

Date: 20170626  
Docket: SC 16-01-30051  
Indexed as: River East Transcona School Division v. Ritcher  
Cited as: 2017 MBQB 122  
(Winnipeg Centre)

## **COURT OF QUEEN'S BENCH OF MANITOBA**

### **B E T W E E N:**

RIVER EAST TRANSCONA SCHOOL DIVISION,	)	Appearances:
	)	
- and -	)	claimant,
	)	Aaron W.K. Challis
	)	for the claimaint
	)	
WAYNE RITCHER,	)	The defendant, appearing
	)	on his own behalf
	)	
defendant.	)	
	)	JUDGMENT DELIVERED:
	)	June 26, 2017

### **DEWAR J.**

[1] In Manitoba, public education is governed primarily by *The Public Schools Act*, C.C.S.M., c. P250 ("the *PSA*"). That act places the delivery of education at the local level to school boards, which, pursuant to s. 3(1) are declared to be body corporates. The school board is a board of school trustees consisting of those who are elected by people in the district to serve in that capacity for a four-year term.

[2] In this case, the claimant is a school board, known as River East Transcona School Division (the "Board"). The defendant is a former trustee, having been elected for the first time in 1995 and who ceased to hold that position on October 5, 2015, when at a special meeting of the Board the trustees in attendance voted unanimously to declare the seat held by the defendant to be vacant. The ground upon which the Board made its declaration was that the defendant was no longer a resident within the school district served by the Board. Having declared the defendant's position on the Board to be vacant, the Board next brought this lawsuit under the *The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M., c. C285, seeking judgment for the remuneration that the defendant had received as a school trustee for the three months preceding his removal from the Board. The Board also claims damages for computer and computer-related equipment which had been furnished to the defendant to assist him in doing the work expected of him as a trustee.

[3] The defendant argues that he was a resident of the school district during those three months. He also argues that he provided his services as a trustee until the day that he was removed. He also has a number of complaints about the manner in which his removal was handled by the Board.

[4] This matter proceeded in the first instance before a Court of Queen's Bench judge because pursuant to s. 2.1(1) of *The Court of Queen's Bench Small Claims Practices Act*, a small claims court official ruled that in the interests of the

administration of justice, it was required to be heard by a judge. The matter was heard on June 6 and 7, 2017.

[5] The *PSA* requires that every candidate for school trustee who puts his/her name forward to the electorate must reside within the district serviced by the particular school division. It reads:

22(1) A person is qualified to be nominated for and elected as a trustee of a school board, if the person

- (a) is a Canadian citizen;
- (b) is of the full age of 18 years, or will be of the full age of 18 years at the date of the election;
- (c) is an actual resident in the school division or school district, and will have been so for a period of at least six months at the date of the election;** and
- (d) is not disqualified under any other provision of this Act or under any other Act, and is not otherwise by law prohibited, from being a trustee or from voting at elections in the school division or school district.

[emphasis added]

### **Claim for Return of Remuneration**

[6] The residency requirement is defined in the definition section of the *PSA* and is as follows:

**"resident"**, as used to refer to or describe a person living in a particular school division or school district, means a person who has his chief place of abode or dwelling in that school division or school district;

[7] Although there is no specific section in the *PSA* which requires a trustee to maintain a residence within the district after election, that requirement is the only reasonable inference to be drawn on a reading of the *PSA* because s. 39.8 mandates the Board to declare a vacancy when a non-residency occurs. It reads:

39.8 A school board of a school division or school district shall declare a seat vacant and, subject to section 26, order an election to fill that seat when the trustee elected to that seat

(a) is deceased; or

(b) has submitted a resignation in writing to the secretary-treasurer of the school division or school district; or

(c) has failed to attend three consecutive regular meetings of the school board without authorization of the school board by resolution recorded in the minutes; or

(d) has been disqualified from holding office under this Act; or

(e) **ceases to be a resident of the school division or school district.**

[emphasis added]

[8] Significant time was taken during the trial when the parties directed their evidence on the issue as to whether the defendant was or was not a resident of the school division during the relevant three-month period. There was conflicting evidence called by both sides. The Board contended that at least for the months of July, August and September 2015, the defendant was a resident of Kingsway Avenue in the River Heights district of Winnipeg. The defendant argued that during those months when he was in Winnipeg, his main residence was at the home of his nephew which was situated within the district serviced by the Board. The bulk of the balance of his time, indeed the bulk of his time for July and August, was spent at his family cottage outside Winnipeg.

[9] The Board claims that if the court accepts its contention that the defendant was a non-resident during July, August and September 2015, then it is entitled to claim a refund of the remuneration paid to the defendant for those months.

[10] School trustees are remunerated pursuant to s. 56(1) of the *PSA*, which reads:

56(1) A school board may, by by-law, provide for the payment of an annual indemnity to the chairman and to each trustee payable in such amount and at such times and under such conditions as provided in the by-law.

(b) such amount per hour as set by by-law of the school board for each hour actually and necessarily spent by him under authority previously given by resolution of the school board in the performance of such duties, work or services as he is required or authorized under the resolution to perform; and

(c) such an amount per mile, as set out by by-law of the school board, for each mile actually and necessarily travelled by him in the performance of the duties, work or services to which clause (b) applies; but the remuneration or mileage mentioned in clauses (b) and (c) is not payable until an account showing the work or service performed, verified by statutory declaration, has been filed with the secretary-treasurer and payment thereof authorized by resolution of the school board.

56(3) A school board may reimburse its trustees, trustees-elect or employees for expenses necessarily incurred while attending conventions or carrying out duties assigned or approved by the school board and at such rates and under such conditions as the school board may determine.

[11] A by-law of the Board, namely By-law No. 2002-06, sets the amount of a trustee's annual indemnity and requires that 1/12<sup>th</sup> of it be paid each month. Evidence was led that the practice employed by the Board was to pay the monthly share of the annual indemnity on the last day of each month. Hence, in this case, the defendant received the sum of \$1,607.98 for each of those three months representing his gross monthly indemnity, less deduction for income tax, plus a \$25 cell phone allowance. The total claimed under this category is \$4,823.94, and there was no dispute as to this quantum.

[12] Counsel for the Board argues that since the defendant was a non-resident during those months, he was disqualified from holding the position of school trustee during those months. Section 39.6(1) of the *PSA* reads as follows:

39.6(1) A trustee is disqualified from holding office if he or she  
**(a) violates any provision of this Act;** or  
(b) is convicted of  
(i) an offence punishable by imprisonment for five years or more, or  
(ii) an offence under section 122 (breach of trust by public officer), 124 (selling or purchasing office) or 125 (influencing or negotiating appointments or dealings in office) of the *Criminal Code* (Canada).

[emphasis added]

[13] Since a trustee must reside in the relevant district, the Board argues that as a non-resident, the defendant was disqualified from holding his position as trustee, and was therefore not entitled to receive any compensation. In short, the Board argues that the defendant knowingly received monies to which he was not entitled and, as a matter of law, is required to repay them.

[14] Counsel for the Board argued that had the Board known of the non-residency it would have not paid the indemnity to the defendant. He equates the situation to a payment made under a mistake of fact, in which case, under some circumstances the payor is entitled to recover from the payee the monies paid in error. Generally, however, a restitutionary remedy will not lie if the payee has a legal or equitable claim to the monies paid or has acted in a manner to his/her detriment upon receipt of the monies.

[15] In this case, there is no dispute that for those three months, the defendant carried out his responsibilities as a school trustee. Indeed, he was viewed by the Board as a school trustee as late as September when he

represented the Board at a ceremony marking an anniversary of a school within the district. He attended two meetings of the Board during the month of September 2015. On September 29, 2015, the Finance, Facilities and Transportation Committee recommended that the defendant be its Vice-Chair for the 2015-16 term, thus demonstrating that at least some trustees believed that the defendant was then carrying out his trustee duties. There is no evidence that the defendant shirked his responsibilities as a school trustee during the months of July, August and September 2015.

[16] Given that the defendant performed his duties during those relevant months, it is not open to the Board to claim repayment of monies which are in fact "earned monies" and which had been paid to him essentially for "services rendered" by him. The course for the Board to remedy a fact of non-residency was to declare the defendant's seat as vacant at a properly called Board meeting. Without determining whether the Board meeting was properly held, it did not occur until October 5, 2015. Once that declaration had been made, until it is successfully challenged, the Board should be viewed as justified in terminating the defendant's remuneration on a going-forward basis. It is not, however, justified in seeking repayment of earned monies.

[17] It was argued, in the alternative, that at the very least the defendant ought to be required to repay the monies directed to him for the months of July and August, since the bulk of his time during those months was spent at his cottage. There was no evidence led to suggest that this course was any

different than the prior years of the defendant's service as school trustee, nor that it was ever previously the subject of discussion amongst members of the Board. The fact is that there are no school board meetings during the summer, and in my view the defendant is not to be penalized because he took the opportunity to take a vacation. Had he remained a trustee beyond October 5, 2015, I have no doubt that his cottage residency would never have been an issue at the end of the year.

[18] I take some support for my conclusion that the declaration of a vacancy in October should not have retroactive effect on remuneration earned in July, August and September from s. 34 of the *PSA* which reads as follows:

34 No resolution, by-law, proceeding or action, of any school board shall be invalid or set aside by reason of any person whose election as a member thereof has been annulled or declared illegal under this Act or any other Act of the Legislature, or who is not qualified under this Act, as the case may be, having acted as a trustee and, where the seat of any trustee becomes vacant, the remaining trustees shall carry on the work of the school board until his successor is elected or appointed and takes office.

[19] If the participation of or contribution made by an ineligible trustee does not invalidate a school board decision (i.e. have retroactive effect), I fail to see why the defendant's entitlement to remuneration for such contribution or participation is retroactively lost.

[20] Furthermore, the *PSA* contemplates the continued recognition of a trustee even though he may be disqualified from acting in that position. Section 39.6 (1.1) reads as follows:

39.6(1.1) When a trustee is disqualified under subsection (1), his or her seat becomes vacant as of the day a declaration is made under subsection 39.7(6) or section 39.8.

[21] In other words, implicit in this section is the right of a trustee to participate in the work of a Board until his seat becomes vacant. If he is entitled to participate, and does participate, in my view, he is entitled to be remunerated for his participation, like every other trustee.

[22] In coming to my decision, I have also considered section 39.7(9) which reads:

39.7(9) Notwithstanding anything in this Act, where any person, whether the person is or was a trustee or not, has realized pecuniary gain in any transaction to which a violation of this Act relates, any person affected by the pecuniary gain, including any school division or school district, may apply to a court of competent jurisdiction for an order of restitution against the person who has realized the pecuniary gain.

[23] In my respectful opinion, that section does not apply to a situation in which a trustee has performed services in the normal execution of his duties and for which the *PSA* and the relevant by-law contemplates payment. Pecuniary gain does not include earned income.

[24] The claim by the Board for repayment of remuneration and expenses totaling \$4,823.94 is therefore dismissed.

### **Computer and Computer Equipment**

[25] What then of the claim by the Board for damages in respect of the computer equipment and printer provided to the defendant at the beginning of his last term as school trustee? The evidence before me was that the Board provided this computer equipment to each trustee at the commencement of their

term to assist them in fulfilling their duties as school trustees. The practice was that if the trustee served his or her full term, new equipment would be provided at the commencement of the next term, if re-elected. Whether re-elected or not, the trustee was entitled to retain the equipment that had been provided four years earlier. The difficulty in this case is that the defendant has not served his four-year term.

[26] Following the declaration of vacancy, the Board made a demand upon the defendant to return his computer and printer. The defendant testified that he did not because he felt that by so doing, he would be admitting that he was properly removed, something which he contends had been wrongful. In my view, so long as that declaration remained unchallenged (and this proceeding is not the place to challenge it), then the defendant is not entitled to retain equipment provided to him or her. I see no difference between this situation and the common situation in which an employer provides employees with computer equipment to assist the employee in performing his or her work. Although possession of the equipment is given to the employee, ownership of the equipment remains in the employer. Similarly, there is evidence before me that the Board purchased the equipment in its name, and there is no evidence that the Board ever transferred ownership in the equipment to the defendant. The defendant did not return the equipment upon the demand of the Board, and must therefore pay damages.

[27] The defendant indicated at the trial that he was quite prepared to return the equipment to the Board at this time. Rather than try and calculate an appropriate rental fee for the period in which the defendant has had possession of the equipment following the declaration of vacancy, the simpler approach is to assess damages against the defendant for the value of the equipment retained by the defendant.

[28] The question, however, is what is the proper assessment of those damages? The Board claims the sum of \$1,430.63 which was the amount paid by the Board to acquire the equipment. The proper damage award would be the actual cash value of that equipment at or around the date of demand. Computer equipment depreciates significantly. Little evidence was laid before the court to assist in the setting of actual cash value of the equipment in this case. The result is that I will take a somewhat arbitrary approach to the problem. Since the equipment was provided for a period of four years after which term the Board would not seek its return, a reasonable estimate of actual cash value after one year of use would be three-quarters of the initial cost. The Board claims \$1,430.63. I order the defendant to pay the Board three-quarters of that amount, namely \$1,072.97.

[29] Neither of the decisions which I have made requires a decision on whether the defendant in fact was or was not a resident within the district at the material times. I have refrained from addressing that issue because in my respectful view, the propriety of the Board declaration is better left to a formal

application for judicial review rather than being the subject of a collateral attack in a proceeding under *The Court of Queen's Bench Small Claims Practices Act*.

[30] Therefore, the Board is entitled to judgment against the defendant for \$1,072.97. Costs may be spoken to if required, although my approach to costs is as follows. There was mixed success in this case, and unless either party can demonstrate that they had made a better offer at least seven days prior to trial when compared to the result of this decision, each party should bear their own costs.

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J.