

# WHEN POLITICAL THEATRE BECOMES WORKPLACE DRAMA: POLITICAL SPEECH AND WORK

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## **Introduction**

Over the past several years there have been numerous examples of employees who face repercussions for making their political views heard within and outside the workplace. The COVID-19 pandemic brought an acceleration of cases where employees' opinions about an issue in the public square has brought the scrutiny of their employer. For example, the Ontario Superior Court of Justice recently considered a decision by the College of Nurses of Ontario to discipline two nurses for making unfounded comments on social media regarding the COVID-19 virus, mask mandates, vaccinations and other public health measures.<sup>[1]</sup> It is not hard to find situations where an employee's opinion about a topic has landed them in hot water.

However, employers must first consider the human rights implications of political speech before taking action. In many Canadian jurisdictions, human rights legislation provides a measure of protection from politically motivated sanctions against employees. At present, eight jurisdictions in Canada have incorporated 'political belief,' or some derivation thereof, as a prohibited ground of discrimination within their human rights legislation: British Columbia, Manitoba, Québec, Prince Edward Island, New Brunswick, Nova Scotia, Newfoundland and Labrador, and the Yukon.

This bulletin provides a summary of the current status of legislative protections for political belief across Canada, followed by an overview of the implications for employers.

## ***Jurisdictions with an Expansive Definition of Political Belief***

In British Columbia, Manitoba, Québec, and Newfoundland and Labrador, human rights legislation provides an expansive definition of workplace-based protections for employees with respect to their political beliefs. Although there is no explicit definition of 'political belief' in these jurisdictions' human rights legislation, their respective human rights regulators and tribunals have shaped the wide scope of protections.

**British Columbia:** British Columbia's definition of 'political belief' is the most developed of all jurisdictions. The British Columbia Human Rights Tribunal has summarized the following guiding principles to determine

whether a belief constitutes a *protected* political belief:

- Political belief should be determined on the facts and circumstances of each case;
- Political belief should be given a liberal definition, not confined to partisan political beliefs, yet with reasonable limitations;
- A political belief should have a factual foundation with a reasonable level of cogency and cohesion to ensure there is sufficient tangibility to the belief;
- A political belief should be genuinely held. It must not be a passing idea nor a position taken for convenience or advantage in the circumstances in which the conflict arises. It must be broader than an individual's own personal interests; and
- A political belief should be core to a person's concept of a system of social cooperation, reaching further, generally, than matters such as operational decisions that an employer or other entity may make.<sup>[2]</sup>

Based on these guiding principles, the British Columbia Human Rights Tribunal and the British Columbia Human Rights Commission have found that protections for political belief include support for political parties or groups that advocate for political change, beliefs about the organization and governance of communities, and advocacy for legislative changes. Although a belief about an employer's business or human resources decisions does not constitute a political belief, a belief in unionism or the right to organize may constitute a political belief depending on the circumstances.<sup>[3]</sup>

In the context of the COVID-19 pandemic, the British Columbia Human Rights Tribunal recently found that a genuinely held belief opposing government rules and restrictions regarding vaccinations could constitute a political belief. However, the Tribunal noted that protection from discrimination based on political belief does not exempt an employee from following provincial health orders or rules. Rather, it protects an employee from adverse impacts in their employment based on their beliefs.<sup>[4]</sup>

**Manitoba:** In Manitoba, there have been no reported decisions that provide guidance on the protected ground of political belief, political association or political activity. However, the province's Human Rights Commission has stated that it will interpret these protected grounds in a similar manner to British Columbia's human rights legislation.<sup>[5]</sup>

**Québec:** The protected ground of political convictions has been interpreted broadly by Québec's Human Rights Tribunal and includes beliefs regarding the organization and functioning of society, its goals and its nature.<sup>[6]</sup> This approach has also been confirmed by Québec's Commission des droits de la personne et des droits de la jeunesse.<sup>[7]</sup>

**Newfoundland and Labrador:** In Newfoundland and Labrador, the Human Rights Commission has confirmed

that protection for 'political opinion' extends beyond an individual's partisan political beliefs.<sup>[8]</sup> However, similar to Manitoba, there have been no reported cases to further delineate the scope of this protected ground.

### ***Jurisdictions with a Narrow or Underdeveloped Definition of Political Belief***

Prince Edward Island, New Brunswick, Nova Scotia, Northwest Territories, and the Yukon have more restricted definitions of 'political belief' with respect to workplace-based protections for employees.

**Prince Edward Island:** Prince Edward Island's *Human Rights Act* is the only human rights legislation in Canada to define 'political belief'. The definition is narrow and includes only "belief in the tenets of a political party that is at the relevant time registered under section 24 of the *Election Act*".<sup>[9]</sup> This belief must be evidenced by either membership of or contribution to that political party, or open and active participation in the affairs of that party.<sup>[10]</sup>

**New Brunswick:** The New Brunswick Court of Queen's Bench has similarly confirmed that the scope of political beliefs or activities is limited to an individual's affiliation or association with a political party.<sup>[11]</sup> This includes:

- membership to a political party;
- financial contribution to a political party;
- open or active participation in a political party;
- having a close association with a spouse who is politically active;
- running for office, or holding office at the municipal, provincial or federal level;
- working for a political candidate; or
- participating in a political protest or movement.<sup>[12]</sup>

**Nova Scotia:** Apart from decisions that confirm that "political belief, affiliation or activity" includes an employee's affiliation with a political party, there has been no case law or guidance from the Nova Scotia Human Rights Commission regarding the protection of political belief. Accordingly, it is likely that the scope of protection afforded is restrictive, similar to protections in Prince Edward Island and New Brunswick.

**Northwest Territories:** The Northwest Territories Human Rights Commission has elaborated that political belief and political association includes political beliefs associated with a formal political party, membership in a political party, political persuasions, and opinions on current political issues.<sup>[13]</sup> While it has been held that labour union involvement in workplace issues does not concern political belief, there is no case law to further delineate the limits of these protections.<sup>[14]</sup>

**Yukon:** In the Yukon, there has been no case law or guidance from the Yukon Human Rights Commission regarding the scope of protections for 'political belief'.

### ***Jurisdictions with No Protection for Political Belief***

Alberta, Ontario, Saskatchewan and Nunavut have yet to include political belief as a protected ground in their respective human rights laws. Although these jurisdictions do not provide for such protection, there has been some effort to extend other protected grounds to encompass some form of political belief.

For example, in Ontario, there have been at least two decisions where an employee has attempted to extend the protected ground of 'creed' to include a political belief.<sup>[15]</sup> So far, Courts in Ontario have remained unwilling to clearly recognize political belief under any protected ground, though there appears to be some possibility of advancement on this issue based on the Ontario Superior Court of Justice's decision in *Al-Dandachi v. SNC-Lavalin, Inc.*<sup>[16]</sup>

In *Al-Dandachi*, an employee was terminated two weeks after he made public comments with respect to the armed conflict in Syria on a live radio interview. The employee sued his employer for wrongful dismissal and claimed damages for breach of the *Code* based on the protected ground of creed. Although the Court refused to make a finding at the pleadings stage that the employee was terminated based on his creed, it denied the employer's motion to dismiss. Notably, the Court indicated that it is possible for a system of political belief to constitute a creed, thus leaving the door open for the protected ground of creed to encompass political opinion in the future. The case did not proceed to trial – it presumably settled.

### ***Implications for Employers***

While everyone is entitled to their political opinions, employers are responsible for maintaining a workplace free from discrimination and harassment. When employees express political beliefs in a manner that threatens the peace and functioning of the workplace environment, employers will need to step in. It is not difficult to anticipate that issues may arise between employees holding opposing political beliefs or beliefs that conflict with other human rights, particularly in the current political climate where social and human rights issues have become highly political. Employers will need to know when it is appropriate to discipline employees for voicing beliefs that are contrary to human rights or harassment protections, and when employees are allowed to express their (oftentimes-unpopular) opinions.

To effectively navigate these matters, employers should adopt harassment and discrimination policies that clearly communicate what constitutes inappropriate workplace conduct. Furthermore, the continuing growth of social media has dragged off-duty activities and expressions of political belief into the workplace. Properly drafted social media policies and codes of conduct are therefore essential for employers looking to discipline employees for their off-duty conduct or social media activities, when such conduct negatively affects the workplace or the employer. Employers who allow employees to use company-decaled vehicles for personal use should also review their vehicle policies to ensure it is clear that employees will be disciplined for participating

in political demonstrations with their company vehicle. It is critical that employers review these policies and procedures to ensure compliance with the latest developments on the protection of political belief in the workplace.

Employers must be prepared to handle these situations while ensuring that they are respecting human rights in the process. The correct approach will require a fact-specific analysis, which is complicated by the varying levels of protection afforded to political belief across Canada. It's a minefield, both politically and legally, and employers should seek legal advice before jumping to an assumption that an employee's action is protected by political belief (or conversely, not protected).

Please reach out to the lawyers at McMillan for guidance in navigating these multifaceted issues.

[1] *Pitter v. College of Nurses of Ontario* and *Alviano v. College of Nurses of Ontario*, 2022 ONSC 5513.

[2] *Pozsar v. City of Maple Ridge*, 2018 BCHRT 107 at [para 34](#).

[3] *Crosxall v. West Fraser Timber*, 2009 BCHRT 436 at [para 22](#).

[4] *Complainant obo Class of Persons v. John Horgan*, 2021 BCHRT 120 at [para 11](#).

[5] Manitoba Human Rights Commission Policy #1-5.

[6] *Rondeau c. Union of Employees of the Social Services Center of Metropolitan Montreal*, [\[1996\] 25 CHRR 495 \(QC TDP\)](#).

[7] See Commission des droits de la personne et des droits de la jeunesse's [video](#) on political convictions.

[8] See Human Rights Commission of Newfoundland and Labrador [website](#).

[9] *Human Rights Act*, SPEI 2002, c H-12 at [s.1\(1\)\(m\)](#).

[10] *Human Rights Act*, SPEI 2002, c H-12 at [s.1\(1\)\(m\)](#); *Reference re Human Rights Act (P.E.I.)*, [1998] 50 D.L.R. (4th) 647 at [para 9](#).

[11] *Doucet v. CEP*, [2015 NBQB 218](#).

[12] *Doucet v. CEP*, 2015 NBQB 218 at [para 57](#).

[13] See Northwest Territories Human Rights Commission [website](#).

[14] *Battaglia v. The Hay River Health and Social Services Authority*, 2013 CanLII 82657 (NT HRAP) at [para 73](#).

[15] *Jazairi v. Ontario (Human Rights Commission)*, [\[1999\] OJ No 2474 \(ONCA\)](#); *Al-Dandachi v. SNC-Lavalin Inc.*, [2012 ONSC 6534](#).

[16] *Al-Dandachi v. SNC-Lavalin Inc.*, [2012 ONSC 6534](#).

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

The logo for mcmillan, featuring the word "mcmillan" in a lowercase, sans-serif font. The "m" and "c" are in a dark red color, while the "m", "i", "l", "l", "a", and "n" are in a light blue color. The logo is positioned in the top left corner of a banner image that shows a low-angle view of a modern glass skyscraper against a clear sky.

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