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Case Note

***107** Minority Language Instruction Rights

Joshua S. Phillips [FNa1]

Assn des Parents Francophones (Colombie-Britannique) v. British Columbia [FN1]

1. BACKGROUND

In a judgment handed down on August 19, 1996, the British Columbia Supreme Court gave further guidance to governments as to how they must meet their constitutional obligations to provide education services to French and English linguistic minorities under section 23 of the *Canadian Charter of Rights and Freedoms*. [FN2] Section 23 reads as follows:

> (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.

***108** British Columbia had published a Regulation under its *School Act* [FN3] creating a Francophone Edu-

cation Authority with exclusive authority to provide section 23 education within prescribed regions of the province. In March 1989, an action was commenced by certain parents with section 23 rights alleging a failure by the government to meet its constitutional obligations. The action was held in abeyance pending the delivery and implementation of recommendations from a task force struck to study minority language education in the province.

The task force recommended a governing structure for French language education consisting of three regional boards with the same powers, duties and responsibilities as other school boards in the province. It also recommended that minority language representatives have exclusive authority to make decisions relating to, inter alia, the expenditure of funds and the making of agreements for education and services.

After some delay, the government announced its intention to create a single Francophone school board with all the powers of a school board, except the right of taxation. However, even this initiative was set aside under a further proposal to set up a system of schools under the *Independent School Act*. [FN4] This latter proposal proved unacceptable to the Francophone parents, who then gave notice of their intention to resume their action.

2. THE LEGISLATIVE SCHEME

The provision of minority language education was to be accomplished largely by regulation, rather than by statute. Section 5 of the *School Act* provided, in part:

> (1) Every student is entitled to receive an educational program that is provided in the English language.
>
> (2) Students whose parents have the right under section 23 of the *Canadian Charter of Rights and Freedoms* to have their children receive instruction in a language other than English are entitled to receive that instruction.

***109** In addition, the Act gave the Lieutenant Governor in Council broad regulatory powers respecting the provision of section 23 education and education in languages other than English and French. At issue in the action was Francophone Education Regulation 457/95, which created the Francophone Education Authority (the "Authority") and granted it exclusive authority to provide Francophone education. The relevant features of the Regulation included:

> 1. "[T]he minister may provide a grant, determined by the minister, for one or more of the following purposes ....
>
> 2. The Minister must provide to the authority that portion of funding provided by the federal government for capital expenditures. The Authority was not permitted to use provincial funding for capital expenditures;
>
> 3. The power of the Authority to enter into agreements and leases for the provision of facilities and services, without a dispute resolution procedure.

The plaintiffs challenged the legislative scheme on several grounds, including:

> 1. The Regulation was ultra vires the *School Act*;
> 2. The legislative scheme was unconstitutional for:
>
> a. not providing mandatory funding for the Authority;
>
> b. prohibiting the Authority from using provincial funds for capital expenditure;

c. not providing a dispute resolution procedure to ensure the Authority will be able to obtain equipment and facilities; and

d. being created by regulation rather than by primary legislation (statute).

***110 3. THE DECISION**

In largely upholding the plaintiff's position, Vickers J. held that the Regulation was ultra vires the *School Act* . That statute places on school boards the responsibility for providing education programs and imposes the duty on persons to attend educational programs provided by school boards. By concluding that the legislation did not grant the Lieutenant Governor in Council the authority to rescind, amend or add to the legislation, Mr. Justice Vickers found a fundamental conflict between the scheme of the Act and the purported creation of the Authority by regulation. He explained the conflict in the following terms:

> In my view the specific provisions of the *School Act*, establishing school boards with specific geographic boundaries, making it impossible to have overlapping jurisdiction, requiring educational programs to be delivered by boards and requiring persons to attend such programs cannot be altered by regulation. To accede to the argument of counsel for the Province would result in an interpretation that violates the scheme set out in the *School Act* for the delivery of education in this Province.

The Court reviewed the constitutional framework for minority language instruction rights as elucidated in the Supreme Court of Canada's decisions in *Mahe v. Alberta* [FN5] and *Reference re Public Schools Act (Manitoba)* [FN6] and then enunciated a series of principles that emerged from these cases.

(a) Mandatory Funding

The Regulation, which provides that “the minister may provide to the [[[Authority] a grant,” was contrasted with language in the statute stating that the Minister “shall” provide funds to school boards. In holding the Regulation unconstitutional for its discretionary nature, the Court stated:

> In *Mahe*, the Supreme Court enunciated a principle of funding equivalency saying that funds allocated to minority schools should at least be equivalent, on a per student basis, to the funds allocated majority schools: *Mahe*, p. 378. When one keeps in mind the remedial nature of s. 23 and the delays already incurred it may be entirely possible, if not probable, that higher per student costs will be incurred, at least on start up.
>
> ***111** It is the use of the word “may”, the discretion by itself, and not the manner in which the discretion is exercised which makes the choice of words inappropriate. I do not assume the minister would exercise his discretion in an unconstitutional manner. The plaintiffs do not complain that he has done so. However they should not have to wait for an inappropriate use of ministerial discretion to challenge a word that in and of itself makes the provision unconstitutional. In my view the use of the word “may” does not meet the constitutional obligation of the Province to provide funding to meet its s. 23 obligations.

(b) Capital Expenditures

Also at issue was the differential treatment between school boards and the Authority in regard to their respective abilities to access funds for capital expenditures. Of particular concern was the Authority's inability to access provincial funds. The Court held:

> Bearing in mind the need for funding equivalency, it is difficult to see how denying the Authority access to capital funds while allowing such access to the majority can fulfil the constitutional obligation of the Province. In addition, it seems to me that the fact that the Authority may only use federal government money for capital expenditure is a clear attempt to shift that responsibility.
>
> The Authority is denied the opportunity to share in funds that might be allocated by the Province for education capital expenses and to that extent I conclude the Province has not met the responsibility imposed upon it by s. 23. That is particularly so when one takes into account the fact that the minority may only lease, unless federal funds are provided, while the majority may purchase as well as lease. It seems to me that this lack of flexibility goes to the heart of management and control. Restricting the measure of management and control of the minority fails to meet the obligation of equivalency and equality mandated by s. 23.

(c) Leasing and the Absence of Dispute Resolution Mechanism

Although it was unable to acquire land and improvements in its own name, the Authority was empowered to enter into leases and agreements. However, the Court gave special attention to the perceived vulnerability of the Authority when negotiating with school boards or others for appropriate facilities:

> In other words, it is not only the minister that would want to see a low lease payment. In the absence of some mechanism to resolve an impasse in negotiations, the Authority is at the mercy of school boards. In my view, that does not afford the authority with the measure of management and control envisioned by s. 23 as explained in *Mahe*. In some respects, it parallels the situation of Edmonton parents who were left, without any protection, to negotiate as best they could with either the Edmonton Roman Catholic Separate School Board or the Edmonton Public School Board.

***112 (d) Primary Legislation or Regulation**

After determining that the situation in British Columbia represented an “urgent and pressing need” with respect to the provision of minority French language education, the Court then referred to the “sliding scale” approach taken by the Supreme Court of Canada in *Mahe*, whereby the degree of management and control afforded to section 23 parents is adjusted in the circumstances to ensure the preservation of minority language and culture. Vickers J. held that, in the instant case, the maximum degree of management and control was required and as such, mere regulation was insufficient:

> Apart from what has been said by the Supreme Court of Canada, it is my view that legislation, as opposed to regulation, is the manner in which this constitutional commitment should be met. Language rights are rights of a fundamentally different nature. Their realization may require creative or innovative measures. The burden of ensuring that the obligations imposed by s. 23 is a burden placed on both the government and the legislature of each province. Provincial legislation provides a measure of security beyond a regulatory scheme. Amending a statute is far more onerous than amending a set of regulations. As well, the presentation of legislation is more likely to ensure a better public understanding of this signi-

ficant Canadian solution for the protection of language and culture, afforded to both French and English speaking Canadians. With debate in the Legislative Assembly comes the opportunity to advance a better understanding of our national heritage and the unique place it holds in the family of nations.

4. SUMMARY

In the result, the Court has made clear that the rights and powers of section 23 parents in British Columbia, and their education institutions, must not only be firmly entrenched in legislation which conforms to section 23, but must also not appear to be subject to the discretion of the Minister or other governmental actors, including other school boards. Where there is a significant minority, differential grants of authority to majority and minority language groups will most certainly be viewed skeptically, if not outright rejected, by the courts.

[FNa1]. Of Golden, Green & Chercover, Toronto.

[FN1]. [1996] B.C.J. No. 1831 (S.C.).

[FN2]. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[FN3]. S.B.C. 1989, c. 61.

[FN4]. S.B.C. 1989, c. 51.

[FN5]. [1990] 1 S.C.R. 342.

[FN6]. [1993] 1 S.C.R. 839.

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