trustee was an expressive activity protected by s. 2(b), the Dunmore criteria for establishing a positive right were not met [4]. The claim was grounded in access to the particular statutory regime of school trusteeship, which is not a fundamental Charter freedom, and the LAEA exclusion did not substantially interfere with the petitioner's freedom to express their opinions about the education system [5]. The Court suggested that school employees express their views by participating and making presentations at school board meetings, "lobby trustees, sit on school councils, write letters to newspapers, give media interviews, and write to MLAs and other public officials" [6].

Justices LeBel, Bastarche, and Abella dismissed the s. 2(b) claim entirely. In their view, s. 2(b) was not engaged because "the purpose of the claim in the instant case is to secure constitutional protection for a right to be elected to a management role in the local

education system of the province of Alberta, but this falls outside the scope of the Charter unless the equality rights of s. 15 are engaged" [7].

In his dissent, Justice Fish argued that s. 2(b) was violated and not justified under s. 1. Justice Fish placed importance on the fact that LAEA prohibited political participation on democratically-elected municipal boards, and that this prohibition appeared to be deliberate and was permanent [8]. He argued against the majority's narrow interpretation of Dunmore as well as their argument that school employees had other means of expression available. According to Justice Fish, school trusteeship was a "qualitatively different means of expression" from the majority's recommendations for expressing similar views. As a result, its prohibition met the Dunmore criterion of substantial interference.

The majority dismissed the petitioner's claim that LAEA violated s. 15(1) equality rights by discriminating against school employees as compared to municipal employees. The Court held that the occupational status of a school employee is not analogous to the enumerated grounds listed in s. 15(1) (that is, race, national or ethnic origin, colour, religion, sex, age or mental or physical disability). Because school employees were not discriminated against based on unchangeable, personal characteristics, the Court held that they were not protected by s. 15(1). Also central to the Court's decision was the fact that teachers are not historically a deprived or disadvantaged group.

Justice Fish did not comment on the s. 15(1) claim.

Cases

- Baier v. Alberta, 2007 SCC 31.
- Dunmore v. Ontario, [2001] 3 S.C.R. 1016.

Sources

- "Court upholds Alberta ban on teachers as trustees" (29 June 2007) CBC News, online: <http://www.cbc.ca/canada/story/2007/06/29/ab-teachers.html>.
- "Top court backs barring teachers from school boards" (30 June 2007) The Globe and Mail online:http://www.theglobeandmail.com/servlet/story/LAC.20070630.TEACH30/TPStory/National.

[1] Baier v. Alberta, 2007 SCC 31 [Baier].
[2] Ibid. at para. 37.
[3] Dunmore v. Ontario, [2001] 3 S.C.R. 1016 [Dunmore]..
[4] As explained at para. 55 in Baier, a positive right requires the government to legislate or otherwise act to support or enable an expressive activity, while a negative right involves the appellants seeking freedom from government legislation or action suppressing an activity in which people would otherwise be free to engage, without any need for any government

support or enablement.
[5] Baier, supra note 1 at 43.
[6] Ibid. at para. 47.
[7] Ibid. at para. 77.
[8] Ibid. at para. 95.