A victory for meaningful access to minority-language education across Canada

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On Dec. 8, 2023, in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, the Supreme Court of Canada (SCC) unanimously affirmed the important role of minority official language education rights under section 23 of the Canadian Charter of Rights and Freedoms (the Charter) for all parents and caregivers across Canada. With this decision, Canada's highest court has sent a strong message to both courts and administrative decision-makers to ensure they consider the critical role education plays in preserving minority official language in our communities when making discretionary decisions related to constitutional protections.

Rights holding versus non-rights holding

This case dealt with the Northwest Territories, where French is a minority language, and addressed the constitutional rights of "non-rights holding" parents who wanted to send their children to a French first language school.

Under section 23 of the Charter, Canadian citizens who have learned and still understand the minority official language of their province, or who have received primary or secondary education in the minority official language of their province, have the right to have their children receive primary and secondary education in that minority official language. These are so-called "rights holding" persons. However, parents or caregivers may also be "non-rights holding" where they do not meet the specific requirements of section 23 for various reasons including for example when the parent or guardian is not a Canadian citizen, or when they do not speak French as a second language.

In this matter, several "non-rights holding" parents with ties to the Francophone community sought to have their children admitted to a French first language school. Their eligibility to do so depended on a Ministerial Directive which set out three (3) circumstances in which children of non-rights holder parents were eligible to be admitted:

1. if the child's parent or grandparent would have been a rights holder but for a lack of opportunity to attend a French first language school;

2. if the parent would otherwise meet the criteria of section 23 if they were a Canadian citizen; and
3. if the parent is a new immigrant whose child does not speak English or French and is enrolling in a Canadian school for the first time.

The parents did not meet the Directive's criteria and requested that the Minister exercise her residual discretion, outside of the Directive, to admit the children to the French first language schools. The Minister declined to do so. The parents, with the support of the Commission scolaire francophone des Territoires du Nord-Ouest (CSFTNO), applied to the Court of Appeal for judicial review. The Court of Appeal overturned the initial decision, but the majority nonetheless found that there was no legal or constitutional obligation to admit a child of a non-rights holder parent (2021 NWTCA 8). The matter was appealed up to the Supreme Court.

The issue

The SCC, in turn, had to consider whether non-right-holding parents who nevertheless had ties to the French-speaking community could have their children admitted to a French language school.

Minority official language school boards are critical to minority language communities

The SCC confirmed that educational environments are places of socialization where students can develop their potential in their own language and become familiar with their culture. As such, they are essential to protecting minority linguistic rights. Instead of adopting a narrow interpretation of section 23, the SCC confirmed the right to minority-language education for children of non-rights holding parents so long as they demonstrate a genuine commitment to Francophone communities. In doing so, the SCC established that the maintenance of minority-language school boards fosters the vitality of the minority official language communities in which they are located.

The SCC found that the Minister had overemphasized both her obligation to make consistent decisions and the cost of the services contemplated, making the Minister's decision unreasonable.

Cautions and takeaways

This decision stops short of allowing access to minority official language education for all children in the country. However, with this decision, the SCC is insisting that applications for admissions of otherwise ineligible parties be assessed carefully, analyzed individually, and understood in the context of the minority-language community at issue. Only then, can minority language rights and minority language communities be truly protected by the Charter.

This decision also reaffirmed the currency of the *Doré v. Barreau du Québec*, 2012 SCC 12 framework in Canadian administrative law, clarifying for decision-makers that they must consider the relevance of Charter protections and values – and place due weight on these considerations – even when applicants do not have the sophistication to raise

these issues on their own. A decision by an administrative decision-maker will be unreasonable and set aside if they fail to take steps reasonably open to them to limit the restriction of Charter protections.

For more information, reach out to any of the key contacts listed below. For decades, BLG has served the interests and needs of French-language school boards across Ontario. If you have any inquires relating to this article, French-language rights, or the other services that we provide to school boards, please contact our National School Boards Practice Co-Chair, John-Paul Alexandrowicz or Kate Agyemang, who practice law in French on behalf of French-language school boards and school boards associations.

For more information on *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, see our pervious article.

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