Commission Scolaire Francophone, Territoires du Nord-Ouest et al v. Attorney General of the Northwest Territoires, 2008 NWTSC 53

Date: 2008 07 22
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 July 22, 2008. This document is placed on the Court file for information only.

REASONS FOR JUDGMENT

I) INTRODUCTION AND BACKGROUND

1. In this motion, the Plaintiffs are seeking an injunction that would compel the Defendants to take immediate measures with regard to École Boréale in Hay River. The Plaintiffs wish to have more space for classrooms, access to a gymnasium for school and extracurricular activities that is comparable to what is available to the students of Hay River's English-language schools, and, for secondary school students, access to a suitable science laboratory. They are requesting that an interim plan be implemented in time for the beginning of the 2008–2009 school year.

2. This motion pertains to a dispute of a much broader scope, in which the Plaintiffs want to compel the Defendants to considerably expand École Boréale. According to the Plaintiffs, the services currently available, in many respects, do not result in an equal treatment of the school's students in comparison with what is available to students attending English-language schools and thus contravenes section 23 of the *Canadian Charter of Rights and Freedoms*. The regulatory provisions that establish the powers of the Commission scolaire francophone (the Commission scolaire) do not grant it the power to acquire land or build additional buildings; they simply grant it the power to prepare, for government approval, estimates of expenditures for all capital items required to deliver the education program. The Plaintiffs are contesting the validity of these provisions and argue that they contravene section 23.

3. Both the temporary relief that is the subject of the application for an interlocutory injunction and the long-term relief sought are therefore based on the rights under section 23 of the *Charter*. The extent and scope of the obligations imposed on the Defendants by this provision are therefore at the heart of the dispute.

4. In 2001, the Commission scolaire francophone was created and assumed the responsibility of managing École Boréale. At that time, the school was located within Princess Alexandra School, an English-language school in Hay River. In 2002, the school moved into portable classrooms. A building was then built, and the school moved there in 2005. The building contains five classrooms, as well as a large hall, which is an open space. The school does not have a gymnasium; students use the gymnasiums of other schools in Hay River. École Boréale does not have a science laboratory for secondary school students. Students use a mobile science workstation that does not include all the equipment usually found in a secondary school science laboratory.

5. The evidence establishes that École Boréale has been the subject of discussions between the Commission scolaire and the Government of the Northwest Territories over the years. The evidence is contradictory as to whether the Commission scolaire completely agreed with the plans for the construction of the school. The Defendants state that they worked closely with the Commission scolaire and the Francophone community throughout the process and that it had been understood that the new building would meet the needs of the Francophone community for 10 years following its construction. The Plaintiffs argue that the current building was designed to meet the needs of primary school students only and that it had always been planned to build a second wing in the relatively short term to meet secondary school needs.

6. It appears from the evidence filed by the parties that since the school has been in its current building, Commission scolaire representatives have been impressing upon the government that extra space was needed, particularly to satisfy needs at the secondary school level. The correspondence sent to the Minister of Education in fall 2007 describes the space problems anticipated for the 2007–2008 school year and speaks of the urgent need to solve them. Other letters to the same effect were sent throughout the 2007–2008 school year. The Plaintiffs state that, until May 2008, they had every reason to believe that the government recognized the

lack of space at École Boréale and was willing to do something to alleviate the problem. They state that this was why they did not commence their legal proceeding before the date that they did, namely, May 29, 2008.

7. The parties agree on very little, be it with regard to the facts or the state of the law. For example, with regard to the facts, the evidence is contradictory as to the number of students the school can accommodate, whether or not there is a lack of space and whether this shortage is critical enough to justify court intervention, whether the evidence shows that the situation engages the Court's *Charter* jurisdiction, and whether or not it is possible to implement certain solutions in time for the beginning of the 2008–2009 school year.

8. As for the law, the parties have diverging interpretations of certain aspects of the case law pertaining to section 23. They do not agree on the scope of the management right which that section confers upon a minority language school board, the extent of a government's power to intervene in certain aspects of such management or the effects of creating a minority language school board on the level of service that should be offered to students.

II) Law governing interlocutory injunctions

9. An application for an interlocutory injunction is of the same nature as an application for a stay of proceedings. An interlocutory injunction is a discretionary, exceptional measure, because its purpose is to grant a remedy to a party before a case has been heard on its merits. A court allows such an application only if the plaintiff establishes that (1) there is a serious issue to be tried; (2) the plaintiff will suffer irreparable harm if no injunction is granted; and (3) the balance of convenience is such that the application should be allowed.

RJR -- MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.* [1987] 1 S.C.R. 110.

10. Because the application in this case is for a mandatory interlocutory injunction, the Defendants state that the burden on the Plaintiffs is to establish more than the mere existence of a serious issue to be tried.

11. It is true that, generally speaking, the burden in the case of a mandatory interlocutory injunction is to demonstrate a "strong *prima faciae* case" (see Robert J. Sharpe, *Injunctions and Specific Performance,* (2003 Canada Law Books), at paragraphs 1.510; 2.640 and15.30; *Horvath* v. *Syncrude Canada Ltd*. [2006] A.J. No. 651, at paragraph 7).

12. The question is whether this higher burden applies in an application for a mandatory interlocutory injunction that involves a *Charter* right. This question was raised in *M.P. v. Chinook Regional Health Authority* 2004 ABQB 10 and *Trang v. Alberta* (2001), 298 A.R. 149 (Q.B.), among others. In those cases, the Court concluded that the serious-issue-to-be-tried criterion was appropriate in applications for mandatory interlocutory injunctions involving the *Charter*, as they often raised complex issues of fact and law that could not be evaluated on the

basis of the inevitably incomplete evidentiary record submitted at the interlocutory stage. I agree with that conclusion. I am therefore of the opinion that the Plaintiffs simply have to establish that there is a serious issue to be tried. However, the fact that they want to oblige the Defendants to act in a certain manner and to incur expenses before the dispute is heard on its merits is a relevant factor, one that should be considered while analysing the balance of convenience.

III) General principles derived from section 23 of the *Charter*

13. Section 23 of the *Charter* is the cornerstone on which the Plaintiffs' proceeding is based. Clearly, I cannot perform an exhaustive analysis of the case law for a motion such as this one, but I must examine the general principles related to the application of this section. This is all the more necessary, given that the Defendants contest the applicability of section 23 to this case and, consequently, also this Court's jurisdiction to intervene. This issue, as well as the other issues raised in the motion, and the evidence submitted must necessarily be examined through the filter of certain well-established principles concerning section 23.

14. Section 23 of the *Charter* stipulates:

> 23. (1) Citizens of Canada
>
> (*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
>
> (*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,
>
> have the right to have their children receive primary and secondary school instruction in that language in that province.
>
> (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
>
> (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
>
> (*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
>
> (*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

15. The general purpose of section 23 of the *Charter* is to preserve and promote French and English, and their respective cultures, by ensuring that each language flourishes, as far as possible, across Canada. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada: *Mahé v. Alberta* [1990] 1 S.C.R. 342.

16. Section 23 encompasses a sliding scale of requirements: the level of service for which the minority is eligible is to some extent determined by the number of people in a given area who are right-holders: *Mahé v. Alberta, supra*.

17. Where the numbers warrant, section 23 confers upon minority language parents a right to management and control over the educational facilities in which their children are taught. This right may require linguistic minority representation on an existing school board. In some circumstances, it may warrant the creation of an independent school board: *Mahé v. Alberta, supra.*

18. Section 23 is remedial in nature. It is designed not only to halt the progressive erosion of minority official language cultures across Canada, but also to promote their flourishing: *Mahé v. Alberta*, *supra*; *Arsenault-Cameron v. Prince Edward Island* [2000] 1 S.C.R. 3; *Doucet-Boudreau v. Nova Scotia (Minister of Education)* [2003] 3 S.C.R. 3.

19. The egalitarian concept that section 23 is designed to promote is not one that requires the identical treatment of minority and majority language groups. Rather, it entails providing the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced. Achieving this goal may sometimes require a different treatment from that reserved for the majority: *Mahé v. Alberta, supra*; *Arsenault-Cameron v. Prince Edward Island, supra*.

20. The provincial and territorial authorities whose mandate it is to administer education programs have wide discretion to decide how to meet their obligations under section 23. *Mahé v. Alberta, supra*. However, governments may not take legislative or other measures that reduce or limit the rights protected under section 23: *Solski (Tutor of) v. Quebec (Attorney General),* 2005 SCC 14, paragraphs 42 and 47; *H.N.* c. *Québec (Ministre de l'Éducation)*, 2007 QCCA 111.

21. The objectives of subsection 23(2) are to provide continuity of minority language education rights, accommodate mobility among all Canadians and ensure family unity: *Solski (Tutor of) v. Quebec (Attorney General), supra*, paragraphs 20, 21 and 34.

22. In cases where subsection 23(2) is at issue and where the right is based on the fact that a child "has received or is receiving" primary or secondary school instruction in French, courts must make a qualitative analysis of the evidence to decide whether the facts disclose a genuine commitment to a minority language education. In most cases, a child properly enrolled in a recognized program should be entitled to continue in that program: *Solski (Tutor of) v. Quebec (Attorney General), supra*, paragraphs 42 and 47.

23. The present motion should be analysed in light of these core principles.

IV) ANALYSIS OF THE EVIDENCE IN LIGHT OF THE CRITERIA FOR OBTAINING AN INTERLOCUTORY INJUNCTION

1. Existence of a serious issue to be tried

24. In interlocutory injunctions, the role of the court is not to examine the evidence in great detail or to draw firm conclusions. Its role is also not to make an in-depth analysis of the questions of law involved in the case. It would be neither possible nor appropriate to do so. However, an evaluation of whether there is a serious issue to be tried requires a preliminary, provisional consideration of the merits of the case. This exercise is always difficult and sensitive, particularly when several relevant facts are being contested, and even more so, when the parties do not agree on the state of the applicable law.

25. On a factual level, it is in the very nature of a motion such as this one that the supporting evidentiary record is incomplete. Moreover, more often than not, it is impossible to evaluate the credibility of the witnesses on the basis of an affidavit. The conflicts and contradictions in the evidence submitted therefore cannot be resolved. I can merely consider the evidence, note the contradictions and assess whether, in light of the applicable legal principles, the Plaintiffs have demonstrated what they must demonstrate to justify their application.

26. As for the legal questions, it is not for me to decide which legal position should prevail ultimately. Obviously, if I am of the opinion that a legal argument made by one of the parties is clearly at odds with the case law, this could have an impact on my assessment as to whether there is a serious issue to be tried.

27. In the present circumstances, the question as to whether or not there is a serious issue to be tried must be examined in consideration of a number of aspects of the dispute.

a. Lack of space

28. The first issue of contention between the parties is whether or not there is a space crisis at École Boréale. The evidence on this issue is being challenged.

29. The Plaintiffs' evidence mainly relies on the affidavit of Sophie Call, the school's principal for the last three years. She described the fit-ups that had to be made in the school for the 2007–2008 school year and some of the problems that have resulted from them.

30. Ms. Call explained that some of the school's physical space that was not designed for teaching has had to be fitted up for teaching purposes because of the lack of space. These areas suffer from acoustic and noise problems, as they are open-plan. There is a shortage of office space for teachers. No space remains for common use, as all spaces designed for that purpose are being used for teaching.

31. In her affidavit, Ms. Call confirms that these fit-ups have had the following consequences:

[TRANSLATION]

> In all of the common areas that the school is obliged to use for teaching, the lack of space and soundproofing (as the areas were designed for common use) have produced a serious noise problem and distractions for students and teachers alike. People talking to the school receptionist either in person or over the telephone, telephones ringing at the reception desk or in the two staffrooms and dance lessons with musical accompaniment combine to produce an unacceptable level of distraction for both students and teachers. In addition to that noise, the voices of teachers teaching at the same time easily intermingle in these open-plan teaching areas, obliging teachers to speak louder, which aggravates the noise problem. The current level of distraction is not conducive to teaching, and the situation will be completely intolerable as of September 2008.
>
> …
>
> At the secondary-school level in particular, young people need a space with which they can identify and to which they can develop a sense of belonging. This year's Grade 9 and Grade 10 students accepted being taught in a temporary area in the hall for one school year, but École Boréale will not be able to hold on to these secondary school students by teaching them in a temporary area in the school, as it was obliged to do in the last school year. The secondary school teachers have also warned me that the shortage of classrooms for teaching secondary school students would become unacceptable if it persisted next year. Based on my own observations, I agree with this prognosis.

32. Christian Girard and Catherine Boulanger, two of the Plaintiffs, have children who attend École Boréale. In their respective affidavits, they confirm to some extent Ms. Call's description of the noise and distraction-related problems arising from the fit-up of temporary "classrooms" in areas that were not designed for teaching.

33. The affidavit of Don Morrison, the Department of Education's Director of Education Operations and Development, contradicts this evidence. His is a detailed affidavit that deals with a vast range of topics. Among other things, Mr. Morrison mentions the size of the building that houses École Boréale and the standards that apply in the Northwest Territories with respect to the size of schools in relation to the number of students. In his opinion, there is enough space at École Boréale, and he suggests various ways in which the classes could be organized for the school to be functional in its current space in the 2008–2009 school year.

34. Let me repeat: at this stage of the proceedings, my review of the questions relating to the merits of the case can be but limited and provisional. But, in my opinion, the question as to whether or not a school is overcrowded is not simply related to factors such as the number of students, the number of square metres the school measures and the school building's theoretical capacity. The number of grades and the number of students enrolled in each grade are also important. In my opinion, the observations of people who have experienced what it is like at the

school on a day-to-day basis cannot be ignored. In my view, therefore, the evidence submitted by the Plaintiffs, in particular Ms. Call's affidavit, establishes at least that there is a serious issue to be tried, namely, whether École Boréale will lack space to function properly in 2008–2009.

b. Applicability of section 23 with regard to the composition of the school's student body

35. The second issue is whether there is sufficient evidence to establish that the Court's powers under sections 23 and 24 of the *Charter* can be invoked by the Plaintiffs. The Defendants argue that the Plaintiffs have not established how many of the students expected at the school in 2008–2009 have a constitutionally protected right to attend École Boréale. The Defendants also argue that the current lack of space, if there is one, results from the fact that too many children of parents who are not right-holders attend the school. They state that the Plaintiffs have the responsibility of using the existing space for the children of right-holders. They submit that the evidence in no way establishes that the existing space is insufficient for meeting the needs of those children and that, consequently, the evidence does not establish that the case falls under section 23.

36. The Plaintiffs argue that the Commission scolaire's management right, as protected by section 23, includes the right to establish École Boréale's admission criteria. They state that the policy to admit a certain number of children of non-right-holding parents complies with the remedial purpose of section 23, because it is one way of remedying the effect of past assimilation. They also state that the policy to admit a certain number of children of non-right-holding parents has existed for a number of years, is public knowledge, and has never been challenged by the government. They are therefore of the opinion that the existence of a policy to admit non-right-holders, and its application over the years, does not in any way affect the government's obligation to provide enough space for the students who are enrolled at the school for the 2008–2009 school year.

37. The school's admission policy has been submitted in evidence, appended to one of the affidavits filed in support of the motion. Under the policy, all children of right-holders will be admitted to the school. The description of right-holders that appears in this policy corresponds to the Plaintiff's interpretation of the scope of section 23, an interpretation that is not shared by the Defendants. In addition to the children of right-holders, children who have completed a pre-school francization program are eligible for the kindergarten program under the policy, and later the full school program.

38. The evidence is controversial with regard to the proportion of children who were or were not children of right-holders at the time of their enrolment in the school. According to one of the answers to the undertakings made as part of the cross-examinations on affidavit, of the 105 children enrolled in the school in 2007–2008, 62 were covered by one of the three section 23 categories at the time of their enrolment. Moreover, according to a report prepared in February 2008 by a consultant hired by the government to study the situation at the school, which is one of the exhibits appended to Mr. Morrison's affidavit, 103 children were enrolled at the

school for 2007–2008, and only 42 of these children were right-holders through either their mother or father.

39. During the cross-examination on affidavit, certain questions were asked to clarify the details of the parents' right-holder status. The Plaintiffs were also requested to provide documentation to confirm this status, which they refused to provide. They simply provided the total number of children covered by section 23, regardless of category. They argue that at this stage, the breakdown of the number of children covered by the categories listed in section 23 is not relevant. The Plaintiffs also refused to provide certain other information at this stage of the proceedings.

40. The Defendants argue that if the Plaintiffs are in possession of evidence on a relevant issue and refuse to submit it, the Court should draw an adverse inference against them. They submit that because of these refusals, the evidence submitted does not establish the relevance of section 23 in this case.

41. It is important to make a distinction between a lack of evidence and a lack of the best evidence, or a lack of the most complete evidence. The Plaintiffs provided the Defendants with some of the information they requested, including the information on the number of students who were children of right-holders at the time of their enrolment for 2007–2008. They provided this information through Ms. Call's answers to the undertakings. What they refused to do was to submit the documents that would corroborate their arguments and to provide more information on the number of right-holders belonging to each of the three categories provided for under section 23. It is not correct to say that there is a complete lack of evidence on these issues. There is evidence, thanks to Ms. Call's testimony and her answers to the undertakings.

42. On June 25, in my decision to refuse to prohibit the Defendants from cross-examining the individuals who had made affidavits in support of the motion, I stated that the composition of École Boréale's student body was relevant for the purposes of this motion, as it could have an impact on the Court's jurisdiction to intervene under the *Charter*. However, I also referred to the case law according to which cross-examinations on affidavit should not be transformed into examinations for discovery.

43. Following the cross-examinations on affidavit, the Defendants obtained some information on the proportion of the children enrolled at the school in 2007–2008 whose parents were right-holders at the time of their enrolment and on the proportion of children whose parents were not. A great deal of other information was not provided, such as documents proving the parents' status. But, in my opinion, the Plaintiffs are not obliged, at this stage of the proceedings, to submit all the details of their evidence or to provide the Defendants with them. As I explained in my reasons dated June 25, these questions, although they do have a certain relevance at this stage, are of limited relevance, because the interlocutory stage is not the right time for performing an in-depth analysis of each student's profile and status under section 23.

44. There are contradictions and some uncertainty in the evidence as to the number of students at the school in 2007–2008 and the proportion of children who were right-holders at the

time of their enrolment. This issue has some relevance, but I do not believe it to be a determining factor in the circumstances of this case.

45. As I alluded to in paragraph 22, the application of subsection 23(2) of the *Charter* requires a qualitative analysis based on more complete evidence than what is available at this stage. However, it appears from *Solski* that, generally, the fact of being properly enrolled in and committed to a minority language program entitles a child to continue in that program. Through section 23, the same right is also granted to the child's brothers and sisters.

46. Contrary to the situation in Quebec, which led to the disputes in *Solski* and *H.N.*, there are no statutes or regulations in the Northwest Territories that set admission criteria for minority language schools. There is no evidence that a departmental directive on this subject has been issued since the opening of École Boréale. Everything suggests therefore that the children who have been educated at École Boréale to date were so legally. The status of their parents (that is, whether they were right-holders or not) at the time of their enrolment in the school last year, or in a previous year, is not determinative of the status of these same parents in September 2008. There is therefore at least one serious issue to be tried with regard to whether all the children who attended École Boréale in 2007–2008 are entitled to return there in 2008–2009. The same issue applies to whether the brothers and sisters of these children are entitled to attend the school.

47. In any case, even if I allowed the argument that there is insufficient evidence for the lack of space for right-holding children because of the Plaintiffs' refusal to provide certain information, the serious issue to be tried would remain, in light of the other aspect of the Plaintiffs' argument, namely their submission based on the Commission scolaire's management power under section 23.

48. 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.

49. 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 directives on enrolments, if this is what is necessary to ensure that the school can continue to meet the needs of right-holders.

50. *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.

51. 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.

52. For these reasons, I conclude that there is a serious issue to be tried, namely, whether there is a lack of space at École Boréale and whether this problem will result in a violation of the individual and collective rights protected by section 23.

c. Gymnasium

53. École Boréale does not have a gymnasium, and its students have to use the gymnasiums of other schools. The Defendants argue that this is in line with territorial standards which determine which schools have enough students to have their own gymnasium. They also state that several other small schools in the Northwest Territories do not have gymnasiums. The Defendants therefore argue that the fact that École Boréale does not have a gymnasium does not raise a serious issue to be tried.

54. I do not think that the question should be considered in this manner. Case law recognizes that, in some circumstances, section 23 stipulates that the minority be treated differently from the majority to ensure true substantive equality. The question as to whether the building of a gymnasium for École Boréale is part of the obligations arising from this principle is a serious issue to be tried, as it was in *Association des parents ayants droit de Yellowknife c. Territoires du Nord-Ouest (Procureur Général)* 2005 NWTSC 58.

d. Science laboratory

55. École Boréale does not have an adequate science laboratory for secondary school students. Ms. Call explained that the students had access to a mobile science workstation, but that this workstation was not suitable for Grade 10 and Grade 11 courses. She stated that the school would not be able to offer Chemistry 11, which is an essential basic course.

56. At the trial, the Defendants will argue that, in light of the sliding scale principle, the government is not obliged to equip a school with a fully-equipped science laboratory if the number of students does not warrant it. They state that the number does not warrant the installation of such a laboratory at École Boréale.

57. The Plaintiffs will argue that the creation of the Commission scolaire is recognition that the number of right-holders in Hay River warrants the highest level of service guaranteed by section 23, and that from such a school board's date of creation, the sliding scale no longer applies. In my opinion, this is a serious issue to be tried.

2. Irreparable harm

58. Generally, it is accepted that irreparable harm is harm that cannot be compensated by the payment of an amount of money. It is therefore not surprising that there is some case law to the effect that the violation of *Charter* rights is, by definition, irreparable harm.

59. In the situation in the present case, the Defendants argue that the evidence does not demonstrate that École Boréale lost students because of the lack of space, the lack of access to a gymnasium or the fact that the school does not have a fully-equipped science laboratory for secondary school students. The Defendants argue that in *Association des parents ayants droit de Yellowknife c. Territoires du Nord-Ouest (Procureur Général), supra,* there was concrete evidence that Yellowknife's French-language school would lose the majority of its students once they reached Grade 8. In this case, such evidence was not submitted.

60. I do not believe that it is accurate to argue that the demonstration of irreparable harm requires the demonstration that this harm has already started to manifest itself. The Plaintiffs' burden is to demonstrate that they will suffer irreparable harm if the remedy is not granted and not to demonstrate that the harm already exists.

61. To use the example of the lack of a science laboratory, the evidence submitted shows that the Grade 11 chemistry course cannot be taught using the school's mobile science workstation. Should one wait until after the fact, that is, for Grade 11 students to have started the school year and be unable to take this course, to rule that the irreparable harm criterion has been met? In my opinion, no. The same is true, in my view, of the lack of space. Should one wait until the parents definitely decide to withdraw their children from the school because the children find it too difficult to study in an open-plan, noisy area where distractions affect their learning? Should one wait for the academic performance of some students to deteriorate? I do not think so.

62. Apart from the possibility that the school may lose students as a result of the teaching conditions in certain grades, another aspect of irreparable harm raised by the evidence is the deterioration of teaching and learning conditions for students, regardless of their grade, with students having to take classes in areas that were not designed for teaching

63. I recognize that the situation in this case cannot be compared with cases such as *Conseil scolaire Fransaskois de Zenon Park v. Saskatchewan* [1999] 12 W.W.R. 742 (C.A.) or some of the others decisions cited by the Plaintiffs. The Plaintiffs created a French-language school board. They had a separate building built to comply with their constitutional obligations. However, the parties are involved in a highly contested dispute that could take years to make its way through the various courts. It is essential that, in waiting for the issues raised in this case to

be resolved, the students attending École Boréale may continue to be instructed there in French and may do so in conditions that are conducive to learning. The evidence that demonstrates that there is a serious issue to be tried with regard to the lack of space also demonstrates the irreparable harm that would occur if the current situation prevails.

64. The Defendants argue that the Plaintiffs are responsible for the situation, partly because they were in control of admissions and should not have admitted so many children of non-right-holders. They also state that the Plaintiffs should have commenced this proceeding much sooner before the beginning of the 2008–2009 school year, as it would then have been possible to rule on the merits of the case and on the basis of a complete evidentiary record.

65. It is true that the Plaintiffs had full control over the time that they chose to commence this proceeding. The evidence shows that they have been anticipating a crisis for the 2008–2009 school year for a long time. And the evidence does not reveal any commitment or promise from the government to take any specific measures before the beginning of the 2008–2009 school year.

66. However, the evidence also shows that, in the last few years, and particularly during the 2007–2008 school year, the Commission scolaire informed the government of the lack of space at École Boréale and of the urgent need to do something about it. In the exchange of correspondence submitted as evidence, the government does not seem to question that there is a lack of space. The discussions to find a solution seemed to be going well, as in April 2008, there was talk of providing École Boréale with space in one of Hay River's English-language schools.

67. It is true that the Plaintiffs could have commenced their proceeding much earlier in 2008, and possibly even in 2007, while continuing, in parallel, to negotiate with the government. However, it cannot be denied that commencing a legal proceeding can sometimes considerably harm a negotiating process. Commencing a legal proceeding costs a considerable amount of money. One cannot fault the parties for wanting to do everything possible to find a solution without resorting to legal action.

68. In my opinion, the Plaintiff's decision to wait until May before commencing their proceeding does not reduce the irreparable harm that would result if the motion was not granted. There is no question, however, that this decision has practical consequences for the range of measures that can be reasonably ordered at this stage. The logistical constraints resulting from the imminence of the beginning of the school year have to be considered when analysing the balance of convenience.

69. I therefore conclude that the Plaintiffs have established that irreparable harm will be suffered if their application is not granted. In my view, this harm will result from the lack of space at École Boréale and the negative impact this lack has on students' learning conditions, the fact that Grade 10 and Grade 11 students do not have suitable equipment for their science classes and the qualitative impact that the lack of gymnasium time has on École Boréale students' school and extra-curricular activities.

3. Balance of convenience

70. In my consideration of this criterion, I must determine which of the parties will suffer the greatest inconvenience or harm if the relief is, or is not, ordered pending a decision on the merits.

71. The Defendants point out that the relief sought would require considerable public funds, an investment that could ultimately be without merit if the Plaintiffs are unsuccessful on the issue of the merits. They also stress that even if the Plaintiffs are successful, the money spent on temporary measures will have been wasted, as other expenses will have to be incurred to expand École Boréale.

72. As I have already alluded to, the Defendants state that this situation could easily have been avoided if the Plaintiffs had not waited so long before commencing their proceeding. They argue that the Plaintiffs, who determined that there was a space problem a long time ago, should have commenced the proceeding so that the dispute could have been heard on the merits well before the beginning of the 2008–2009 school year. The Defendants state that in proceeding as they did and in asking the Court to rule on the issues in an interlocutory manner, the Plaintiffs short-circuited the usual legal process to achieve their purpose. They also state that the Commission scolaire's commitment to compensate them if they are not ultimately successful is meaningless, as the Commission scolaire is entirely dependent on the government for its funding. They are therefore of the opinion that the balance of convenience is in their favour and that the relief sought should not be granted. They argue that, instead, the Court should order that the case be heard in an expeditious manner so that the issues are resolved in time for the beginning of the 2009–2010 school year.

73. For their part, the Plaintiffs state that the government must have been aware of its obligations under section 23 for a long time, especially as they were informed of the space problems at École Boréale on several occasions in the last few years. They argue that the temporary solutions they propose (installing portable classrooms or renovating and leasing a neighbouring building) would not commit the government in the long term: if the Plaintiffs were unsuccessful, the portable classrooms could be moved and used elsewhere, and the lease for the temporary premises could be cancelled. They argue that the situation at École Boréale is such that the balance of convenience requires measures to be taken for the beginning of the 2008–2009 school year.

74. The parties blame each other for the current situation. But regardless of who is at fault, logistically speaking, it is doubtful that the solution of installing portable classrooms or renovating the neighbouring building can be implemented in time for the beginning of the 2008–2009 school year. I must also take into account the costs that would be incurred for fitting up these new premises and the fact that the Plaintiffs may be unsuccessful on the merits.

75. On the other hand, having determined that the Plaintiff's proceeding raises serious issues to be tried, and in light of my analysis of irreparable harm, I am of the opinion that it would be unacceptable to subject the students of École Boréale to another school year in the conditions described by Ms. Call. I believe that it is essential to ensure that there is sufficient space to create

reasonable learning conditions for the students of all grades, regardless of their number, pending a hearing of the case on its merits.

76. It is also my view that access to a gymnasium for school and extra-curricular activities should be equivalent, in time and quality, to the access available to students of the majority-language schools. École Boréale should not have access to the gymnasiums of other school only during times when the other schools do not need them. A fair schedule of use must be established, taking into account the needs of all users and considering these users as having equal right of access.

77. Lastly, the secondary school students have to be able to take their science courses while having access to the same resources and equipment as the students who are attending an English-language secondary school.

78. I therefore conclude that the balance of convenience requires that certain remedies be granted, but that these remedies must take into account what it is logistically possible to achieve between now and the beginning of the school year, as well as the financial consequences they entail. The government does not have an unlimited budget, and we are at the interlocutory stage. It seems doubtful that portable classrooms could be delivered and properly installed in time for the beginning of the school year. It also seems doubtful that the renovations that would have to be done in the neighbouring building could be completed in time. Moreover, this solution would require the government to commit to leasing premises for a period exceeding a year. If the Plaintiffs are unsuccessful, it might be possible to cancel the lease, but there would certainly be considerable costs and penalties, especially if the building had been renovated specifically to house a school.

79. To give the secondary school students proper access to science laboratories, they would, in any case, have to use the laboratory of another secondary school. There seem to be classrooms available in other schools in Hay River. If there is an existing infrastructure, it is appropriate to use it as a temporary measure. On a temporary basis, and mainly because there are very few options given the time remaining before the beginning of the school year, the use of space in one of the community's other educational institutions is the most realistic solution. I recognize that this is far from being an ideal solution and that it will entail costs, as it will be necessary to provide a distinct area for École Boréale students within another school, but, in the circumstances, I think that it is the most reasonable solution given the time constraints.

80. Indeed, I note that this option was examined in April 2008 when the parties were still discussing possible solutions for the beginning of the 2008–2009 school year. In a letter sent to the Deputy Minister of Education on April 22, 2008, the Director General of the Commission scolaire wrote:

> [TRANSLATION]

> The possible short-term solution that your Minister proposed to us would be to obtain additional classrooms in another educational institution in Hay River.
>
> ...
>
> It is certain that, for the Commission scolaire, this emergency solution is not the option we prefer. As we pointed out to you, the installation of portable classrooms attached to École Boréale is, in our opinion, the best temporary solution for remedying the situation.
>
> ...
>
> Your suggestion to temporarily occupy additional space in a nearby English-language school in August 2008 would be acceptable to us only if this space meets the minimal requirements of section 23, that is, that it is located in a physically distinct area. The space would have to:
>
> 1. Be located at Diamond Jenness Secondary School;
>
> 2. Be located in a distinct area of the school and equipped with a dividing wall; and
>
> 3. Provide fair access to science laboratory rooms and the gymnasium at different times from the school's Anglophone students.

81. For the purposes of a mandatory interlocutory injunction, this solution seems the best one, because it involves the use of existing infrastructure rather than committing the government to acquire new infrastructure.

82. In his affidavit, Mr. Morrison asserted that if the Commission scolaire demonstrated that there was a real need, his department would intervene to ensure that the students of École Boréale would be provided with suitable services, in terms of both space and access to gymnasiums and science laboratories. He stated that there was no need for a court order for these measures to be taken if the Commission scolaire could demonstrate that they were necessary.

83. In the current circumstances, I do not think that it would be appropriate to leave it to the Defendants alone to decide how École Boréale's needs can be best met. The parties are involved in a dispute at the heart of which are the school's actual needs. The parties agree on very little, neither the past facts nor the current facts, or even the state of the law. In the circumstances, I am of the opinion that intervention by the Court to order temporary relief is appropriate.

V) CONCLUSION

84. For these reasons, the motion for an interlocutory injunction is granted.

85. I order that the Defendants immediately implement an interim plan to ensure that, as of the beginning of the 2008–2009 school year, the following elements are in place:

1. Access time to gymnasiums during and after school hours for school and extra-curricular activities, according to schedules that meet École Boréale's needs and reflect a fair division of gymnasium time with the other schools, in both quantitative and qualitative terms.

2. Access for École Boréale students to a science laboratory in which secondary school science classes can be taught properly, ensuring substantive equality of use.

3. The use by École Boréale of three classrooms in another secondary school in Hay River, with the fit-ups necessary to create a physically distinct space for the students who will make use of them.

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

Dated at Yellowknife, NT,
this 22nd day of July 2008

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

S-0001-CV-2008000133

SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

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

Defendants

- and -

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

Plaintiffs

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU

This document is an unofficial English translation of the Reasons of Judgment of the Honourable Justice L.A. Charbonneau dated July 22, 2008. This document is placed on the Court file for information only.