Commission Scolaire Francophone, Territoires du Nord-Ouest et al. v. *Attorney General of the Northwest Territories, (No.2),* 2008 NWTSC 65

Date: 2008 08 21
Docket: S-0001-CV-2008000133

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

COMMISSION SCOLAIRE FRANCOPHONE, TERRITOIRES DU NORD-OUEST, CATHERINE BOULANGER and CHRISTIAN GIRARD

Plaintiffs

- and -

ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES and COMMISSIONER OF THE NORTHWEST TERRITORIES

Defendants

This document is an unofficial English translation of the Reasons of Judgment of the Honourable Justice L.A. Charbonneau dated August 21, 2008. This document is placed on the Court file for information only.

REASONS FOR JUDGMENT
(APPLICATION TO STAY A DIRECTION OF THE MINISTER)

1. In this application, the Plaintiffs seek leave to amend the Statement of Claim that they filed in this action. They are also asking the Court to make an order suspending a directive of the Minister of Education of the Northwest Territories concerning the enrolment of students in the French first language educational program.

A) BACKGROUND

2. The Plaintiffs commenced proceedings against the Defendants on May 29, 2008. They rely on section 23 of the *Canadian Charter of Rights and Freedoms* in seeking certain remedies. The proceedings concern the scope of individual rights protected by section 23 (the right of certain parents to have their children educated in French) and the scope of the collective rights protected by that same provision (the right of the Commission scolaire francophone des Territoires du Nord-Ouest to manage the schools under its authority).

3. A first interlocutory application was made by the Plaintiffs and was heard by the Court on July 9, 2008. That application sought to require the Defendants to implement interim measures to mitigate issues of space and access to certain services at Hay River's École Boréale. In reasons reported in *Commission Scolaire Francophone, Territoires du Nord-Ouest et al* v. *Attorney General of the Northwest Territories*, 2008 NWTSC 53 [unofficial English translation], I allowed the application.

4. The present application stems from a decision of the Minister of Education to issue a directive setting out eligibility conditions for children in the two schools under the authority of the Commission scolaire francophone, Territoires du Nord-Ouest. The direction was issued on July 7, 2008.

5. The directive reads as follows:

> [TRANSLATION]
> (1) Except for the provisions set out in paragraph (2), no new student may be enrolled in a French first language educational program unless the Commission scolaire francophone des Territoires du Nord-Ouest (Commission scolaire) has confirmed that the student is eligible for this program, as per section 23 of the *Canadian Charter of Rights and Freedoms*.
>
> For greater clarity, a new student may be enrolled in a French first language educational program only if he or she is
>
> (a) of Francophone origin but unable to provide evidence in support of his of her eligibility for French first language education, as per section 23 of the *Canadian Charter of Rights and Freedoms*; or
>
> (b) not a Canadian citizen.
>
> (2) The Minister may approve enrolment of a student in the educational program if that student is not eligible for that program under section 23 of the *Canadian Charter of Rights and Freedoms.*

(3) The Commission scolaire must confirm the eligibility of each new student to enrol in a French first language educational program, document its eligibility confirmation procedures and preserve the documents provided by the student's parent or guardian to prove such eligibility. The Department of Education, Culture and Employment must be provided with information on student eligibility upon request, within a reasonable time.

(4) The Commission scolaire must provide the Department of Education, Culture and Employment with a written copy of the procedure used to confirm student eligibility for enrolment in a French first language educational program.

6. Paragraph 7(1)(*u*) of *Commission Scolaire Francophone, Territoires du Nord-ouest Regulations*, R-071-2000, states that the Commission scolaire must follow directives issued by the Minister.

7. The Commission scolaire adopted an admission policy in 2002. That policy is in evidence, as an exhibit to André Légaré's affidavit dated May 28, 2008. Submissions about the terms of that policy and how it has been applied at École Boréale were made during the application for an interlocutory injunction.

8. With respect to admission criteria, the Commission scolaire's policy provides that:

[TRANSLATION]
Any student who meets the following access criteria and who resides in the territory under its jurisdiction is entitled to enrol in French-language programs provided by the CSFD, without cultural limitation.

> Any child of right-holders, as defined in section 23 of the *Canadian Charter of Rights and Freedoms*
>
> Children of Francophone descent to the third generation (upon a sworn or notarized statement)
>
> Children of immigrant permanent residents who fluently speak and understand French

Furthermore, to meet the specific needs of Francophone communities outside Yellowknife:

> The children of non-right-holders who attend and complete a francization program at the preschool level will be eligible for the kindergarten program and subsequently the full education program offered by the Commission

> To ensure that children enrolled in a Francophone school develop a Francophone identity, the number of students of non-right-holders of that category may not exceed 20% of the school's student body.

9. The directive of the Minister is more restrictive than the Commission scolaire's policy, because it limits access to the French-language educational program to children of right-holders under section 23.

10. The Plaintiffs argue that section 23 confers upon minority school boards the absolute right to manage their educational institutions, and that this includes the right to define program admission criteria. They contend that the directive of the Minister constitutes a violation of that management right. They therefore wish to add their challenge of the directive of the Minister to the other issues that they have already raised in their proceedings. They are also asking for the directive to be suspended until a decision is made on the merits and until all grounds of appeal have been exhausted.

11. It should be noted that the Plaintiffs seek, among other things, to force the government to expand the building of École Boréale. They argue that the existing infrastructure no longer meets the school's needs because of the increase in its student population and because of existing requirements at the secondary level.

12. The Defendants do not concede that there is a space issue at École Boréale, but contend that, if indeed there is one, it is due to poor enrolment management by the Commission scolaire. They state that the policy of admitting children of non-right-holders is overly broad and not strictly applied; consequently, too many children of non-right-holders have been admitted to École Boréale over the past few years. The Defendants argue that the Minister has not only the power, but the duty, to intervene so as to ensure that École Boréale is henceforth used for its primary function and that the money spent by the government to meet its constitutional obligations is used to meet the needs of right-holders. They state that the directive is a legal and appropriate exercise of the Minister's powers under the *Education Act.*

13. The Defendants also object to the Plaintiffs' application to amend their Statement of Claim. The Defendants contend that the validity of the directive of the Minister is separate from the other issues raised in that proceeding. They submit that if the Plaintiffs want to challenge the directive, they should do so in a separate proceeding.

B) ANALYSIS

I) INTERLOCUTORY INJUNCTION

14. In *Commission Scolaire Francophone, Territoires du Nord-Ouest et al.* v. *Attorney General of the Northwest Territories, supra*, at paragraphs 9 to 12, I outlined the legal principles that apply to an application for interlocutory injunction. Those same principles apply in this case. To succeed here, the Plaintiffs must establish that there is a serious issue to be tried,

that they would suffer irreparable harm if the application were not allowed, and that the balance of convenience is in their favour: *R.J.R. MacDonald v. Canada (Attorney General)* [1994] 1 S.C.R. 311; *Manitoba (Attorney General)* v. *Metropolitan Stores Ltd.* [1987] 1 S.C.R. 110.

1. Serious issue to be tried

15. In *Commission Scolaire Francophone, Territoires du Nord-Ouest et al* v. *Attorney General of the Northwest Territories, supra,* I concluded that the Plaintiffs' proceeding would raise a certain number of serious issues to be tried, including the degree of autonomy of a minority school board, the scope of such a school board's right to manage its schools under section 23, and the government's power of oversight regarding certain aspects of this management right:

> [TRANSLATION]
> One of the points disputed in this matter is a minority language school board's level of autonomy once it has been created. The Plaintiffs argue that the management right guaranteed by section 23 should be interpreted as one that gives a school board great flexibility with regard to not only admission policies but also decisions on program delivery. According to the Plaintiffs, this includes absolute control over admission policies and the power to make other decisions related to École Boréale's broader vocation as a school community centre. They state that this includes, for example, the right to decide to offer preschool or daycare services so as to contribute to francization and the increased presence of the minority language, in compliance with the remedial purpose of section 23.
>
> The Defendants state that the Commission scolaire was responsible for controlling enrolments to ensure that the school could continue fulfilling its primary mission, namely, meeting right-holders' needs. They state that if the school failed in this responsibility, it cannot now demand that the government commit other public funds to solve a space problem of its own creation and continue to aggravate the problem by sticking to its admission policy. They submit that the government has not only the right but also the duty to intervene, for example, by issuing directions on enrolments, if this is what is necessary to ensure that the school can continue to meet the needs of right-holders.
>
> *Solski* and *H.N.* recognize that governments have some control over certain aspects of minority school management. In both cases, the courts overruled legislative provisions that regulated the right to enrol in English-language minority schools. But they did not do

> so because the government had no control; they did so because the restrictions the government had introduced contravened section 23.
>
> These decisions therefore confirm that the government has some control, but also stipulate clearly that this control cannot be used as a means to limit or reduce a right guaranteed by section 23. One of the questions on the merits of the case is to what extent the government can use its control to limit the growth of a minority school by limiting the infrastructure available for that school. The delineation of the boundary between the Commission scolaire's management right and the government's powers will be determinative. This is a serious issue to be tried.
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> *Commission Scolaire Francophone, Territoires du Nord-Ouest et al*. v. *Attorney General of the Northwest Territories*, 2008 NWTSC 53, at paragraphs 48-51.

16. The Defendants submit that the only issue this application raises is that of determining whether the government is entitled to restrict access to minority schools solely to the children of right-holders. They argue that the Supreme Court of Canada previously decided this question in *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201 and *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238. For this reason, they claim that the application does not raise any serious issue to be tried.

17. The Defendants acknowledge that section 23 should be interpreted contextually. They also acknowledge that the Supreme Court of Canada has taken the Province of Quebec's specific linguistic context into account in its decisions on this issue. They recognize, moreover, that the environment of the Northwest Territories' Francophone minority community cannot be compared with that of Quebec's Anglophone minority. The Defendants claim, however, that those different contexts must not result in a management right with different scopes in different regions of Canada. In other words, if the Supreme Court of Canada has recognized that section 23 of the *Charter* does not prevent the Government of Quebec from setting conditions for admission to its English-language educational programs, then the Government of the Northwest Territories must also have the same right to set conditions for admission to its French-language educational programs. Since the direction of the Minister confers the right to be admitted to the program to all children of right-holders under section 23, there is no basis for concluding that the direction contravenes that same section.

18. The Plaintiffs state, to the contrary, that the different contexts are crucial in analyzing the scope of their management right. They maintain that control over admission criteria is a very important part of the right that section 23 confers upon them in the specific context of Hay River's Francophone community. In this context, they argue, it is essential that section 23's remedial objectives be met so that the Commission scolaire will have the authority to provide non-right-holders with access to its program and thereby repair past wrongs and reverse the effects of assimilation.

19. In my view, the case law has established that neither the right of a minority school board to manage its schools nor the government's power of oversight is absolute. In my opinion, the question of the Commission scolaire's management right versus the government's power of oversight arises in a context that is fundamentally different from those of cases in which the government's right to set standards of admission was considered. The management right under section 23 is not stipulated in its text; it is a right that the courts have recognized in interpreting that provision. I do not think it would necessarily be out of the question for a court to conclude that the scope of this right might vary from place to place, depending on the context.

20. The Plaintiffs do not have to establish that they will necessarily succeed. They only have to demonstrate the existence of a serious issue to be tried. In my view, the question that the application raises is a serious issue to be tried. The first test for obtaining an interlocutory injunction has been met.

2. Irreparable harm

21. Because the directive of the Minister considerably restricts criteria for admission to Northwest Territories schools that offer French first language instruction, the Plaintiffs assert that application of this directive would cause them irreparable harm. They argue that this harm would take two forms. First, the Commission scolaire would lose an important aspect of its right to manage its schools, and the remedial aspects of its admissions policy would be hindered. Second, parents who are not right-holders under section 23 would suffer direct harm in not having access to the French educational program because of the direction.

22. With respect to the first aspect of harm alleged, the Plaintiffs assert that the Commission scolaire's admission policy seeks to remedy past wrongs by reversing the consequences of the French community's assimilation at a time when no French first language educational program was available. They claim that students who will be excluded from the program because of the directive will, in some cases, lose access to the program offered at École Boréale, even if the Plaintiffs ultimately succeed in their action and the directive of the Minister is quashed. The Plaintiffs argue that this constitutes an irreparable harm because it could be up to five years because all appeal processes are exhausted in this matter. They argue that during that period of time, a very large number of prospective students will be excluded from the program, never to return.

23. In my view, the problem with that argument is that it is highly speculative. To begin with, it is speculative to say that if the directive is not immediately suspended, it will affect school enrolments for a five-year period. If the Plaintiffs succeed at trial in having the directive quashed, it is far from certain that this decision will be stayed if the case is appealed.

24. There is no concrete evidence to support the submission that all non-right-holder parents whose children must study elsewhere while this directive is in effect will never subsequently decide to send their children to École Boréale should that option be restored.

25. The Plaintiffs assert that the directive, and the extent to which it interferes with a school board's right to manage its schools, will have a national impact. No evidence has been adduced to support this assertion.

26. The Plaintiffs argue that the directive will serve to stunt the growth of the student body at École Boréale, which will in turn have an impact on the school's future expansion and essentially decide the outcome of the lawsuit. I do not agree. The Plaintiffs will be permitted during the proceedings to calculate the percentage of students who were admitted under the admission policy even though they were not children of right-holders, and thereby demonstrate the school's growth rate while the Commission scolaire's policy was in effect. They will be able to present evidence of projected future growth if the Commission scolaire's admissions policy is restored. For this reason, I do not think it is accurate to say that the application of the directive of the Minister will determine the outcome of this case.

27. The Plaintiffs also maintain that the directive has generated great uncertainty in the community with respect to École Boréale's future, and that such uncertainty could also have an adverse effect on its growth and on the use that non-right-holders make of its francization program, among other things. I have no doubt that such uncertainty exists, but it has not been established that it results from the directive. The situation as a whole creates uncertainty and tension in the community. The uncertainty will not disappear if application of the directive is suspended. That decision could be appealed. Even if it the directive is suspended at the interlocutory stage, it may be declared valid at the end of the trial, which would at that moment create the same kind of dilemma for parents who are reviewing their options in selecting their children's educational paths. Any litigation of this magnitude generates uncertainty. In and of itself, such uncertainty does not constitute irreparable harm.

28. The Plaintiffs also point to the harm that will be sustained by non-right-holder parents who would be prevented by the direction from having their children taught in French. I do not agree. The "irreparable harm" that must be established in this context is the harm sustained by the party that invokes it. The Commission scolaire cannot rely on the harm to individuals who are not right-holders and who might seek access to the French educational program.

29. Furthermore, these parents are not without remedies. The directive of the Minister sets out a procedure for obtaining the admission of children who are not children of right-holders. Parents who are not right-holders and wish to enrol their child at École Boréale can apply to the Minister for that purpose. If the decision is unfavourable, those parents can take steps to contest it.

30. I am well aware of and recognize the comments of the Supreme Court of Canada in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, regarding the vulnerability of minority communities to governmental procrastination in a context like this one, where the scope of rights partly depends on the number of people capable of exercising them. I am also well aware of the fact that this judgment was applied at the interlocutory stage in *Association des parents ayants droits de Yellowknife c. Territoires du*

Nord-Ouest (Procureur Général) 2005 NWTSC 58, at paragraph 18. However, the evidence in that case suggested that the school was losing its students because of a lack of services, once these students reached the secondary level. The very survival of the school's secondary program was threatened.

31. The evidence in this case demonstrates that École Boréale is a rapidly growing, vibrant and highly popular educational institution. In light of that evidence, I do not believe that the irreparable harm test has been met. In view of that conclusion, there is no need to consider the third test for obtaining an interlocutory injunction.

3. Impact of the direction of the Minister on the 2008–2009 school year

32. I would like to add a comment regarding the impact of the directive of the Minister on the very quickly approaching start of the 2008–2009 school year. Mr. Légaré's affidavit sets out information received from the school principal regarding students already enrolled in the school who will be denied access to it because of the directive. At Paragraph 4 of his affidavit, Mr. Légaré states:

> [TRANSLATION]
> I was advised by Sophie Call, principal of the École Boréale in Hay River, and I believe her information to be true, that because of the direction of the Minister, it will be necessary to deny admission to at least four students who have already been accepted to École Boréale's kindergarten for the new 2008–2009 school year. I have been advised by the principal of the École Boréale that 12 to 15 students will start kindergarten in September, 12 of whom are already enrolled. Because of the direction of the Minister, the CSFTNO will be obliged to advise the parents of those four students to find other schools for their children prior to the start of school on September 2, 2008.

33. Paul Devitt, who works for the Department of Education, states at paragraph 13 of his affidavit dated August 15, 2008, that a student is not enrolled until the first day of classes:

> Despite what is stated by Mr. Légaré in his Affidavit, none of these students is enrolled until the first day of school in September, and only after a parent has presented evidence of a s. 23 right.

34. The directive of the Minister, which I cited at paragraph 5 above, stipulates that [TRANSLATION] "no new student may be enrolled" unless he or she meets the criteria that are set out in it. The directive does not define what constitutes enrolment.

35. I have no evidence pertaining to École Boréale's enrolment process. But parents generally do not decide where to enrol their children two weeks before school starts. The process begins

much earlier than that. The term [TRANSLATION] “enrolled” thus conveys a certain degree of ambiguity and leaves room for interpretation.

36. The Defendants say that interpretation of the directive, and of what is meant by the term [TRANSLATION] “enrolled”, is not a question raised by this application and that I therefore do not have to decide it. Strictly speaking, this is true. The application is about the suspension of the directive, not its interpretation. It is, however, difficult for me to completely ignore this question, because it arises on the evidence and the parties’ submissions. On the one hand, the Defendants say that the directive is not intended to have a retroactive effect. On the other hand, Mr. Devitt seems to be saying that a child of non-right-holders who is eligible for admission under the Commission scolaire’s policy and whose parents have taken all of the steps to send him or her to École Boréale in 2008–2009 and have been told that he or she would be admitted, is no longer eligible because that child is not [TRANSLATION] “enrolled”. At first blush, it seems to me that this interpretation amounts to giving the directive a retroactive effect.

II) AMENDMENT OF THE STATEMENT OF CLAIM

37. With respect to the application to amend the Plaintiffs’ Statement of Claim, in my view, it should be granted. One of the positions that will be put forward by the Defendants is that the government is not responsible for providing the children of non-right-holders with a French language educational program. The Commission scolaire will maintain that its right to manage its schools comprises the right to take remedial measures, including the admission of children of non-right-holders, even if that has a budgetary impact on the government. The government’s power of oversight over admissions criteria is one of the questions at the heart of that debate. It seems to me, therefore, that the government’s power to issue this directive is closely linked to other issues raised in those proceedings.

C) DISPOSITION

38. For these reasons,

1. The Plaintiffs’ application for an order suspending the directive of the Minister dated July 7, 2008, is dismissed.

2. The Plaintiffs are authorized to file their amended Statement of Claim.

D) COSTS

39. The parties wish to make submissions on the matter of costs and wish to do so in writing. For that purpose:

1. The Plaintiffs' written brief must be filed with the court clerk and served upon the Defendants by September 5, 2008.

2. The Defendants' written brief must be filed with the court clerk and served upon the Plaintiffs by September 19.

/signed/
L.A. Charbonneau,
J.S.C.

Dated at Yellowknife, NT,
this 21st day of August 2008

Counsel for the Plaintiffs: Roger Lepage
Counsel for the Defendants: Maxime Faille

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