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COURT OF APPEAL FOR ONTARIO
FINLAYSON, CATZMAN and ABELLA JJ.A.

BETWEEN:

SUSAN ABBEY, AND NICHOLAS ABBEY,
JOSHUA ABBEY AND NAOMI ABBEY,
minors by their litigation guardian,
SUSAN ABBEY

Appellants

- and -

ESSEX COUNTY BOARD OF EDUCATION

Respondent

) Paul S. Rouleau
) for the appellants

) Leonard P. Kavanaugh
) for the respondent

) Heard: October 14, 1998

ABELLA J.A.:

[1] This case turns on the interpretation and application of s. 23 of the Charter of Rights and Freedoms, the section dealing with "Minority Language Educational Rights." In particular, the focus is on s. 23(2), which gives Canadian citizens the right to have all of their children receive either French or English language instruction if any of their children has received it. The issue in this appeal is whether this right extends to a parent whose first language is not that of the linguistic minority population of the province in which that parent lives.

[2] Susan Abbey is an Ontario parent. Her first language, and the language in which she received her primary school education, is English. She pays taxes to the public school board. Her three children have received practically their entire primary school education from French as a First Language schools (French Language Schools). Until September 1996, the local public school boards had purchased this service for the Abbey children through a purchase of services arrangement with the separate school boards.

[3] In 1989, Nicholas Abbey, the oldest child, was the first to attend a French Language school in Essex County. The Essex Public Board did not operate a French Language School, so an application was made to attend the French Language School operated by the nearest separate school board. Because his mother was English-speaking, Nicholas was accepted by way of its admissions

committee, established pursuant to s. 289 of the Education Act, R.S.O. 1990, c. E.2. Acceptance by the admissions committee meant that the French Language School's tuition fees would be paid by the local public school board.

[4] When the family moved to London in 1990, the local French Language School agreed to allow all three Abbey children to register. The basis for their admission was that since Nicholas had already received French language education, Susan Abbey had acquired the right under s. 23(2) of the Charter to have all her children receive their education in the French language. The children remained in the French Language School until June 1996 when the family moved to the Town of La Salle in Essex County.

[5] On their return to Essex County, Susan Abbey attempted to register her three children in a French Language School so they could continue their education in French. The Essex County Board of Education still did not provide French First Language instruction. It did, however, offer a French immersion programme in an English language elementary school. In a French Language School, French is the exclusive language at the school for all purposes, and the school itself is governed by the linguistic minority group. In French immersion programmes, the principal language of instruction is usually English, and most non-classroom activities and social interaction are in English. A French immersion programme does not constitute a "French language instructional unit" for the purposes of s. 288 of the Education Act, R.S.O. 1990, c. E.2.

[6] Initially, Ms. Abbey registered her children in the French immersion elementary school. Within days, her children, who had received their entire primary education to date in French, experienced profound difficulty in adapting to the English language instruction. As a result, in September 1996, purporting to exercise her rights under s. 23 of the Charter of Rights and Freedoms, Ms. Abbey wrote to the Director of Education of the Essex Public Board requesting that her children be permitted to attend the French Language School operated by the local Separate School Board, the Windsor Roman Catholic Separate School Board.

[7] The Director verbally denied Ms. Abbey's request on September 9, 1996. The Windsor Separate School Board, on the other hand, acknowledged Ms. Abbey's s. 23 rights in a letter dated September 13, 1996, and agreed to admit the Abbey children subject to the Essex Public Board paying their tuition fees.

[8] At a meeting on September 30, 1996, the Essex Public Board formally refused to enter into an agreement with the Windsor

Separate School Board to purchase French language instruction from that Board for the Abbey children. It denied Ms. Abbey's request by a resolution stating:

That the Board deny the request to pay tuition fees to the French First Language Program of the Windsor Roman Catholic Separate School Board, on behalf of an Essex County family, on the basis that the family does not qualify for Section 23 Charter Rights.

[9] This decision was confirmed in a letter dated October 2, 1996.

[10] The Ontario Ministry of Education and Training agreed with the position taken by Susan Abbey. In its letter dated October 2, 1996 to the Essex Board, the Ministry stated in part:

... it is my understanding that in 1990, both Abbey sons (and in 1992, their daughter) were admitted to École Alexandra (now École Marie Curie), a French-language instructional unit of the Board of Education for the City of London, on the basis of Charter s. 23, and not through an admissions committee. Therefore, all three children have been educated in a French-language instructional unit of the London board, since that time. Based on this fact, and the advice I have received from the Ministry of Education and Training's legal services, the ministry's view is that the Abbey children "have received...primary...school instruction in French" for years and therefore, under Charter s.23(2), they currently "have the right to have all [their] children receive primary and secondary school instruction in the same language."

[11] Despite a request from Ms. Abbey on October 3, 1996 that the Essex Board reconsider its decision in light of this letter from the Ministry, the Board decided at a meeting on October 20, not to change its original decision.

[12] Ms. Abbey then requested permission from the Windsor Separate School Board that her children attend its French language school for the 1996-1997 school year. In a letter dated November 1, 1996, the Separate School Board not only agreed to let the Abbey children register at the school, it also agreed to

absorb the tuition fees in the event that Ms. Abbey was unsuccessful in legal proceedings against the Essex Public Board.

[13] On November 5, 1996, Ms. Abbey registered her children at the French Language School operated by the Windsor Separate School Board.

[14] In February 1997, Ms. Abbey and her three children brought an application for judicial review of the Essex Public Board's decision not to defray the tuition costs of the children's attendance at the French Language School.

[15] The application for judicial review was dismissed by the Divisional Court on June 10, 1997. It concluded that the rights set out in s. 23(2) of the Charter did not apply to the Abbey children because they did not fit the category of persons for whom s. 23 was intended. The court found that:

The purpose of s. 23(2) can only be determined in light of

1. The overall purpose of s. 23, which is to secure linguistic rights to linguistic minorities, not to linguistic majorities, and
2. The wording, structure, and headings and marginal notes of s. 23 itself.

[16] In the opinion of the Divisional Court, s. 23(2) is not a separate right, but is available only to provide continuity of language instruction to those who qualify under s. 23(1), namely, citizens whose first language is that of the linguistic minority population of the province in which they live. In its view, as a result, the right to continuity of French language education is available only to linguistic minorities, and s. 23 "does not provide the anglophone community in Ontario with the right to have their children educated in French", whether or not they have already received their education in the French language. The Divisional Court also interpreted the marginal note beside s. 23(2) - the "continuity of language instruction" - as confirmation of the dependence of s. 23(2) rights on those guaranteed in s. 23(1).

[17] For the reasons which follow, I cannot, with respect, agree with this constitutional interpretation.

Analysis

[18] In view of the interpretation given to s. 23(2) by the Divisional Court, it is necessary to set out s. 23 of the Charter in full:

[19]

Minority Language Educational Rights

23(1) Citizens of Canada

Language of instruction. (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 in 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.

Continuity of language instruction. (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.

Application where numbers warrant. (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.

[20] Sections 288 and 289 of the Education Act, R.S.O. 1990, c. E.2 set out how the rights to attend French Language Schools are attained:

Section 288

In this Part,

"French-language instructional unit" means a class, group of classes or school in which French is the language of instruction but does not include a class, group of classes or school established under clause 8(1)(y) (French-language instruction for English-speaking pupils); ...

"French-speaking person" means a child of a person who has the right under subsection 23(1) or (2), without regard to subsection 23(3) of the Canadian Charter of Rights and Freedoms to have his or her children receive their primary and secondary school instruction in the French language in Ontario; ("francophone")

Section 289

- (1) Every French-speaking person who is qualified under this Act to be a resident pupil of a board has the right to receive elementary school instruction in a French-language instructional unit operated or provided by the board.
- (2) Every board that has one or more resident pupils who exercise their right to receive instruction in a French-language instructional unit shall establish and operate one or more French-language instructional units for those pupils or shall enter into an agreement with another board to enable those pupils to receive instruction in a French-language instructional unit operated by the other board.
- ...
- (6) A board, on the request of the parent of a pupil of the board who is not a French-speaking person, or of a person who has lawful custody of a pupil of a board who is not a French-speaking person, or of a pupil of the board who is an adult and is not a French-speaking persons, may admit the pupil to a

French-language instructional unit if the admission is approved by majority vote of an admissions committee appointed by the board and composed of the principal of the school to which admission is requested, a teacher who uses the French language in instruction in the school and a French-speaking supervisory officer employed by the board or arranged for in accordance with subsection (7).

[21] As stated earlier, the Essex Public Board does not have a French Language School. Instead, it pays the required tuition fees to French Language Schools operated by other boards, such as the Windsor Roman Catholic Separate School Board, for children in Ontario who are entitled to be educated in the French language. Access to French Language Schools is restricted to s. 23 rights-holders and to children like Nicholas Abbey who are admitted through committees administered pursuant to s. 289 of the Education Act (now s. 293).

[22] As a Charter provision, and particularly as a remedial provision which "creates a code which establishes minority language education rights for the nation", s. 23 is entitled to a liberal interpretation: *Re Minority Language Education Rights* (1984), 47 O.R. (2d) 1 (C.A.) at pp. 28-29; see also *In Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148 at p. 1176, and *Mahé v. Alberta*, [1990] 1 S.C.R. 342.

[23] The heading of s. 23 is instructive. It reads "Minority Language Education Rights", thereby stressing both language and education, and reinforcing the inextricable connection between the two. What s. 23 primarily entrenches is, where numbers warrant, the right of French or English linguistic minorities to obtain educational instruction in their own language in order to facilitate both linguistic fluency and linguistic continuity: *Martel, Official Language Minority Education Rights in Canada: From Instruction to Management*, (Ottawa: Office of the Commissioner of Official Languages, 1991) at 16. The purpose of this right is to protect the linguistic and cultural integrity of the minority language group in a province. Put simply, it is to promote linguistic continuity: *Book II (Education) of the Report of the Royal Commission on Bilingualism and Biculturalism* (1968) at p. 8. In *Mahé*, Chief Justice Dickson explained this purpose at p. 362:

The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.

And at p. 350:

[Section 23 represents] a linchpin in this nation's commitment to the values of bilingualism and biculturalism.

[24] Against this background, it is my view that s. 23(1) and (2) set out separate entitlements which are conceptually related, but independent from each other. Minority language educational rights are not merely those of children of citizens whose first language is that of the English or French linguistic minority population of the province in which they reside, or who received their primary school education in that language: s. 23(1). These educational rights are also available to all the children of a Canadian citizen if any of that citizen's children has received primary or secondary school instruction in English or French in Canada. Not only do children who have received - or are receiving - their education in the language of the linguistic minority have the right to continue receiving their primary and secondary school education in that language, their siblings enjoy the same continuous right.

[25] For purposes of s. 23(2), it does not matter whether this prior language instruction originated in another province, another part of a province, or through the kind of admissions committee contemplated by the Education Act. However it originated, it is the fact of it having occurred which attracts the protection of s. 23(2).

[26] The independence of the various rights in s. 23 was supported by the judgment of this court in *Re: Minority Language Educational Rights*, where it said at p. 29:

It is to be observed that s. 23 of the Charter, as it applies to Ontario, accords rights to parents to have their children receive instruction in French, the minority language of the province, if these parents come within one of three distinct categories:

(i) citizens whose first language learned and still understood in French; [s. 23(1)(a)]

(ii) citizens who have received their own primary school instruction in French in Canada, [s. 23(1)(b)] and

(iii) citizens of whom at least one child has received or is receiving primary or secondary school instruction in French in Canada. [s. 23(2)]

It can be seen that in the Charter there is no requirement that children, in order to be entitled to receive instruction in the French language in Ontario, must themselves be French speaking.

[27] It is also helpful to look at s. 23(3) which refers to right-holders under both s. 23(1) and s.23(2), reinforcing a conclusion that distinct rights are created under these latter two provisions: see also P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1997) at pp. 53.26, 53.28.

[28] I do not quarrel with the observation of the Divisional Court that "section 23 is designed to secure rights to linguistic minorities and does not provide the anglophone community in Ontario with the right to have their children educated in French." Anglophone parents in Ontario do not have a constitutional right to have their children educated in French as a matter of choice. Their children cannot be admitted to a French Language School unless an admissions committee, controlled by members of the minority group, grants them access: Michel Bastarache, André Braën, Didier Emmanuel, Pierre Foucher, *Language Rights in Canada*, Michel Bastarache ed. (Montreal: Les Editions Yvon Blais Inc. 1989). If, however, one of their children is admitted to a French Language School, then the rest of their children do have such a right.

[29] Even though the overriding purpose of s. 23 is the protection of the language and culture of the linguistic minority through education, this does not preclude interpreting s. 23(2) according to its plain meaning, even if this means that rights accrue to persons who are not members of the linguistic minority. The more fluency there is in Canada's official languages, the more opportunity there is for minority language groups to flourish in the community.

[30] Chief Justice Dickson's acknowledged in Mahé that not all

section 23 right-holders would be members of the minority language group. Specifically, he noted at p. 379:

... the persons who will exercise the measure of management and control described above are "s. 23 parents" or persons of such parents designated as their representatives. I appreciate that because of the wording of s. 23 these parents may not be culturally part of the minority language group.

[31] I also cannot accept the proposition articulated by the Divisional Court that the marginal note to s. 23(2) - "continuity of language instruction" - means continuity of those rights guaranteed by s. 23(1). Such a restrictive interpretation renders s. 23(2) meaningless, since s. 23(1) implicitly guarantees such continuity.

[32] In any event, it is difficult to see how a marginal note can be permitted to trump the plain meaning of a constitutional section and render the rights it delineates redundant. There is no doubt that marginal notes are relevant: *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at p. 376. But, they are not so relevant that they can be interpreted in a way which makes the section itself irrelevant.

[33] The marginal note should not be interpreted using an interpretative approach different from the one used to interpret the section itself. As stated earlier, the section is entitled to a liberal interpretation. Only a narrow, technical construction of the marginal note argues for making s. 23(2) merely a continuation of those rights set out in s. 23(1). I prefer to interpret the marginal note in a way which is explanatory, not contradictory of the content of the plainly articulated constitutional right it accompanies.

[34] Nicholas Abbey received his primary school education at a French Language school. Pursuant to s. 23(2), not only he, but also his siblings, are therefore entitled to continue their primary and secondary school education in this manner, and the Essex Public Board is obliged to purchase these educational services for the Abbey children.

[35] For the reasons given the appeal is allowed, the judgment of the Divisional Court is set aside and an order will go:
(a) declaring that the appellant Susan Abbey is entitled by virtue of s. 23 of the Charter to have her children receive their primary and second school instruction in the

French language;

(b) declaring that the appellants Nicholas Abbey, Joshua Abbey and Naomi Abbey, are entitled to receive, and that the respondent, Essex County Board of Education is obligated to provide to them, French language instruction in accordance with the Board's obligation under the Education Act; and

(c) quashing the resolution passed by the Board on September 30, 1996, which denied Susan Abbey's request that the Board pay the tuition fees in respect of her children to attend the French as a First Language School, the école Monseigneur Jean Noël, operated by the Windsor Separate School Board.

[36] The appellants are entitled to their costs both here and below.

Released: February 11, 1999