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September 24, 2012

The Honourable Justice
Arthur J. LeBlanc
Supreme Court of Nova Scotia
1815 Upper Water Street
Halifax, NS B3J 1S7

MY LORD:

Re.: Angela Jones v. Returning Officer for Halifax Regional Municipality & Chief Administrative Officer for Halifax Regional Municipality, Hfx. No. 406970

INTRODUCTION

This matter is scheduled to be heard before your lordship at 9:30am on October 2, 2012. The matter is proceeding on an emergency basis because it involves the present municipal election, for which advanced voting begins October 6, 2012. The matter came before the Honourable Justice C. Richard Coughlan on September 19, 2012 on a motion for directions, and was set down for the hearing, at which time his lordship also gave directions as to the filing of various documents and briefs. Please accept this correspondence as the applicant's brief for the hearing of the judicial review.

FACTS

The applicant, Angela Jones, also known as Angela Jones-Rieksts, is a candidate in the upcoming municipal election. The applicant is also a lawyer in the municipality's legal department. However, the applicant has been on parental leave since prior to the day she filed her nomination, and will remain on leave until after the election.

On the morning of September 11, 2012, the last day for filing nominations in the election, the applicant attended at the office of the returning officer to file her nomination. Concerned that the returning officer, who is the municipal clerk, might not accept the applicant's nomination on the basis of her parental leave solely, the applicant raised the issue with the returning officer. Her own position was that she did not need special leave because she was already on a leave of absence from her employment with the municipality. (How can one request a leave of absence from employment from which one is already on leave?) The returning officer agreed she was on a leave of absence and accepted the applicant's nomination, issued the applicant a receipt, added the applicant to the list of candidates and otherwise treated the applicant as a candidate in the ordinary course.[1]

So the applicant's nomination had been accepted by the returning officer on September 11, 2012.

On September 12, 2012, the returning officer called and emailed the applicant to advise that she also needed to request a leave of absence from the chief administrative officer, specifically for the purposes of the legislation. The email and the telephone conversation concerned the applicant's benefits while running as a candidate.[2] The applicant complied and on the same day made a written request from the chief administrative officer, for a leave of absence specifically pursuant to the *Municipal Elections Act*.[3] She emailed the returning officer as well, who had made the request and representations concerning benefits, and asked that the leave be made retroactive to the nomination day.[4] The chief administrative officer, however, purported to refuse the applicant's request for leave, stating that he had no authority to accept such a request after the nomination was submitted.[5]

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[1]Agreed Statement of Facts, ppara. 2-3; Returning Officer's Record, tabs 1, 5, 6, 8, & 15.

[2]Agreed Statement of Facts, para.8; Returning Officer's Record, tab 9.

[3]Returning Officer's Record, tab 10.

[4]Returning Officer's Record, tab 13.

[5]Chief Administrative Officer's Record, tab 1.

On September 13, 2012, the returning officer revisited her decision to accept the nomination which she had made on September 11, 2012. The returning officer determined that she had not had authority to accept the applicant's nomination, declared the applicant disqualified, and removed the applicant's name from the list of candidates.

ISSUES

The issues in this judicial review are:

1. Did the returning officer have jurisdiction to revisit her decision to accept the applicant's nomination? If the court finds that the returning officer lacked jurisdiction, then the court should set aside the decision.

2. If the returning officer did have jurisdiction to revisit her decision to accept the applicant's nomination:

    a. Is the standard of review for the returning officer's second decision one of reasonableness or correctness? and

    b. Was the returning officer's decision to reject the nomination reasonable or correct, as the case may be?

3. Did the chief administrative officer have jurisdiction to refuse the applicant's request for a leave of absence? If the court finds that the chief administrative officer lacked jurisdiction, then the court should set aside the decision.

4. If the chief administrative officer did have jurisdiction to refuse the applicant's request for a leave of absence:

    a. Is the standard of review for the chief administrative officer's decision one of reasonableness or correctness? and

b. Was the chief administrative officer's decision reasonable or correct, as the case may be?

LAW AND ARGUMENT

Issue 1: Did the returning officer have jurisdiction to revisit her decision to accept the applicant's nomination?

In *New Brunswick (Board of Management) v. Dunsmuir*,[6] the Supreme Court of Canada stated that certain types of questions would always attract particular standards. Among those questions that always attract a correctness standard are questions of jurisdiction:

> "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.[7]

"Candidate" is defined in the *Municipal Elections Act*:[8]

> In this Act, unless the context otherwise requires, ... (b) "candidate" ... (ii) after the close of nominations on nomination day means a person who has been nominated as a candidate;

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[6]2008, Doc. 31459 (S.C.C.), Applicant's Book of Authorities, tab 6.

[7]para.59.

[8]R.S.N.S. 1989, c.300, Applicant's Book of Authorities, tab 2 (the "Act").

Section 48 reads:

> (1) If the returning officer is satisfied that all requirements of this Act have been complied with, the returning officer shall sign the receipt on the nomination paper and transmit the deposit, if any, to the clerk and provide the candidate or his official agent with a copy of the final lists of all electors entitled to vote for the office for which the candidate has been nominated.
>
> (2) The signing of the receipt on the nomination paper by the returning officer shall be evidence that the candidate has been officially nominated.
>
> (3) A returning officer shall not reject a nomination paper after he has signed the receipt on the nomination paper.
>
> (4) Once signed by the returning officer, a nomination paper is open to inspection by the public, but shall not be photocopied or otherwise reproduced for members of the public.

The jurisdiction of a returning officer concerning nominations in municipal elections was considered in *MacKinnon v. MacEachern*.[9] The decision specifically references section 47 of the *Municipal Elections Act* as it read at the time. That section is reproduced at paragraph 9 of the decision, and it is identical to subsections 48(1) and (2) of the legislation as it exists today. The decision also references the definition of "candidate" at paragraph 11, which has not since been amended.

The court concluded that, the nomination having been accepted, the nominee became a candidate, and the court went on to refer to authority after authority to the effect that a returning officer did not have jurisdiction to reject a candidate's nomination once the

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[9]1980, Doc. C.B.D. 00238, (N.S. Co. Crt.), Applicant's Book of Authorities tab 4.

returning officer had accepted it.:

> In Rogers, *Law of Canadian Municipal Corporations*, (2nd edit. 1971 at p. 118 the learned author states:
>
> > It is within the power of the Returning Officer to reject invalid nomination papers but if the papers are regular and the person nominated appears to be legally qualified he is bound to accept them. If they are not drawn in accordance with the Statute, it may be the duty of the Returning Officer not to accept them and inform the meeting that the person nominated was not legally a candidate, but if they are accepted and acted upon at the meeting, it can not be subsequently rejected.[10]
>
> ...
>
> In support of the above propositions, the learned author relies on several authorities including the case entitled In re *St. Vital, Tod v. Mager*, (1912) 2 W.W.R. 185 (Man. C.A.). ... Richards, J.A. at p. 188 of the report stated as follows:
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> > When at the end of the hour of receiving nominations he announced that there were more candidates nominated than were required to fill the office of Reeve, and made known to the electors present the time and places when and where the polls would be opened for the taking of votes for the candidates nominated, he became *functus officio* so far as his duties at the meeting were concerned. He had no power thereafter to recall what he had done. ....[11]

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[10]Para.16.

[11]Para.17.

...

In *Re Village of Dawson Creek* (1954) 12 W.W.R. (N.S.) 558, Manson J. stated at p. 559:

> In my view of the law, McClellan was qualified to be a commissioner as holder and owner of an entirety in fee simple in the property mentioned in the material. Clauses in the by-laws which have not to do with procedure are invalid. There appears to be no provision in the statute empowering any one to reject a nomination paper which has been received on the ground that the person nominated is not the holder of proper property qualifications. I cannot add to the statute. ....[12]

...

Re *St. Vital Municipal Election* (1912) 2 W.W.R. 185 is a case where the returning officer, after nominations had closed, had received an objection to the qualifications of one candidate. He gave effect to the objection and declared the other candidate elected. The Court of Appeal said the returning officer had exceeded his authority. Howell, C.J.M. had this to say at p. 188:

> In this case there were two candidates nominated and the returning officer duly made the announcements required by Section 89. The next day and of course after the meeting was over, that officer, believing that one of the candidates was disqualified, declared the other one, the defendant, duly elected and the latter has taken the office and is acting as if elected.

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[12]Para.19.

> The action of the returning officer was clearly illegal, (*Re Mayor of Bangor*, 13 A.C.241). He had no power whatever, to decide this question and no power to arrest the election proceedings commenced by him. ....[13]

Purdue, J.A., in a separate judgment remarked at p. 189:

> The returning officer clearly acted beyond the scope of his authority in assuming to deal judicially with the question of Tod's alleged disqualification after he, the returning officer, had received Tod's nomination paper, and had made known to the electors where and when the poll would be held. It was not until the afternoon following the nomination that the returning officer pretended to reject Tod's nomination. *Pritchard v. The Mayor of Bangor*, 13 A.C. 241, is a clear authority against the power of the returning officer to do what he has pretended to have done.[14]

The court in *MacKinnon v. MacEachern* concluded that the returning officer in that case similarly had no jurisdiction to revisit the decision to accept the nomination once made.

It appears that, at some point following *MacKinnon v. MacEachern*, the Legislature saw fit to amend the Act to codify this principle:

> A returning officer shall not reject a nomination paper after he has signed the receipt on the nomination paper.[15]

So if there was any doubt left behind after the decision in *MacKinnon v. MacEachern* as to

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[13]Para.21.

[14]Para.22.

[15]Subs.48(3).

whether a returning officer in a municipal election has jurisdiction to reject a nomination once accepted, that doubt was removed by the Legislature with the enactment of subsection 48(3).

This interpretation of the limits of the returning officer's jurisdiction makes practical sense. If the returning officer had rejected the nomination in the first instance, then the applicant could simply have requested and obtained the special leave the returning officer was requiring, and resubmitted her nomination to the returning officer, in which case it would have been accepted. But in rejecting the nomination in the second instance too much time had passed and it was no longer open to the applicant to do this. Therefore, the returning officer's interpretation of the limits of her jurisdiction leads to a patently unjust result, whereas the applicant's interpretation leads to a just result.

Indeed, the returning officer's jurisdiction is limited to an even narrower scope in that the returning officer lacks jurisdiction to reject – in the first instance – a nomination which on its face is not deficient. I review excerpts from *MacKinnon v. MacEachern* which considered authorities to this effect in my analysis of the standard of review below. The nomination papers are not deficient on their face.

The oath discloses that the applicant was not disqualified as a candidate. It is in prescribed form[16] and it reads in part:

> I have (He/She has) read the sections of the *Municipal Elections Act* related to persons disqualified to vote, to be nominated or to serve on a council and none of the reasons for disqualification listed in those sections apply to me (him/her).[17]

The regime is thus that a nominee is required to swear that he or she has read the

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[16]Applicant's Book of Authorities, Tab 3.

[17]Returning Officer's Record, Tab 1, para.7.

disqualification provisions, and that they do not apply to him or her. The regime is not thus that the returning officer weighs the legal correctness of the statement – that is for the nominee to assure herself of to the extent that the nominee is prepared to swear to it. It was beyond the returning officer's jurisdiction to go behind the oath and question the applicant's statement.

So even if the returning officer had rejected the nomination in the first instance, that would also have exceeded the returning officer's jurisdiction.

That ought to end the inquiry. The returning officer had no jurisdiction to reject the applicant's nomination, certainly after having accepted it. The judicial review ought to be allowed on that basis alone and there should be no need for the court to analyze the substance of the returning officer's decision.

Issue 2(a): Is the standard of review for the returning officer's second decision one of reasonableness or correctness?

Alternatively, if the returning officer did have jurisdiction to reject the applicant's nomination once it had been accepted, then the applicant challenges the decision on its merits and the court must determine the standard of review.

The leading decision on standard of review is *New Brunswick (Board of Management) v. Dunsmuir*.[18] That decision rewrote the analysis for determining the standard of review. The standard must be either one of reasonableness or one of correctness. The analysis for choosing between these standards is summarized at paragraph 64:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the

[18]2008 Doc. 31459 (S.C.C.), Applicant's Book of Authorities, tab 6.

> presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

I shall review the application of this analysis to the facts of this case in accordance with the considerations as enumerated in this paragraph.

(1) privative clause.

There is no privative clause in the Act. This consideration weighs against deference and in favour of a standard of correctness.

(2) purpose of the tribunal.

The tribunal in this case is the returning officer. The purpose of the returning officer is set out in the Act. Part of the functions of the returning officer are set out in section 6:

> The returning officer shall
>
> (a) exercise general direction and supervision over the *administrative* conduct of all elections;
>
> (b) appoint such enumerators, revising officers, deputy returning officers, poll clerks and other election officers as may be necessary;
>
> (c) appoint substitute election officers to act in the stead of election officers who cannot act by reason of death, sickness, conflict of interest, resignation or other cause;

(d) fix such polling places as may be required for the various polling districts;

(e) instruct the election officers in the effective execution of their duties;

(f) require election officers to conduct themselves with fairness and impartiality and in compliance with this Act; and

(g) do all other acts required for holding elections in conformity with the provisions of this Act. [Emphasis added.]

The court added the same emphasis to the word, "administrative," in *MacKinnnon v. MacEachern* in reviewing section 4, as it then appeared in the Act.[19] The court went on to review further authorities:

> In Halsbury's *Laws of England*, 3d, Vol. 14 at p. 99, there is a statement of law which is worthy of note:
>
> **DECISION AS TO VALIDITY OF NOMINATION PAPERS.**
>
> The returning officer is entitled to hold a nomination paper invalid only on the ground that the particulars of the candidate or persons subscribing the paper are not as required by law or that the paper is not subscribed as so required. He cannot, however, decide any question which might be raised with respect to the disqualification of a candidate; but a nomination paper which is on the face of it a mere abuse of the rules of nomination or an obvious unreality (for example, if it purported to nominate a

[19]Applicant's Book of Authorities, Tab 4, para.12.

> deceased Sovereign) should be held invalid.
>
> At a parliamentary election the returning officer must give his decision on any objection to a nomination paper as soon as practicable after it is made. At a local government election the returning officer must examine the nomination papers as soon as practicable after the latest time for the delivery of nomination papers and decide whether the candidates have been validly nominated.[20]
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> ...

Wolfe v. Lafreniere (1920) 2 W.W.R. 560 is a case where the returning officer had accepted two nominations on nomination day which were in proper form. The returning officer, who was also secretary-treasurer of the municipality checked the tax rolls, found Wolfe in arrears of taxes and, as soon as the time for filing nomination papers expired, he disqualified Wolfe and declared the other candidate elected. Dickson, D.C.J. at p. 561 stated:

> The present case in my opinion comes within the meaning the principle there enunciated. While I am sure the returning officer believed that he was taking the proper course, he was nevertheless wrong. It was his duty since he received the two good nomination papers to have held the poll. The question as to whether or not a candidate is eligible is not for him to deal with. ....[21]
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> ...

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[20]Para.15.

[21]Para.18.

The following statement is contained in the judgement of Robertson J. in a reported case entitled "*In Re Provincial Election Act*, in *Re Hartley* (1934) 1 W.W.R. 108 at p. 115:

> I think the returning officer has to satisfy himself of the validity of the nomination papers pursuant to sec. 54 of the Act by an examination of the nomination papers themselves. There is not a great deal of time between nomination day and election day and the Act discloses that there are a great many things that have to be done, after nomination day, by way of preparation for the election, e.g. ballots have to be printed and forwarded to the various returning officers in outlying parts of the province and lists of the candidates nominated have to be sent to the said returning officers so that the absentee voters may exercise their rights. If the returning officer in two or three constituencies were to spend some time considering objections which involved something other than consideration of the nomination papers themselves and the taking of evidence, it might be that owing to the absence of witnesses or other causes the hearing could not be brought until it would be too late to comply with the provisions of the Election Act and this might have the effect of invalidating the whole election. It seems to me that the intention was that the returning officer should consider the nomination papers alone.[22]

The returning officer fulfils an administrative purpose within the context of the statute. Her role in accepting nominations is to examine the nomination papers submitted by the candidate and determine whether those papers comply with the statute. Her role is not to adjudicate the validity of the facts set out in the nomination papers, nor to substitute her own legal opinion for the candidate's oath as to her qualifications.

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[22]Para.20.

This weighs strongly against deference and in favour of a standard of correctness.

(3) nature of the question.

The questions before the returning officer were whether the candidate was required under section 17C of the Act to request leave from the chief administrative officer while she was already on parental leave and, if so, whether her having failed to do so disqualified the candidate under section 18. These are discrete questions, as is discussed below, and an affirmative answer to the first question does not necessarily lead to an affirmative answer to the second. The questions go to the nature of a person's relationship with an employer while on parental leave. That issue is not limited to the *Municipal Elections Act* and it stems to areas of employment law that must be considered by other bodies besides the returning officer, such as the Labour Standards Board and the Human Rights Commission.

The court writes at paragraph 60 in *Dunsmiur*:

> As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, Local 79, at para. 62, per LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, Local 79, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process — issues that are at the heart of the administration of justice (see para. 15, per Arbour J.).

The question in this case – whether a mother who is already on parental leave is bound by statutory requirements which compel a general class of individuals, of which the mother is a member, to apply for a leave of absence – is "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise," such as to "require

uniform and consistent answers." This weighs against deference and in favour of a standard of correctness.

(4) Expertise of the Tribunal.

The returning officer's expertise is administrative. As regards to accepting nominations, the returning officer is charged under subsection 48(1) of the Act:

> If the returning officer is satisfied that all requirements of this Act have been complied with, the returning officer shall sign the receipt on the nomination paper and transmit the deposit, if any, to the clerk and provide the candidate or his official agent with a copy of the final lists of all electors entitled to vote for the office for which the candidate has been nominated.

The "requirements of this Act" which the returning officer must assess when reviewing the nomination papers are set out in section 44:

> (1) A nomination shall be in writing in prescribed form or to the like effect.
>
> (2) A nomination shall be filed at the office of the returning officer between the hours of nine o'clock in the forenoon and five o'clock in the afternoon on the second Tuesday in September.
>
> (3) No nomination shall be valid or shall be accepted by the returning officer unless it has been completed and is signed by the candidate.
>
> (4) The returning officer shall not accept a nomination unless there is attached to the nomination paper a certificate in the prescribed form of the clerk, treasurer, collector or other official having

knowledge of the facts that the charges that are liens on the person's property due by the person to the municipality and the taxes due by the person to the municipality have been fully paid or all instalments or interim payments that are due as of nomination day have been paid.

(4A) Subsection (4) does not apply with respect to a candidate for election to a school board.

(5) The returning officer shall not accept the nomination of a person who he knows is not qualified under this Act to be elected.

(6) The returning officer shall not accept a nomination unless it contains the consent and oath of the candidate or his official agent in prescribed form.

(7) Where a deposit is required, the returning officer shall not accept a nomination unless it is accompanied by the deposit of

(a) legal tender of Canada;

(b) a certified cheque or demand drawn on a chartered bank, trust company or credit union and payable to the municipality; or

(c) a postal money order or chartered bank draft payable to the municipality.

(8) The nomination paper may contain an appointment by the candidate of his official agent.

(9) Notwithstanding subsection (2), a nomination may be filed by

> appointment with the returning officer during the five business days immediately preceding nomination day.

The returning officer surely has expertise to determine whether the nomination papers are in prescribed form, are filed on time, are signed by the candidate, and are accompanied by the tax certificate, the consent and oath, and the deposit. Those areas of expertise do not bear on whether the candidate's leave qualifies as leave under the Act, or whether the candidate is an employee who "holds or is engaged in the employment," pursuant to paragraph 18(1)(d), or who is contemplated under subsection 17C(2). Those are technical legal questions which the returning officer has no expertise to adjudicate.

The returning officer *is* prohibited under subsection 44(5) from accepting a nomination from a candidate whom she "knows" to be disqualified. If, for example, a member of the House of Commons, Senate or Legislative Assembly tendered nomination papers, the returning officer could be said to "know" that the candidate is disqualified under paragraph 18(1)(a) or (b).[23] Being a member of such a public office is a matter of some notoriety and little legal analysis is required.

On the other hand, it would be impossible for a returning officer to "know" whether a candidate "has been convicted of any corrupt practice or bribery" pursuant to paragraph 18(1)(f), unless perhaps the conviction was for the offence of "bribery" itself. Whether the conviction was for a "corrupt practice" is a question of law and not within the returning officer's field of expertise.[24] So a returning officer is compelled to accept the oath of a nominee who swears he has not been convicted of a corrupt practice. It is not for the returning officer to go behind the oath and determine that the nominee had been convicted of a corrupt practice, and thereby disqualify the nominee.

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[23]The excerpt from Halsbury's cited in *MacKinnon v. MacEachern* which I cite at pages 12 to 13 herein similarly provides the example of a deceased Soveriegn.

[24]"Corrupt practice" is defined at paragraph 2(1)(d) of the Act, and includes an act or omission which "is recognized as such by law." Applicant's Book of Authorities, tab 2.

The returning officer does not have special expertise to determine a nominee's qualification or the legal nature of the applicant's leave as it applies to the Act. This also weighs against deference and in favour of a standard of correctness.

In this case, all four factors from *Dunsmiur* weigh against deference and in favour of a finding that the standard of review in this case is one of correctness, not reasonableness. The standard of review in this case is therefore one of correctness.

Issue 2(b): Was the returning officer's decision to reject the nomination reasonable or correct, as the case may be?

The returning officer's decision to reject the nomination was both incorrect and unreasonable.

(1) Section 17C vs. Paragraph 18(1)(d)

The legislation in question started with a disqualification in what is now paragraph 18(1)(d):

> No person is qualified to be nominated or to serve as councillor who ...
> (d) accepts or holds office or employment in the service of the municipality, ... to which any salary, fee, wages, allowance, emolument, profit or other remuneration of any kind is attached, **for so long as he holds or is engaged in the office or employment** .... [Emphasis added.]

So the disqualification only applied to a municipal employee only for so long as the employee was "engaged" in such employment. The applicant would not have been disqualified under this provision.

I submit that in this phrase, "holds," applies to "office" whereas "is engaged in" applies to

"employment," as one does not "hold" employment whereas one does "hold" an office. But even if this is incorrect nothing in the word, "holds," adds anything to the phrase, "is engaged in," as those words apply to "employment." If one is not engaged in employment, then neither is one holding that employment.

A person who is on a parental leave of absence is not engaged in employment. The person does not attend at the place of employment, provides no services to the employer and has no obligation to report to the employer. The person is off work. One who is off work cannot be said to be engaged in one's employment.

So an employee of the municipality is not disqualified from running as a candidate if the employee is not engaged in the employment. The applicant was not engaged in her employment. Therefore, she did not come within paragraph 18(1)(d), and she was not disqualified.

In 2000,[25] the Act was amended to include Section 17C, and to amend paragraph 18(1)(d):

> Clause 18(1)(d) of Chapter 300 is amended by adding "unless the person is on a leave of absence granted pursuant to subsection 17C(2)" immediately after "employment" in the seventh line.

This amendment does nothing to change whether or not the applicant falls within the strict meaning of the disqualification in paragraph 18(1)(d). The applicant still does not fall within that meaning. This amendment simply allows employees who *do* fall within the disqualification to qualify themselves by submitting a special request for a leave of absence pursuant to the new subsection 17C(2).

Section 17C sets up a special regime to allow employees to obtain a leave of absence and run for office while on leave, while maintaining certain benefits and job security:

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[25]S.N.S. 2000, c.42, Part II, Applicant's Book of Authorities, tab 1.

(1) A person who is an employee of a municipality, other than the chief administrative officer, and who intends to become a candidate shall take a leave of absence beginning not later than the day the person becomes a candidate.

(2) A person who

(a) is required by subsection (1) to take a leave of absence; or

(b) intends to become a candidate and wishes a leave of absence beginning sooner than required by the required leave of absence,

shall apply for a leave of absence to the chief administrative officer of the municipality and the leave of absence shall be granted.

(3) Where the person withdraws as a candidate and, before the election, notifies the chief administrative officer of the municipality of the person's intention to return to work, the person may return to the position the person held immediately before the leave of absence commenced two weeks after the notice is given, or at such other time as is agreed to by the person and the chief administrative officer.

(4) A leave of absence granted to a person pursuant to subsection (2) terminates on the day the successful candidate in the election is declared elected unless, on or before the day immediately before ordinary polling day, the person notifies the chief administrative officer of the municipality that the person wishes the leave of absence to be extended for such number of days, not exceeding ninety, as the person states in the notice and in

such case the leave of absence terminates as stated in the notice.

(5) A person on a leave of absence granted pursuant to subsection (2) to be a candidate in an election and who is an unsuccessful candidate in the election may return to the position in the employment of the municipality that the person held immediately before the leave of absence commenced.

(6) The leave of absence of a person who is a successful candidate is extended from ordinary polling day of the election at which the person was elected until two weeks after the latest of

(a) the resignation of the person from council, if the resignation occurs before the next election;

(b) the date nominations close for the next election, where the person is not officially nominated as a candidate in the next election; or

(c) declaration day for the next election, if the person is not declared elected in the next election.

(7) Where the person is elected for the second time, the leave of absence granted to that person pursuant to subsection (2) terminates on the day the person is declared elected for the second time and the person ceases to be an employee of the municipality or to hold office for all purposes, including entitlement to all employee or office-related benefits.

(8) Notwithstanding Section 18 of the *Municipal Government Act*, a person who is not re-elected at the second election held during

> the leave of absence granted to that person pursuant to subsection (2) may, when the leave of absence expires pursuant to subsection (6), return to the position in the employment of the municipality that the person held immediately before the leave of absence commenced or, where that position has been filled or eliminated, to an equivalent position.
>
> (9) Where a leave of absence is granted pursuant to subsection (2), the person to whom the leave of absence is granted shall not be paid but the person, upon application to the chief administrative officer of the municipality at any time before the leave of absence commences, is entitled to pension credit for service as if the person were not on a leave of absence and to medical and health benefits, long-term disability coverage and life insurance coverage, or any one or more of them, if the person pays both that person's and the municipality's, utility's, board's, commission's, committee's or official's share of the cost.

The intention of the Legislature in creating this regime was to allow persons who would otherwise be disqualified, to take a leave of absence and run for office. The Legislature did not intend to expand the disqualification to include new individuals who did not already come within the disqualification in paragraph 18(1)(d).

This is especially compelling when considering mothers who are on parental leave from their employment, when one interprets the amendments consistently with *Charter* values. If the 2000 amendment were intended to subtract from a right from which a mother is benefitting by virtue of her being a mother, then the amendment was intended to be inconsistent with the value expressed in the guarantee of gender equality and non-discrimination afforded by the constitution. It is unreasonable to interpret the intention of the Legislature to have been inconsistent with that principle.

Subsection 17A(1) defines "employee" for the purposes of section 17C by reference to the

wording in paragraph 18(1)(d):

> A person **who accepts or holds office or employment** in the service of a municipality or any utility, board, commission, committee or official of the municipality is, for the purpose of Sections 17B and 17C, an employee of the municipality. [Emphasis added.]

This language lifts part of the language from paragraph 18(1)(d), "accepts or holds office or employment," but excludes other parts of the language from paragraph 18(1)(d): "to which any salary, fee, wages, allowance, emolument, profit or other remuneration of any kind is attached," and "for so long as he holds or is engaged in the office or employment." This demonstrates the Legislature's intention to impose the duty to make a request to the C.A.O. on all employees, whether or not they are receiving remuneration, and whether or not they are engaged in the employment. In this way, the legislature intended to impose the duty on a broader class of individuals than those who come within the more limited parameters of paragraph 18(1)(d). Thus a person may not be disqualified under paragraph 18(1)(d), but nevertheless may be impressed with a duty to make the request to the C.A.O. under subsection 17C(2).

So section 17C is a discrete regime which was intended to allow municipal employees to take leaves of absence and run for office, while maintaining certain benefits and enjoying job security. Section 18 is a wholly separate regime in which various individuals, including municipal employees who are engaged in their employment, are disqualified from running for office. So one cannot say simply that a failure to make a request to the chief administrative officer pursuant to subsection 17C(2) necessarily disqualifies the employee pursuant to paragraph 18(1)(d).

(2) Nature of Benefits

The benefits which the applicant receives during her parental leave[26] are no greater than those which an employee is entitled to under subsection 17C(9). The applicant would be entitled to employer contributions to her group insurance premiums, which is over and above the benefits described in subsection 17C(9), but in this case the applicant does not receive that benefit.[27] The applicant is also entitled to supplementation of her federal employment insurance benefits, but those ended for this candidate many months before the nomination. The applicant accumulates sick leave and vacation pay, but these are not addressed in subsection 17C(9), and they are not benefits which an employee receives until she returns to work.

The applicant is also entitled to pension contributions while on parental leave. During the leave, the employer pays both the employer's and employee's shares of these contributions, but the employee must repay the employee's share when she returns to work, or may prepay the employee's share before taking the leave. We submit that this is the same net benefit as is described in subsection 17C(9). We understand, however, that the respondent says that subsection 17C(9) requires the employee to pay both the employer's share and the employee's share of the pension contributions.

I parse the relevant provisions of subsection 17C(9) in the manner which we submit assists in the correct interpretation of the provisions:

> is entitled to pension credit for service as if the person were not on a leave of absence
>
> and to medical and health benefits, long-term disability coverage and life insurance coverage, or any one or more of them, if the person pays

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[26]Agreed Statement of Facts, schedule.

[27]Agreed Statement of Facts, para.5.

> both that person's and the municipality's...share of the cost.

I understand the municipality interprets the legislation as parsed as follows:

> is entitled to pension credit for service as if the person were not on a leave of absence and to medical and health benefits, long-term disability coverage and life insurance coverage, or any one or more of them,
>
> if the person pays both that person's and the municipality's...share of the cost.

So when the municipality interprets this legislation, they say that the employer's share of "the cost" which the employee has to pay includes the employer's pension contributions, not just insurance coverage contributions as we maintain, which means that the employee is not entitled to pension contributions from the employer while the employee is on leave pursuant to subsection 17C(2).

The municipality's interpretation is inconsistent with the plain language of the subsection, the scheme of the subsection as a whole, and the intention of the Legislature because it ignores the placement of the phrase, "as if the person were not on a leave of absence," before the phrase beginning, "and to medical and health benefits...." If the Legislature had intended to require the employee to pay both the employer's and employee's share of pension contributions, then it would not have included the phrase, "as if the person were not on a leave of absence." The inclusion of the phrase between the pension benefits and group insurance provisions demonstrates the Legislature's intention to treat pension contributions differently from group insurance premiums.

Otherwise there is an ambiguity which ought to be resolved in favour of the party against whom it is asserted, namely the employee.

It is important to note, however, that insofar as section 17C imposed a duty on the applicant

to request a leave of absence from the C.A.O., she complied with that duty. She requested the leave of absence on September 12.[28] She may have done so the day after her nomination but she even went so far as to request that the leave be made retroactive.[29] There is no language in section 17C which requires the candidate to make the request prior to the nomination day, such as is the case in section 18.[30] And there is no consequence if the request is made the very next day after nominations. Benefits may be – and we suggest *are routinely* – adjusted retroactively as a mere matter of administration.

The applicant has asked the court to overturn the decision of the returning officer and the decision of the chief administrative officer. If she is successful, then the chief administrative officer will be directed to accept the applicant's request for leave and subsection 17C(9) will apply. The applicant accepts that her benefits should be adjusted as of September 11, 2012, as she has always maintained.

(3) Subsections 17C(1) and 17C(2)

Consider the differences between subsections 17C(1) and (2) and an alternative argument presents itself. Both of these subsections create a duty. Subsection (1) requires the "employee" to "take" a leave of absence. If the employee is already on a leave of absence, then surely the employee is not required to take a leave of absence – the employee has already taken one. Subsection (2) creates a duty *to apply to the chief administrative officer* for a leave of absence, and imposes the only on those who are "required to take" a leave pursuant to subsection (1) and those who elect to take early leave.

All of the subsequent provisions referring back to leave under this section refer to subsection

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[28]Returning Officer's Record, tab 10.

[29]Returning Officer's Record, tab 13.

[30]Applicant's Book of Authorities, tab 2, subsection 18(1): "No person is qualified to be nominated...."

17C(2), not subsection 17C(1).[31] The legislation refers to two different classes. In subsection (1), the legislation includes in one class any individual who is an "employee of the municipality," which it defines in subsection 17A(1) by reference to language also found in the disqualification provision. Subsection (2) creates another class of individuals, who are *required to take* a leave of absence under subsection (1). So one might come within the class defined in subsection (1) but not within the class defined in subsection (2). The Legislature must have intended something by enacting the two subsections, and having certain consequences apply to one subsection but not the other.

The answer is that one could be an employee of the municipality under subsection (1), but not a person who is required by subsection (1) to *take* a leave of absence under subsection (2). The applicant is precisely what the Legislature contemplated in this distinction. She is an employee, but she is not engaged in her employment such as to disqualify her under paragraph 18(1)(d). She might otherwise have been required under subsection 17C(1) to *take* a leave of absence, but that would be absurd in her case because she was already on a leave of absence. Therefore the applicant may have come within the class defined in subsection 17C(1). However, she did not come within the class defined in subsection 17C(2) because she was not required by subsection (1) to take a leave of absence as she was already on one.

(4) Misrepresentation

Furthermore, the returning officer's decision to reject the applicant's nomination was unreasonable because the returning officer had already made a representation to the applicant that she was not disqualified as a candidate, which the applicant relied on to her detriment. The issue was raised with the returning officer. The returning officer told the applicant that she agreed she was on a leave of absence before accepting the nomination.[32] The applicant therefore did not apply to the chief administrative officer for special leave in advance of the

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[31]See Applicant's Book of Authorities, subsections 17C(4), (5), (7), (8) and (9), and paragraph 18(1)(d).

[32]Agreed Statement of Facts, para.3.

deadline, which she certainly would have had the returning officer not accepted her as being qualified on the nomination day.

In *Suttle v. Ettinger*,[33] the Court of Appeal cited the following from the decision of Carver J.'s:

> Mr. Suttle's nomination papers were proper on their face, except being signed. He took them to the Returning Officer on nomination day to sign them and have them sworn to by the Returning Officer. Under the circumstances, the Returning Officer should have asked Mr. Suttle to sign them, and then taken his oath. When a person so presents his nomination paper, what else would he or she expect if the papers were otherwise proper on their face? Likewise the Tax Certificate. She had a Tax Certificate showing his taxes were paid. She again should have asked him to sign, and should have taken his oath. **If she was rejecting them on the ground he had not signed them, she should have told him so, and permitted him to go elsewhere to have them completed. Returning officers, like any public official, have a duty to be helpful so long as it does not countenance their position.** Here, rather than drawing lines in the sand of her own creation, this whole matter could have been resolved by a call to the Municipal Elections Officer.[34] [Emphasis added.]

If the returning officer in this case were rejecting the nomination papers on the basis of a disqualification arising from the applicant's not having made a leave request to the chief administrative officer, the applicant reasonably expected that the returning officer would have told her so, in accordance with her duty, in which case she would have gone elsewhere and submitted the request to the C.A.O.. Or the returning officer could have called the

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[33]1995, Doc. C.A. 118186 (N.S.), Applicant's Book of Authorities, tab 5.

[34]Para.9.

municipal elections officer. Instead, the returning officer accepted the nomination, having expressly agreed with her that she was on a leave of absence after the applicant raised the issue with her.

The returning officer's not having advised the applicant that there was a problem with her nomination, not having given the applicant an opportunity to make the request for leave she eventually would require of her, nor having called the municipal elections officer to resolve the issue, amounts to a representation that the applicant was not disqualified. Any reasonable person would infer that from the circumstances. The returning officer made a further representation in expressing that she agreed she was on a leave of absence. The applicant relied on these representations and did not make a request for leave pursuant to subsection 17C(2). The deadline passed and so the applicant's reliance on the returning officer's representations became to the applicant's detriment. It is unreasonable for the returning officer to have interpreted the legislation to have disqualified the applicant when she had represented to the applicant's detrimental reliance that the applicant was not disqualified.

(5) Due Process

It was similarly unreasonable for the applicant to have made her decision to reject the nomination on the basis of disqualification without having afforded the applicant notice and an opportunity to respond. The applicant had no reason to think that the issue would be revisited after she tendered her nomination papers. The decision was communicated to the applicant and it was the first time the applicant heard that the decision was even being considered. It is unreasonable for the returning officer to have made that decision without first hearing from the applicant.

Issues 3, 4(a) and 4(b): Decision of the Chief Administrative Officer

On September 12, 2012, the applicant made a request to the chief administrative officer for

a leave of absence pursuant to subsection 17C(2).[35] This request did not come from the applicant's having reconsidered her responsibilities or having determined that there was a disqualification which she had to correct. Rather the applicant requested this leave because the returning officer had advised her that the Human Resources department needed the request in order to adjust the applicant's benefits.[36]

(This was a confusing request because there should have been no adjustments to make. The applicant is entitled to no greater benefits than what subsection 17(C)(9) would have entitled her to. The confusion is resolved when one considers the municipality's apparent interpretation of the effect of a subsection 17C(2) leave of absence on employer pension contributions pursuant to subsection 17C(9), which is discussed above.)

The chief administrative officer refused the request because:

> Pursuant to the legislation an HRM employee must be on a leave of absence prior to being nominated. There are no provisions in the Act which would allow me to grant retroactive leave.[37]

We maintain that this decision was incorrect and ought to be overturned. Much of the analysis of the issues concerning the chief administrative officer's decision is the same as the analysis concerning the returning officer's decision. I shall not duplicate the analysis.

The applicant made her request the day after nomination day. Nothing in the legislation sets a time limit on when the request may be made, and subsection 17C(2) closes with:

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[35]Returning Officer's Record, tab 10.

[36]Agreed statement of facts, para. 8; Returning Officer's Record, tab 9.

[37]Chief Administrative Officer's Record, tab 1.

> ...and the leave of absence shall be granted.[38]

The chief administrative officer is given no discretion in this decision, but rather is directed by the legislation to grant the leave of absence.

We say this is a question of jurisdiction and therefore the chief administrative officer is given no deference on review. If this is incorrect, then all of the *Dunsmiur* factors indicate a standard of correctness. There is no privative clause. The purpose of the chief administrative officer has nothing to do with assessing whether or not a candidate is qualified. A chief administrative officer is appointed under other legislation which has nothing to do with municipal elections. The officer has no special expertise to determine a question in the nature of whether a candidate is qualified to run in an election. The legislation simply directs that the leave of absence shall be granted and that is the extent of the chief administrative officer's role in the decision.

The chief administrative officer was incorrect in refusing the applicant's request for leave on each of the following grounds:

1. The officer was required by the legislation to grant the request.

2. The officer did not lack jurisdiction to grant the leave by virtue of the request having been made after nomination day.

3. The applicant was on a leave of absence prior to being nominated.

4. The applicant was not disqualified at the time she was nominated.

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[38]Applicant's Book of Authorities, tab 2.

RELIEF SOUGHT

It is submitted that the decision of the returning officer of September 13, 2012 be set aside, and that the returning officer be directed to reinstate the applicant on the list of candidates. It is submitted that the decision of the chief administrative officer be set aside, and that the chief administrative officer be directed to accept the applicant's application for leave pursuant to subsection 17C(2).

If successful, I would also like to be heard with respect to costs.

RESPECTFULLY SUBMITTED

Matthew J.D. Moir,
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