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Case Note

**\*73** Province's Obligation to Promote and Preserve Minority Language Instruction under Section 23 of the Charter Satisfied by Sending Children to a Nearby School in Another Province

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*Chubbs v. Newfoundland & Labrador* [FN1]

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

The Plaintiffs, parents of children living in the Labrador Straights region of the Province of Newfoundland and Labrador (hereinafter “the Province”), wished to have their children educated in the minority French language within the Province in accordance with their constitutional rights under section 23 of the *Canadian Charter of Rights and Freedoms* (hereinafter the “*Charter*”). The Defendants, the Province and the Minister of Education for the Province, argued that the small number of children in the community who qualified under section 23 of the *Charter* did not warrant minority language instruction in the L'Anse-au-Clair region of Southern Labrador. The Province had already made arrangements to have the children attend school in the nearby francophone community of Lourdes de Blanc-Sablon just inside the Quebec border, with all costs associated with that arrangement being paid by the Province.

Section 23 of the *Charter* provides that the right of citizens of Canada to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population in that 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 **\*74** them out of public funds of minority language instruction; and (b) includes, where the number of those children so warrant, the right to have them receive that instruction in minority language education facilities provided out of public funds.

The issues before the Supreme Court of Newfoundland & Labrador (hereinafter “the Court”) were: (1) whether the number of students of section 23 rights holders in the Southern Labrador region of the Province warranted educational instruction in the French language and, if so (2) whether these s. 23 *Charter* rights were being satisfied by having the children educated in Quebec instead of Newfoundland. The Plaintiffs argued that the arrangement between the Provinces of Quebec and Newfoundland was not acceptable because Newfoundland had no jurisdiction in Quebec and either Province could terminate the arrangement at any time with no remedy for the parents. The Plaintiffs did not ask for a separate school facility but that a program of instruction be delivered in French by and in the Province of Newfoundland.

The Court accepted the evidence that the potential number of students in L'Anse-au-Clair who could avail

themselves of French language education was 19 and that the actual number of students expected in any given year would be no greater than 15. Relying on the Supreme Court of Canada's holdings in *Mahe v. Alberta* [FN2] and *Arsenault-Cameron v. Prince Edward Island* [FN3] that under the “numbers warrant” test the number would lie somewhere between the actual number and the potential number of students who could avail themselves of minority language instruction, the Court estimated that the number of students warranting consideration in the present case was 17.

In examining the “numbers warrant” issue, the Court found that there does not appear to be any specific or identifiable number of minority language students that would trigger section 23 *Charter* rights and held that, in determining whether the “numbers warrant” the minority language instruction rights requested, it is necessary to review each circumstance on an individual basis within its own geographical, social and cultural context. The Court further accepted the view that, overall, there is a general right to minority language instruction pursuant to section 23 but that this general right should be viewed as encompassing a “sliding scale” of requirement, the lower level being that the right to instruction is guaranteed only where the number of children warrants and the upper level of \*75 the range being a guaranteed right to minority language educational facilities.

In the end, the Supreme Court of Newfoundland & Labrador held that the number of children of the section 23 rights holders in the L'Anse-au-Clair region of Southern Labrador was not sufficient to warrant an upper range placement on the “sliding scale” of educational services as stated by the Supreme Court in *Mahe*. [FN4] But for the Quebec agreement, the best that could be hoped for in the way of providing French language educational facilities in the Southern Labrador region would be a two-room school with two teachers in a multi-grade environment with no gymnasium and no separate laboratory facilities. This option, the Court concluded, did not satisfy the constitutional obligation of the Province of Newfoundland to promote and preserve minority language instruction in the Province when there was a much more effective method of doing so; that being to send the children to a French language instruction school over the Quebec border with a complement of 19 teachers and two computer laboratories, a science laboratory and a gymnasium. The Court further found that the resources required to duplicate this high level of French language instruction on the Newfoundland side of the border were not warranted for the number of students involved.

The Court also held that the Province's agreement with Quebec complied with the “in that province” requirement of section 23 of the *Charter* because the Newfoundland & Labrador *Schools Act, 1997* [FN5] obligated a School Board to provide for the instruction of students either by establishing a program in its schools or by making an arrangement with another Board or with another educational body in Canada. Finally, the Court stated that the Defendants and the Provincial French Language School Board had to develop an administrative protocol to protect the management rights of the section 23 right holders whose children were attending school outside of the Province.

The decision in *Chubbs v. Newfoundland & Labrador* [FN6] is significant because the arrangement reached between the Province of Newfoundland and the Province of Quebec in the case is illustrative of a novel solution encouraged by the Supreme Court in *Mahe* [FN7] and extends flexibility to section 23 of the *Charter* to effect its purpose. In *Mahe*, Chief Justice Dickson stated:

\*76 I do not believe that these words support the proposition that s. 23 should be given a particularly narrow construction, or that its remedial purpose should be ignored.

...

Careful interpretation of such a section is wise: however, this does not mean that courts should not “breathe life” into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose. [FN8]

[FN1]. Of Green & Chercover, Toronto, Ontario.

[FN1]. 2004 NLSCTD 89, 2004 CarswellNfld 137 (N.L. T.D.).

[FN2]. 68 D.L.R. (4th) 69, 1990 CarswellAlta 26, 1990 CarswellAlta 649, [1990] 3 W.W.R. 97, 105 N.R. 321 (S.C.C.).

[FN3]. 181 D.L.R. (4th) 1, 2000 CarswellPEI 4, 2000 CarswellPEI 5, 249 N.R. 140 (S.C.C.).

[FN4]. Above, note 2.

[FN5]. S.N. 1997, c.S-12.2.

[FN6]. Above, note 1.

[FN7]. Above, note 2.

[FN8]. *Ibid.* at 84-85 [D.L.R.].  
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