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Case Note

***303** Supreme Court Takes a Purposive Approach to Minority Language Instruction

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Arsenault-Cameron v. Prince Edward Island [FN1]

Constitutional law-Minority language instruction rights-*Canadian Charter of Rights and Freedoms*, s. 23

At issue in this case was the interpretation of section 23 of the *Canadian Charter of Rights and Freedoms*, which requires that a province provide official minority language instruction where the numbers warrant. In particular, the case concerned the respective roles and responsibilities of the Minister of Education and the local school board in determining the needs of a minority language community.

The Supreme Court of Canada decision in this case is a progressive one which recognizes the remedial nature of section 23, places section 23 within its historical context, adopts a nuanced approach to equality rights, and recognizes that the French language community is ultimately in the best position to determine its own needs.

***304 1. BACKGROUND**

In November of 1994, the Appellants made a request to La Commission Scolaire de la Langue Francaise [Hereinafter referred to as the "Board"]., for the establishment of a French elementary school in the Summerside area for the 1995-96 school year. Thirty-four students preregistered in January 1995, including a total of 17 children in grades 1 and 2 who fell within the scope of section 23. Based on the preregistration results, the Board decided to make a conditional offer of French first language instruction in Summerside. In making this recommendation, the Board was aware that the parents did not view transporting their young children to the French program in Abrams Village, some 28 kilometres from Summerside, as an appropriate response to the needs of the French language community.

In February of 1995, the Minister of Education refused to approve the Board's offer of a French language school in Summerside, but instead, offered to maintain a transportation service to Abrams Village. Allegedly, cost was not a factor in the Minister's decision. In an attempt to find a compromise solution, the Board proposed to provide French language instruction in Summerside through Ecole Evangeline. The Minister rejected this proposal.

The Appellants commenced legal proceedings against the Crown, seeking a declaration that they had the right to have their children receive French first language instruction at the primary level in a facility in Summer-

side.

In the Prince Edward Island Supreme Court, Trial Division, Desroches J. found that there were sufficient numbers to warrant provision of French language instruction out of public funds in Summerside and that the parents of those children had the right to receive that service in the Summerside area.

The Crown appealed to the Appeal Division. The Appeal Division allowed the appeal and held that the advantages that may result from the establishment of the school in Summerside could not supersede the disadvantages of receiving instruction that would, in the opinion of the Minister, be inferior in pedagogical terms to that offered to the children of the official language majority. The matter was appealed to the Supreme Court of Canada.

***305 2. ISSUES**

The Supreme Court of Canada defined the main issue in appeal as the delineation of the right of management and control over exercised by the Board with regard to the location of minority language schools and the discretion of the Minister to approve the decisions of the Board.

(a) Section 23

The Court held that section 23 has a remedial purpose, as it was designed to correct, on a national scale, the historically progressive erosion of official language groups and to give effect to the equal partnership of the two official language groups in the context of education. Section 23, therefore, requires that provincial governments do whatever is practically possible to preserve and promote minority language education. A purposive interpretation of section 23 rights must address past injustices, provide the official language minority with equal access to high quality education in its own language, and enhance community development. To give effect to the purpose of section 23, an historical and contextual analysis must be adopted.

The Court found that the Minister, in reaching his decision, failed to give proper weight to the promotion and preservation of minority language culture and to the role of the Board in balancing the pedagogical and cultural considerations. The narrow approach adopted by the Minister made his decision vulnerable to constitutional review by the Courts.

(b) Equality

The Court noted that a formal vision of equality that focuses on treating the majority and minority official language groups alike would not satisfy the remedial objective of section 23. Specifically, assessing the needs of the minority language children by the use of objective standards, primarily by reference to the pedagogical needs of majority language children, does not take into account the special requirements of the section 23 rights holder. Section 23 is premised on the fact that substantive equality requires the official language minorities be treated differently, if necessary, according to their particular circumstances and *306 needs, in order to provide them with the standard of education equivalent to that of the official language majority.

The Minister and the Appeal Division inappropriately emphasized the impact of three elements on the two linguistic communities: duration of the bus ride, size of schools and quality of education.

(c) Where Numbers Warrant under s. 23

Following Dickson C.J. in *Mahe v. Alberta*, [FN2] the Court adopted a sliding scale approach to the determination of “where numbers warrant” under section 23. They noted that the necessary numbers must be worked out by examining the particular facts of each case. The relevant number is the “number who will potentially take advantage of the service”. The Court found that the Appeal Division erred in adopting a different and more restrictive standard. In fact, there was never any real issue as to the existence of sufficient numbers of qualified students to justify instruction in the minority language. In analyzing the situation, the Board had fulfilled the requirements of the appropriate regulations.

In *Mahe*, the Supreme Court ruled that the “where numbers warrant” provision requires that two factors be considered: first, it requires a determination of the appropriate services in pedagogical terms, for the number of students involved; and, second, it requires an examination of the costs of the contemplated service. The Appeal Division endorsed the Minister's reasoning that the cultural advantages of having a French school in the community were outweighed by the disadvantages of the inferior education that was thought to result from the establishment of a small school. The Supreme Court rejected this analysis and instead preferred the analysis of Desroches J. at the trial division. He had found that local minority language education was justified under the purposive approach to section 23 that had been mandated by the Supreme Court in *Mahe*. There was no evidence that pedagogical concerns could not be met in the small school. The Court found that the Minister had failed to give proper weight to the effect of his decision on the promotion and preservation of the minority language community in Summerside and had not given proper recognition to the role of the Board in this regard.

***307 (d) Role of the Board**

The essential question here was determining whose opinion should prevail in circumstances such as these: the Board's or the Minister's. The Court found that where a Language Minority Board has been established to further section 23 rights, it is up to the Board to decide what is more appropriate from a cultural and linguistic perspective. The principal role of the Minister is to develop institutional structures and specific regulations and policies to deal with the unique blend of linguistic dynamics that has developed in the province. In *Mahe*, Dickson C.J. articulated two reasons why management and control are critical to the enjoyment of section 23 rights: first, they are essential to the preservation and enhancement of minority language, education and culture; and second, the right to management and control furthers the remedial goals of section 23 by protecting the linguistic minority from the hegemony and subjugation of the majority, which had occurred in the past.

3. CONCLUSION

In *Arsenault-Cameron v. Prince Edward Island*, the key to resolving the dispute was to understand that the specific form of educational system provided to the minority need not be identical to that provided to the majority. In other words, what may be seen as pedagogically inferior for the majority may well be quality education for the minority. In this case, what made sense to the minority language community and its Board did not make sense to the Minister because pedagogical needs were understood in different ways. The Minister did not appear to consider the fact that the pedagogical requirements of the minority and majority need not be met in identical ways.

Although the Minister had accepted that the numbers warranted French first language instruction, he had

erred in determining that transportation to the French first language school was sufficient to fulfill the government's obligation to provide French education in Summerside. He also had failed to defer to the decision of the French Language Board, which was properly made within its mandate under provincial Regulations and according to constitutional requirements. The Minister's decision was unconstitutional because the offer of minority language classes or facilities came within the exclusive right of management*308 of the minority and met all provincial constitutional requirements. The Minister's discretion was limited to verifying whether the Board had met provincial requirements. There were no pedagogical or financial parameters that were not met by the Board. The Minister had no power to substitute his own criteria. Nor could the Minister substitute his decision for that of the Board simply because he was of the view that the Board's decision was not a good one.

In conclusion, the Supreme Court has recognized the diversity of circumstances that may exist in relation to minority language education and avoided adopting a rigid formula to govern these issues. The determination of the appropriate area for the provision of minority language instruction facilities is something which has to be decided on the facts of each case. Thus, in some cases, it may be necessary to provide transportation for students; while in other cases it may be necessary to provide boarding or even to establish schools.

In the result, the Supreme Court allowed the appeal, set aside the decision of the Appeal Division and restored the decision of Desroches J.

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[FN1]. 2000 S.C.C. 1, 14 Nfld. & P.E.I.R. 44, 559 A.P.R. 44 (S.C.C.).

[FN2]. [1990] 1 S.C.R. 342, 106 A.R. 321, 72 Alta. L.R. 92d) 257 (S.C.C.). [Hereinafter referred to as *Mahe*.]
10 Educ. & L.J. 303

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