Noëlla Arsenault-Cameron, Madeleine Costa-Petitpas and the Fédération des Parents de l'Île-du-Prince-Édouard Inc. *Appellants*

v.

The Government of Prince Edward Island *Respondent*

and

**The Attorney General of Canada,
the Attorney General for Ontario,
the Attorney General of Manitoba**,
**the Commission scolaire de langue française de l'Île-du-Prince-Édouard,
the Commission nationale des parents francophones,
the Société St-Thomas d'Aquin – Société acadienne de l'Île-du-Prince-Édouard,
and the Commissioner of Official Languages of Canada** *Interveners*

Indexed as: Arsenault-Cameron *v*. Prince Edward Island

Neutral citation: 2000 SCC 1.

File No.: 26682.

1999: November 4; 2000: January 13.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.

on appeal from the prince edward island supreme court, appeal division

Constitutional law – Charter of Rights – Minority language educational rights – Educational facility – Location of minority language schools – Right of management and control over educational facility – Whether minority language educational rights in s. 23 of Charter include right to instruction in educational facility located in specific area where numbers warrant provision of minority language instruction – Delineation of right of management and control exercised by minority language board regarding location of minority language schools – Minister of Education's discretion to approve board's decisions regarding minority language educational services.

The individual appellants hold minority language educational rights under s. 23 of the *Canadian Charter of Rights and Freedoms.* They made a request to the French Language Board for the establishment of a French school for grades 1 to 6 in the Summerside area for the 1995-96 school year. The pre-registration results met the minimum requirement set out in the regulation, and the Board made a conditional offer of French first language instruction in Summerside. The Minister of Education conceded that the children of s. 23 right holders living in the Summerside area were entitled to educational instruction in the French language and that the number of children warranted the provision of the instruction out of public funds, but he refused to approve the Board's offer and instead offered to maintain transportation services to an existing French language school in Abram's Village. The average bus ride from the Summerside area to the existing French language school was 57 minutes. He also rejected the Board's subsequent proposal to provide French language instruction in Summerside through the existing French language school in Abram's Village. The appellants initiated proceedings against the provincial government seeking a declaration of their right to have their children receive French first language instruction at the primary level in a facility situated in Summerside. The Prince Edward Island Supreme Court, Trial

Division, granted the declaration but the Appeal Division set aside that judgment and reinstated the Minister's decision.

Held: The appeal should be allowed.

Section 23 of the *Charter* mandates that provincial governments do whatever is practically possible to preserve and promote minority language education. Its object is in part remedial, and it is not meant to reinforce the *status quo* by adopting a formal vision of equality that would focus on treating the majority and minority official language groups alike. A purposive interpretation of s. 23 rights is based on the true purpose of redressing past injustices and providing the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced. The historical and contextual analysis is important for courts in determining whether a government has failed to meet its s. 23 obligations, and should guide governmental actors in reaching appropriate decisions to give effect to s. 23. The fact that constitutional language rights resulted from a political compromise is not unique to language rights and does not affect their scope.

Under s. 23(3) of the *Charter*, a province has a duty to provide official minority language instruction where the numbers warrant. The relevant number is somewhere between the known demand and the number of students who could potentially take advantage of the service. Since s. 23 favours community development and links the right to instruction to the area where the conditions for the exercise of that right are present, calculation of the relevant number is not restricted to the existing school boundaries. When a minority language board exists, the area is to be defined on a case-by-case basis and is within the minority's exclusive powers of management and control, subject to objective provincial norms and guidelines consistent with s. 23. Otherwise, the remedial and protective potential of s. 23 would be greatly impaired. In

this case, the relevant number in the Summerside area was between 49 and 155. The Appeal Division erred in adopting a different, more restrictive, standard focussed solely on actual demand.

Identifying what is required by s. 23 involves a determination of the appropriate services, in pedagogical terms, for the number of students involved and an examination of the costs of the contemplated service. Educational services provided to the minority need not be identical to that provided to the majority. Substantive equality under s. 23 requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide a standard of education equivalent to that of the official language majority. Owing to the variety of circumstances encountered in different schools and the demands of a minority language education itself, providing the same form of educational system to the minority and the majority may be impractical and undesirable. Focussing on the individual right to instruction at the expense of the linguistic and cultural rights of the minority community effectively restricts the collective rights of the minority community. Here, by using objective standards, which assess the needs of minority language children primarily by reference to the pedagogical needs of majority language children, the Minister failed to take into account the special requirements of the s. 23 rights holders. Further, although travel arrangements may, in some circumstances, meet the requirements of s. 23, the Minister also failed to recognize that the s. 23 children were faced with a choice between a locally accessible school in the majority language and a less accessible school in the minority language, a choice which would have an impact on the assimilation of the minority language children. Furthermore, a school is the single most important institution for the survival of the official language minority, which is itself a true beneficiary under s. 23; insufficient weight was given to this factor. It was conceded by the Minister that financial considerations were not an issue in this case.

Management and control are critical to the enjoyment of s. 23 rights, and, where numbers warrant the creation of facilities, the representatives of the official language community have the right to a degree of governance of these facilities. The right of management and control is independent of the existence of a minority language board. At the upper end of the sliding scale of rights, where a minority language board is required, it will have both the powers of management granted by the legislature and any further powers conferred by s. 23. Although the Minister is responsible for making educational policy, his discretion is subordinate to the *Charter*, including the remedial aspect of s. 23, the specific needs of the minority language community and the exclusive right of representatives of the minority to the management of French language instruction and facilities. Within the parameters of s. 23, regulation of the board's powers is permissible. The government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met. The province has a legitimate interest in the content and qualitative standards of educational programs for the official language communities and it can impose appropriate programs in so far as they do not interfere with the legitimate linguistic and cultural concerns of the minority.

In the present case, the French Language Board had an obligation to offer French language instruction where numbers warrant and to determine the location of the required classes or facilities, subject to the approval of the Minister. The Minister's decision not to offer services in Summerside is unconstitutional because the offer of classes or a facility came within the exclusive right of management of the minority and met with all provincial and constitutional requirements. The Minister's discretion was limited to verifying whether the Board had met provincial requirements; he had no power to substitute his own criteria or decision. The Minister failed to give proper weight to the effect of his decision on the promotion and preservation of the minority language

community in Summerside and did not give proper recognition to the role of the French Language Board in this regard.

The Appeal Division erred in deciding that the sliding scale approach was governed by the "reasonable accessibility" of services without considering which services would best encourage the flourishing and preservation of the French language minority. It also erred in accepting that the Minister could unilaterally decide what level of service was appropriate. The priorities of the minority community had to be given precedence because they lie at the core of the management and control conferred on the minority language rights holders and their legitimate representatives by s. 23.

Cases Cited

Followed: *Mahe v. Alberta*, [1990] 1 S.C.R. 342; **referred to:** *Reference re: School Act* (1988), 49 D.L.R. (4th) 499; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839; *R. v. Beaulac*, [1999] 1 S.C.R. 768; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Lavoie v. Nova Scotia (Attorney-General)* (1988), 50 D.L.R. (4th) 405; *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 10 D.L.R. (4th) 491.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 23.

School Act, R.S.P.E.I. 1988, c. S-2.1, ss. 2(1) [am. 1994, c. 56 , s. 2], 7(1)(a), (b), 27(1), 49 [*idem*, s. 14], 112, 121(1), (2), (3), (4), 122(2), (3), 128(1) [*idem*, s. 28], (2).

School Act Regulations, EC674/76 [am. EC108/90], s. 6.01(b), (f), 6.05(1), (4), 6.07, 6.08, 6.11.

APPEAL from a judgment of the Prince Edward Island Supreme Court, Appeal Division (1998), 162 Nfld. & P.E.I.R. 329, 500 A.P.R. 329, 160 D.L.R. (4th) 89, [1998] P.E.I.J. No. 38 (QL), reversing a judgment of the Trial Division (1997), 147 Nfld. & P.E.I.R. 308, 459 A.P.R. 308, [1997] P.E.I.J. No. 7 (QL). Appeal allowed.

Robert A. McConnell, for the appellants.

Roger B. Langille, Q.C., for the respondent.

Claude Joyal, *Warren J. Newman* and *Marc Tremblay*, for the intervener the Attorney General of Canada.

Robert Earl Charney, for the intervener the Attorney General for Ontario.

Deborah L. Carlson, for the intervener the Attorney General of Manitoba.

Pierre Foucher, for the intervener the Commission scolaire de langue française de l'Île-du-Prince-Édouard.

Paul S. Rouleau, for the intervener the Commission nationale des parents francophones.

Christian E. Michaud, for the intervener the Société St-Thomas d'Aquin -- Société acadienne de l'Île-du-Prince-Édouard.

Daniel Mathieu and *Richard L. Tardif*, for the intervener the Commissioner of Official Languages of Canada.

The judgment of the Court was delivered by

1 MAJOR AND BASTARACHE JJ. — In December of 1982, a group of parents representing 17 children who attended schools located in the region of Summerside requested that a class be opened by Unit 2 Regional School Board, an English language board, in Summerside, for instruction in the French language pursuant to s. 23 of the *Canadian Charter of Rights and Freedoms*. The Regional Board declined to grant the request but offered either to register the children who qualified for French language education in existing local French immersion classes or to bus them to École Évangéline, a school administered by the Unit 5 Regional School Board in Abram's Village, where education was provided in the French language. Further requests were brought in 1983 and 1985; the same reply was made. An action was commenced in the Supreme Court of Prince Edward Island and later abandoned after a reference to the Appeal Division of the Court was issued on September 19, 1985. In *Reference re: School Act* (1988), 49 D.L.R. (4th) 499, the Appeal Division of the P.E.I. Supreme Court found that the sections of the Act and many of the Regulations referred to in the Reference were unconstitutional. The School Act and Regulations were later amended, providing in particular that Unit 5 Regional School Board be reconstituted and given responsibility for the promotion and delivery of all French language education in the province.

2 In November of 1994, the personal appellants in the present action made a request to the Commission scolaire de langue française (the "French Language Board" or the "Board") for the establishment of a French school for grades one to six in the Summerside area for the 1995-96 school year. Officials of the Board met with representatives of the Minister of Education to discuss the possible establishment of a school. Thirty-four students pre-registered in January 1995, with a total of 17 s. 23 children in grades one and two. Twenty-nine children were from Summerside, four from Miscouche and one from Kensington. Based on the pre-registration results, the Board

decided to make a conditional offer of French first language instruction in Summerside. The Board did not offer transportation to École Évangéline, located in Abram's Village, because the majority of parents did not want to send their young children outside the community. Abram's Village is 28 kilometres from Summerside, 20 kilometres from Miscouche, 40 kilometres from Kensington and Bedeque, and 46 kilometres from Kinkora. The Board was aware of the fact that 20 years of available transportation had not been accepted as responding to the needs of the French language community. For the year 1995-96, of the 34 pre-registered students and 13 others prepared to attend a French school in Summerside, 15 were enrolled in French immersion in English schools in the Summerside area because their parents deemed the trip too long for young children.

3 In February of 1995, the Minister of Education refused to approve the Board's offer and instead offered to maintain transportation services to Abram's Village. In an attempt to find a solution acceptable to the Minister, the Board proposed to provide French language instruction in Summerside through École Évangéline. The Minister also rejected this proposal. In June 1995, the appellants gave notice to the Crown and, in a statement of claim filed in November 1995, initiated proceedings against the government of Prince Edward Island seeking a declaration to the effect that they have the right to have their children receive French first language instruction at the primary level in a facility situated in Summerside.

4 The Prince Edward Island Supreme Court, Trial Division, found that the number of children from grades one to six that could be assembled for instruction in Summerside was sufficient to warrant the 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 Appeal Division of the Supreme Court of Prince Edward Island allowed the appeal and held that the advantages that may result

from the establishment of a French language 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 court added that bus transportation could be considered an educational facility and did not constitute an impediment to the exercise of the rights of parents in the Summerside area given that the average time of travel did not exceed the provincial average. We are of the view that the decision of the trial judge, who made all of the necessary findings of fact and committed no error of law, must be restored.

I. The Issues

5 No constitutional question was adopted in the present appeal. The following issues were formulated for the direction of the parties:

1. Should para. 23(3)(*a*) of the *Charter* be interpreted to mean that when the numbers warrant the provision of minority language instruction in a specific area, the right automatically includes the right to instruction in an educational facility located in that area?

2. Having regard to the appropriate considerations, including the number of students that could eventually be expected to take advantage of minority language instruction, will the sliding scale approach to the application of s. 23 of the *Charter* allow for minority language instruction in a facility located outside the area where the numbers warrant the provision of minority language instruction?

6 After hearing the submissions of the parties and interveners, we are of the view that the main issue in this appeal is the delineation of the right of management and

control exercised by the French Language Board with regard to the location of minority language schools and the discretion of the Minister to approve of the decisions of the Board in that regard.

II. Relevant Constitutional and Statutory Provisions

7 *Canadian Charter of Rights and Freedoms*

> **23.** (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.

School Act, R.S.P.E.I. 1988, c. S-2.1

2. (1) The Minister is responsible for the administration of this Act, for ensuring the provision of educational services through the Department, and the school boards, and for overall leadership of the educational system in the province.

. . .

7. (1) The Minister shall

(a) define the goals, standards, guidelines, policies and priorities applicable to the provision of education in Prince Edward Island;

(b) research and assess changing needs, trends and approaches in education and develop and implement strategic plans;

. . .

27. (1) The Minister may establish such school units as the Minister considers necessary, each of which shall have the boundaries prescribed by the regulations and shall be administered by a school board in accordance with this Act.

. . .

49. A school board shall, subject to the regulations and Minister's directives,

(a) provide for instruction in an educational program to all persons who are enrolled in its schools and eligible in accordance with the Act and the regulations;

(b) provide for the recruitment, employment, management and evaluation of staff of the school board and identification of staff development needs;

(c) provide for and manage such facilities and equipment as may be necessary for the safe and effective operation of the school unit;

(d) provide for the transportation of students;

(e) provide for effective and efficient management of the financial affairs of the school board;

(f) monitor and evaluate effectiveness of schools;

(g) ensure the development of and approve school improvement plans;

(h) encourage good relations among schools, parents and the community and promote family and community awareness of the importance of education.

. . .

112. (1) Subject to proof of eligibility as prescribed by the regulations, parents who are resident in Prince Edward Island have the right to have their

children receive French first language instruction where numbers warrant, if one of the following criteria is met:

(a) the first language learned and still understood of the parent is French;

(b) the parent received primary school instruction in Canada in French as a first language; or

(c) a child of the parent has received or is receiving French first language instruction in Canada at the primary or secondary level.

(2) Where numbers warrant, French first language instruction provided pursuant to subsection (1) shall be provided in French language educational facilities in accordance with the regulations.

(3) Residents of the province who meet the qualifications of subsection (1) have the right to participate in the administration and management of French first language instruction, whether or not they have any children.

. . .

121. (1) The Minister shall establish a school board funding program.

(2) Each school board shall submit to the Minister budget information in accordance with the regulations and Minister's directives.

(3) The Minister shall meet annually with school boards to discuss budget matters.

(4) On or before the date fixed by Minister's directives, the Minister shall approve a budget for each school board with such recommendations or conditions as the Minister considers necessary.

. . .

122. . . .

(2) A school board shall not budget for a current deficit in any fiscal year if such deficit would create an accumulated deficit.

(3) Where a school board has incurred a deficit, the deficit shall be a first call on the school board's grant for the second fiscal year following and the school board shall budget accordingly.

. . .

128. (1) The Minister after consultation with the school board concerned, may recommend to the Minister of Transportation and Public Works

(a) the purchase, rental or acceptance of gifts of land or buildings for school purposes;

(b) the construction and furnishing of school buildings; and

(c) capital additions to school buildings.

(2) A school board, with the Minister's approval, shall determine the location of school buildings.

School Act Regulations, EC674/76

PART VI

FRENCH LANGUAGE INSTRUCTION

. . .

6.01 In this Part

. . .

(b) "French school" means a building or a part of a building which

(i) is designated as a school by the Minister pursuant to section 6.11, and

(ii) is used, during school hours, to provide French language instruction to classes over several grade levels;

. . .

(f) "where numbers warrant" means at least fifteen section 23 children over two consecutive grade levels, who can reasonably be assembled for the purposes of providing French language instruction.

. . .

6.05 (1) The French school board shall have jurisdiction over and administer French language instruction in the province in accordance with the Act and the regulations.

. . .

(4) The French school board shall be responsible for the promotion of, and distribution of information with respect to, French language instruction in the province.

. . .

6.07 The French school board shall, where numbers warrant, provide French language instruction in a particular area by offering classes or by offering transportation to an area that has a class.

6.08 (1) Where the French school board is making preliminary plans to start a new class in any area or to offer transportation to a class, it must take

into consideration the proximity of existing classes or facilities, projected numbers of section 23 children, and other relevant factors, and the French school board may conduct a pre-registration of section 23 children in order to determine the demand for French language instruction in that area.

(2) Before making a conditional offer of French language instruction the French school board shall obtain the Minister's approval with respect to

(a) the projected number of section 23 children to be served by the class; and

(b) their reasonable assembly for a class.

(3) For the purpose of determining whether a sufficient number of children can reasonably be assembled, the Minister may examine if section 23 children are sufficiently concentrated both geographically and by grade level, taking into account the following factors:

(a) the proximity of existing classes and facilities to the area,

(b) the number of section 23 children in the area,

(c) the potential for future admissions,

(d) the distances over which the children must be transported,

(e) the ages of the children.

(4) A conditional offer of registration for French language instruction may consist of

(a) a new class to be started in an area; or

(b) transportation of section 23 children to another area.

(5) Where a conditional offer is made pursuant to subsection (4), parents shall return registration forms to the French school board not later than March 1 in the school year in which the offer is made.

. . .

6.11 (1) The Minister may designate a school as a French school.

(2) For the purposes of subsection (1), the Minister shall take into consideration the following factors:

(a) the number of students;

(b) the number of grade levels; and

(c) the reasonable assembly of the students in one location.

III. Judicial History

A. *Prince Edward Island Supreme Court – Trial Division* (1997), 147 Nfld. & P.E.I.R. 308

8 DesRoches J. considered *Mahe v. Alberta*, [1990] 1 S.C.R. 342, and *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839. He also reviewed the historical background of this litigation, as set out in *Reference re: School Act*, *supra*, and in the evidence before him. He canvassed the evidence presented by community leaders and a socio-linguistic expert with regard to linguistic and cultural assimilation of the official language minority and recognized the importance of local schools for the preservation of the minority community. He also noted that parents objected to long travel times not only because of the inconvenience to the children, but also because busing prevented children from participating in extracurricular activities and created problems for parents who needed to meet with teachers, to retrieve a sick child, or to take a child to an appointment.

9 DesRoches J. noted that the parties agreed that the number of s. 23 children was sufficient to warrant the provision of French language instruction. The main issue was therefore whether the number of children warranted the provision of French language educational facilities out of public funds in the Summerside area. He noted that in accordance with the purpose of the s. 23 right as defined in *Mahe*, the answer to this question should ideally be guided by that which will most effectively encourage the flourishing and preservation of the French language in this province, and particularly in the Summerside area. Section 23 was intended as a remedial provision and, in order to be effective as a remedy for past defects, it must be given a broad and liberal interpretation.

10 In this case, the parties accepted that 34 s. 23 students had pre-registered for elementary school, and that 140 s. 23 students attended English elementary schools in

the Summerside area in the 1995-96 school year. Ms. Angéline Martel, a socio-linguistic expert, projected, and the respondent accepted, that 155 s. 23 children could attend French language classes in Summerside in the 1996-97 school year. She also projected that an additional 151 children would be eligible to attend French primary school in the next five years. DesRoches J. noted, at p. 340, that the relevant number was "the number of persons who will eventually take advantage of the contemplated programme or facility" and that the right was not limited to existing school boundaries. He concluded that 306 students could potentially take advantage of French language instruction (155 students then eligible plus 151 students who would be coming into the school system). He found the relatively low pre-registration understandable, and inferred from the increase in enrollment at École François-Buôte in Charlottetown that it was reasonable to expect the demand to increase once French language services were established in Summerside.

11 DesRoches J. found it unnecessary to decide whether Regulation 6.08(2) gave the Minister the discretion to determine whether to offer classes or transportation or whether such a discretion was contrary to s. 23, and expressly took no position on the constitutional validity of the Regulations.

12 DesRoches J. noted that the Minister had not considered in any significant way the number of pre-registrations, the number of s. 23 children in Summerside, the potential for future admissions, or the transportation distance. Particularly, the Minister had not considered the purpose of s. 23, its remedial aspect, or the role it plays in the preservation and flourishing of minority language culture. DesRoches J. found that the Minister should have weighed the effects of the two choices he believed he had, bussing or local facilities, on the French language minority in the Summerside area. Such a consideration was particularly important given the socio-linguistic expert's testimony that the transportation option met the needs of individuals, but did not strengthen and

sustain French language and culture in an area which contains the second largest French language minority population in the province.

13 DesRoches J. concluded that French language instruction for elementary school students from Summerside was not reasonably accessible – the bus ride was too long for children in elementary grades. Although 19 of the 34 pre-registered students attended École Évangéline, their parents were concerned about the long bus trip. For the parents of the 15 pre-registered students who eventually attended English schools, it was believed that the existing French school was too far away. Moreover, it should be noted that for those who attended École Évangéline, most were not able to participate in any extra-curricular school activities owing to the distance between their home and the school.

14 DesRoches J. found that, if the numbers warranted the establishment of a facility pursuant to s. 23, as they did in this case, then the facility should be located so as to be reasonably accessible and should eliminate unduly lengthy bus rides for elementary school children where possible. This was particularly true when evidence demonstrated that majority language elementary children in the Eastern school district did not travel comparable distances. DesRoches J. felt that providing French language classes out of public funds in Summerside organized and presented by École Évangéline under its mandate would be more likely to guarantee s. 23 parents in the Summerside area their rights than would transportation to École Évangéline. He held that "the 'numbers warrant' test applied to the particular facts of this case requires a remedy on the higher end of the sliding scale proposed by the Supreme Court of Canada in *Mahe*" (p. 346).

15 Pursuant to s. 24 of the *Charter*, DesRoches J. thus declared (1) that the number of children in the Summerside area whose parents have the right to have their

children receive grade one through six education in the French language was sufficient to warrant the provision to them, pursuant to s. 23(3)(*b*) of the *Charter*, of instruction out of public funds; and (2) that the appellants had the right pursuant to s. 23(3)(*b*) to have their children receive French language primary school (grades one through six) instruction in French language facilities in the Summerside area provided out of public funds.

16 While recognizing that costs on solicitor and client basis should only be awarded in exceptional cases, DesRoches J. concluded that such costs should be awarded in the case at bar. After receiving further submissions on the issue of costs, DesRoches J. reaffirmed the solicitor and client costs in a supplementary judgment in February 1997.

B. *Prince Edward Island Supreme Court, Appeal Division* (1998), 162 Nfld. & P.E.I.R. 329

17 As a preliminary matter, McQuaid J.A., writing for the Appeal Division, noted that the trial judge's declaration should be read as granting the appellants the right to have a class or classes in the Summerside area and not necessarily a separate school in the sense of a separate physical structure, as it was now being interpreted by the appellants. He held that the trial judge erred in law in failing to properly apply the sliding scale approach to the interpretation of s. 23, and in making palpable and overriding errors in the assessment of the evidence and in drawing certain inferences from the evidence.

18 The Appeal Division noted that the Minister conceded that the children of s. 23 rights holders living in the Summerside area were entitled to educational instruction in the French language and that the number of children warranted the provision of the

instruction out of public funds. What the Minister opposed was the establishment of a separate educational facility in the Summerside area.

19 With respect to the interpretation of s. 23 of the *Charter*, McQuaid J.A. noted that while a purposive approach was warranted and while the section was to be construed remedially, other important interpretative principles had to be considered. First, different interpretative approaches may be applicable in different jurisdictions given the unique blend of linguistic dynamics that have developed in each province. Second, as language rights are fundamentally different from other rights protected by the *Charter* in that they are founded on political compromise, prudent interpretation of the section is advised. Third, the right conferred on each individual right holder is the right to an educational system.

20 McQuaid J.A. was of the view that the court had to address the requirements at the bottom or middle of the sliding scale. He recognized that the relevant figure for s. 23 rights holders could only be roughly estimated by considering the known demand and the number of those qualified in the area under s. 23(1) and (2). In addition, the "numbers warrant" test involved the consideration of subtle and complex factors, the most important being the pedagogical requirements and the cost of the services, with the former having more weight than the latter. McQuaid J.A. held that s. 23 did not intend to place provinces in the position of having to construct schools or otherwise establish facilities that might be substantially under-utilized. Thus, he found that the onus was on those requesting the instruction to prove that, on a balance of probabilities, the number in fact warranted the instruction and the nature of the minority language educational facilities being requested.

21 The Appeal Division held that the trial judge had made palpable and overriding errors in concluding that 306 s. 23 children could potentially take advantage of French first language elementary schooling in the Summerside area. McQuaid J.A.

further found that the trial judge erred in inferring that upon the establishment of a facility, the demand for French first language instruction would increase at the same rate in the Summerside area as it had in the Charlottetown area. He found that there was no evidence provided to the trial judge nor to the Minister that the number of children who might eventually take advantage of French first language instruction in the Summerside area was greater than 50 in 1996-97 with the addition of 15 over the next two years. McQuaid J.A. found that the appellants, who had the onus of proving that the Minister's actions amounted to a denial of that right and that the number of s. 23 children who might eventually take advantage of French first language instruction warranted the establishment of a facility for that purpose in the Summerside area, had failed to establish that the number was more than 65 students in any year. Thus, the trial judge had erred in finding that the number was higher.

22 McQuaid J.A. found that in determining the appropriate level of service, the primary consideration had to be the pedagogical requirements of the students. In this respect, consideration had to be given to the minimum number of students necessary to deliver appropriate educational instruction and the appellants had the onus of establishing the minimum number which would be appropriate pedagogically. While fewer students might be required to establish a minority language program than a majority language program, the considerations would otherwise be the same. McQuaid J.A. concluded that there was no evidence, except that of the Minister, which addressed the pedagogical considerations. In this connection, the Minister had stated that it would be difficult to meet all the children's pedagogical needs including music, physical education, library and resource with less than 100 students. McQuaid J.A. held that since the right to minority language education carried with it the right to educational instruction roughly equivalent to that offered to the majority, creating an educational system for the minority that is inferior to that being delivered to the majority would be inconsistent with the purposes of s. 23.

23 McQuaid J.A. stated that when the number that would warrant instruction is determined, consideration then turned to the facilities required to receive the instruction. In this connection, he held that considerations might have to be given to the quality of the program of existing minority language educational facilities, the availability of physical space, the location of the existing facility, and whether transportation would be an impediment which might effectively deprive the children of the right to minority language education.

24 McQuaid J.A. recognized that while it was important for children of both the majority and minority to have the opportunity to be educated in their respective communities, the evidence demonstrated that children in the province had to be transported from their communities to facilities located in other communities and equipped to provide an appropriate education system. He agreed with the Minister that where the numbers warrant, the instruction may be received in a minority language educational facility located outside the area, provided such facility was "reasonably accessible" and offered a program of instruction which was pedagogically appropriate. He found that the word "facilities" as used in s. 23 had a broad meaning and was not restricted to physical structures like classrooms or schools but would also include buses to provide transportation.

25 In conclusion, McQuaid J.A. noted that the Minister was justified, with the numbers before him and the failure of a pilot project in French first language instruction for grades one to three two years previously, in giving priority to the pedagogical considerations and in deciding that the best instruction could be provided at École Évangéline, a truly homogenous school. McQuaid J.A. granted the appeal and dismissed the cross-appeal. Given that the requirements at the lower end of the sliding scale were

arising for the first time and that litigation might have been unavoidable, he held that the parties were responsible for their own costs at trial and on appeal.

IV. Analysis

A. *The Remedial Purpose of Section 23*

26 Section 23 imposes a constitutional duty on the province to provide official minority language education to children of s. 23 parents where the numbers warrant. In *Mahe, supra*, at pp. 362 and 364, this Court affirmed that language rights cannot be separated from a concern for the culture associated with the language and that s. 23 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; see *Reference re Public Schools Act (Man.), supra,* at p. 849. Section 23 therefore mandates that provincial governments do whatever is practically possible to preserve and promote minority language education; see *Mahe,* at p. 367.

27 As this Court recently observed in *R. v. Beaulac,* [1999] 1 S.C.R. 768, at para. 24, the fact that constitutional language rights resulted from a political compromise is not unique to language rights and does not affect their scope. Like other provisions of the *Charter,* s. 23 has a remedial aspect; see *Mahe, supra,* at p. 364. It is therefore important to understand the historical and social context of the situation to be redressed, including the reasons why the system of education was not responsive to the actual needs of the official language minority in 1982 and why it may still not be responsive today. It is clearly necessary to take into account the importance of language and culture in the context of instruction as well as the importance of official language minority schools to the development of the official language community when examining the actions of the

government in dealing with the request for services in Summerside. As this Court recently explained in *Beaulac*, at para. 25, "[l]anguage rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada" (emphasis in original). A purposive interpretation of s. 23 rights is based on the true purpose of redressing past injustices and providing the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced.

28 In light of the importance of this remedial purpose, the trial judge properly began his reasons by explaining the historical background of the official language minority in Prince Edward Island and in Summerside, as had the court in *Reference re: School Act*, *supra*. From this review, the trial judge was prepared to decide whether the s. 23 rights had been infringed.

29 The historical and contextual analysis is important for courts in determining whether a government has failed to meet its s. 23 obligations. It should also guide governmental actors in reaching appropriate decisions to give effect to s. 23. In this case, the Minister was of the view that it would be more beneficial for the children to receive their instruction in a homogeneous school located at the heart of the Acadian community. Insisting on the individual right to instruction, the Minister appeared to ignore the linguistic and cultural assimilation of the Francophone community in Summerside, thereby restricting the collective right of the parents of the school children. The trial judge explained the position of the Minister in these terms (at p. 337):

> . . . while he agreed a school is a considerable component of the preservation of language and culture, the location of the school, in his view, was not significant. He testified that students are moved all over the Province now; location is not the key, rather the program offered is the key.
>
> The Minister did agree, however, a French language school in Summerside would preserve the French culture and language in that area.

> He stated he was aware that some of the students who had pre-registered did not attend l'école Évangéline, and that the length of travelling time was probably the main reason. . . . The Minister was asked whether he had considered options which would most effectively maintain French culture and language in Summerside. He responded he did not specifically deal with that; under his interpretation, he was required to provide education and he believed that he had done so to the extent necessary under the law. He testified he was simply looking at making French education available, and he did not look at the impact of each option on the preservation and flourishing of French culture.

The Minister attached some importance to the cultural environment provided by École Évangéline to individual students. He also pointed to the existence of a number of French cultural institutions in Summerside, but this was in support of the proposition that a French language facility is unnecessary to the cultural development of the minority community. In our view, this approach is inconsistent with that adopted in *Mahe*. In fact, the existence of French cultural institutions in Summerside highlights the incongruity of the absence of a school and cannot be used to support the argument proposed by the Minister. The expert evidence of Ms. Angéline Martel, supported by all other witnesses for the appellants, indicates that the school is the single most important institution for the survival of the official language minority, which is itself a true beneficiary under s. 23.

30 The Minister has a duty to exercise his discretion in accordance with the dictates of the *Charter*; see *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. In reaching his decision, the Minister failed to give proper weight to the promotion and preservation of minority language culture and to the role of the French Language Board in balancing the pedagogical and cultural considerations. This was essential to giving full regard to the remedial purpose of the right. The approach adopted by the Minister therefore increased the probability that his decision would fail to satisfy constitutional review by the courts.

B. *The Notion of Equality*

31 As discussed above, the object of s. 23 is remedial. It is not meant to reinforce the *status quo* by adopting a formal vision of equality that would focus on treating the majority and minority official language groups alike; see *Mahe*, *supra*, at p. 378. The use of objective standards, which assess the needs of minority language children primarily by reference to the pedagogical needs of majority language children, does not take into account the special requirements of the s. 23 rights holders. The Minister and the Appeal Division inappropriately emphasized the impact of three elements on equality between the two linguistic communities: duration of the bus rides, size of schools and quality of education. Section 23 is premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority. Before examining this issue in more detail, however, it is important to deal briefly with the "numbers warrant" analysis which was discussed in both the trial and appeal divisions.

C. *The Determination of Numbers Under Section 23*

32 The province has a duty to provide official minority language instruction where the numbers warrant. As Dickson C.J. pointed out in *Mahe*, *supra*, the "sliding scale" approach to s. 23 means that the numbers standard will have to be worked out by examining the particular facts of each case that comes before the courts. The relevant number is the number who will potentially take advantage of the service, which can be roughly estimated as being somewhere between the known demand and the total number of persons who could potentially take advantage of the service; see *Mahe*, at p. 384. Lamer C.J. defined the number in *Reference re Public Schools Act (Man.)* in this way,

at p. 850: "the number of persons who can eventually be expected to take advantage of a given programme or facility".

33 The Appeal Division erred in adopting a different and more restrictive standard. Instead of considering the demographic data to assess potential demand, McQuaid J.A. focussed solely on actual demand (at p. 350):

> The survey conducted by the respondents, which is the best evidence of potential demand for the instruction, revealed that 49 children in grades one to six would take advantage of instruction in the French language in the Summerside area in the 1996-97 school year, with the addition of 15 over the next two years.

The trial judge had found, based on current enrolment of s. 23 children aged 6 to 11, as well as demographic projections for children up to 5 years of age in the area, that the relevant number of children who could potentially take advantage of French language education was 306. This was a projection covering a ten-year period. In this case, the appropriate estimate of the potential number of students who might attend the facility in any given year is 155, the uncontested number projected by the expert witness, Ms. Angéline Martel. Therefore, according to the approach advocated in *Mahe*, the relevant number would be between 49 and 155. The trial judge also attached some importance to the experience of parents in Charlottetown where projected numbers were surpassed once the educational facility was in place. He compared the population of each locality and inferred that the same response could be expected. This was not an unreasonable inference. We agree with the appellants that there was sufficient evidence to support this inference, especially because no evidence was presented to rebut it.

34 Although the plaintiffs must establish their rights under s. 23, including the sufficiency of numbers, it is not possible for minority right holders to obtain more accurate and complete information with regard to enrolment projections than what was

made available here, nor is it reasonable to impose more on them. The province has the duty to actively promote educational services in the minority language and to assist in determining potential demand. This duty is in effect enshrined in the *School Act* at s. 7(1)(b) and recognized in *Reference re Public Schools Act (Man.)*, *supra*, at pp. 862-63. The province cannot avoid its constitutional duty by citing insufficient proof of numbers, especially if it is not prepared to conduct its own studies or to obtain and present other evidence of known and potential demand.

D. *The Determination of What the Numbers Warrant Under Section 23*

35 In fact, there was never any issue as to the existence of a sufficient number of qualified students to justify instruction in the minority language. It is important to emphasize that the threshold number of "fifteen section 23 children over two consecutive grade levels, who can reasonably be assembled for the purposes of providing French language instruction", in s. 6.01(f) of the Regulations, was met in this case and that the Board complied with the requirements of s. 6.08 in evaluating the need for local classes.

36 The trial judge, at p. 343, found that the Minister's decision to deny local instruction was not dependent on numbers but exclusively on the availability of space at École Évangéline. The number of qualified students is nevertheless relevant because the applicants were requesting a local educational facility. There is no mention of the required number of qualified students with regard to facilities in describing the powers of the French Language Board. However, the parties seem to have tacitly accepted that the Board could request the approval of the Minister for a school, or facility. This is consistent with the wording of the *School Act* generally (ss. 49(c) and (f), 112(2), 128(1)(b) and (2)) and with the decision in *Mahe*, *supra*, with regard to the right of the

minority community to manage and control instruction and facilities in the minority language.

37 The Regulations add little to the description of the role of the Board on this point. Section 6.11 simply indicates that the Minister possesses the sole discretion to designate a school as a French school, having regard to the number of students, the number of grade levels and the reasonable assembly of the students in one location. No criteria are set out in the Regulations to govern the exercise of this discretion.

38 *Mahe* explains that the numbers warrant provision requires that two factors be considered in determining the demands of s. 23. First, it requires a determination of the appropriate services, in pedagogical terms, for the number of students involved. Then it requires an examination of the costs of the contemplated service. In addressing the first concern, pedagogical requirements, it is important to consider the value of linguistic minority education as part of the determination of the services appropriate for the number of students. The pedagogical requirements established to address the needs of the majority language students cannot be used to trump cultural and linguistic concerns appropriate for the minority language students.

39 The Appeal Division endorsed the Minister's reasoning and stated that the cultural benefits that flow from having a French school in the community should not be allowed to supersede the disadvantages of what the Minister considered to be an inferior education. In our view, DesRoches J. more appropriately weighed the pedagogical needs factor and the cultural and linguistic advantages of having a local school in the context of the minority. He found that under the purposive approach to s. 23, a local education was justified. Despite the Minister's testimony that small schools generally have more difficulty meeting all curriculum requirements, we note that there was no evidence that pedagogical concerns could not be met, or that a small school would mean an education

that is substandard. It was not shown that the Board would not be able to meet these requirements in the instant case. The only minimum numbers required by the province under the Regulations were met, those dealing with French language instruction (s. 6.01(f)). The logical inference is that these numbers are sufficient to meet the provincial pedagogical standards. The Regulations set out no minimum requirements for facilities. This suggests that it is for the Board to determine sufficient numbers in the exercise of its duty to provide facilities (see in particular s. 128(1)(b) and (2)).

40 Instead of providing a rationale for refusing the creation of a school based on the reasoning of the Board, the Minister announced a minimum requirement of 100 students for a school to be viable. This number was based solely on the personal experience of the Minister as an educator. He testified that the provision of a full range of educational services, including guidance, music, gym and resource teaching is difficult in small schools. However, the number of students suggested by the Minister is unrelated to the specific circumstances and needs of the official language minority in the Summerside area. There was also evidence that a number of English language schools with less than 100 students existed in the Eastern school district, but the Minister was not willing to close them or to say they did not meet the department's pedagogical standards. Although the Minister is responsible for making educational policy, his discretion is subordinate to the *Charter*. As mentioned earlier, the Minister failed to give proper weight to the effect of his decision on the promotion and preservation of the minority language community in Summerside and did not give proper recognition to the role of the French Language Board in this regard.

41 The second factor to be considered is the cost of the contemplated services. At the hearing before this Court, the province explained that costs were not a consideration in the Minister's decision. This is consistent with the fact that the Minister had maintained at trial that the Board's plan to provide French language instruction

locally to such a small group was not pedagogically viable. The trial judge concluded that the Minister had simply decided that a facility in Summerside was not a "practical option". This conclusion, as mentioned earlier, was based on the availability of space at École Évangéline (pp. 336-37). It can therefore be assumed for the purpose of analysis that the second factor in assessing sufficient numbers in *Mahe*, i.e. costs, is not at issue in this case.

42 In *Mahe*, the Court decided that, where numbers warrant the creation of facilities, the representatives of the official language community have the right to a degree of governance of these facilities. This right of management and control is present independent of the existence of a minority language board, which, in effect, is required at the upper end of the sliding scale of rights. In the present case, where there is a French Language Board, it is essential to analyse the right to a facility in Summerside in light of the role and powers of that Board.

E. *The Role of the French Language Board*

43 The essential question here is that of determining whose opinion should prevail in circumstances such as these. In *Mahe, supra*, at p. 372, the Court put the question in these terms:

> Furthermore, as the historical context in which s. 23 was enacted suggests, minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority.

Where a minority language board has been established in furtherance of s. 23, it is up to the board, as it represents the minority official language community, 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 (for example, see *Reference re Public Schools Act (Man.)*, *supra*, at p. 863).

44 When the Minister exercises his discretion to refuse a proposal pursuant to the Regulations, his discretion is limited by the remedial aspect of s. 23, the specific needs of the minority language community and the exclusive right of representatives of the minority to the management of minority language instruction and facilities. The case by case approach to s. 23 issues contemplated in *Mahe* requires that the particular context play an important role in the court's analysis. In this case, as a result of *Reference re: School Act*, *supra*, the government took effective measures to fulfill its obligations under s. 23. It considered that the management component of the right to minority language facilities could best be met through the transformation of the French language Unit 5 Regional Administrative Board into a provincial French language board. Regulations were adopted in February 1990 to provide an appropriate institutional framework. These measures preceded the release of reasons for judgment in *Mahe*. The appellants argue that the Regulations can reasonably be interpreted to conform to s. 23. Our analysis must therefore begin with the recognition that every school board has the powers of management that are specifically granted by the Act and Regulations. In addition, a minority language board, as the representative of the s. 23 rights holders, will have those further powers conferred by s. 23 to the extent appropriate under the sliding scale.

45 In *Mahe*, at pp. 371-72, Dickson C.J. articulated two reasons why management and control are critical to the enjoyment of s. 23 rights. First, they are essential to the preservation and enhancement of minority language education and culture. He stated, at p. 372, that management and control are necessary "because a

variety of management issues in education, e.g., curricula, hiring and expenditures, can affect linguistic and cultural concerns". Second, the right to management and control furthers the remedial goals of s. 23. Empowerment is essential to correct past injustices and to guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns.

46 As to the degree of management and control that is mandated, the Court held that s. 23 rights holders must have control over "those aspects of education which pertain to or have an effect upon their language and culture" (p. 375). Exhaustive specifics cannot be given principally because of the sliding scale of rights and the need to adapt modalities to the particular circumstances of each province or territory.

47 The question posed here is whether the location of minority language instruction and facilities is an aspect of education that pertains to the preservation and flourishing of the linguistic minority community. The problem is that this issue may involve financial and pedagogical considerations that may have been adopted by the department of education independently of any cultural or linguistic considerations.

48 The key to resolving this debate is found in *Mahe*, *supra*, at p. 378, where Dickson C.J. says:

> . . . the specific form of educational system provided to the minority need not be identical to that provided to the majority. The different circumstances under which various schools find themselves, as well as the demands of a minority language education itself, make such a requirement impractical and undesirable.

Because the Minister did not think that programs delivered by the seven small schools that had between 55 and 83 students were pedagogically beneficial, he did not recognize that by denying a similarly sized facility to the minority language community in

Summerside he was depriving French language students of equal access to quality education in their own language.

49 What made sense to the minority language community and its Board did not make sense to the Minister because pedagogical needs were not understood in the same way. The fact that the pedagogical requirements of the minority need not be met in an identical way to those of the majority did not appear to be a factor in the decision of the Minister. The same is true on the evaluation of the transportation requirements. The Minister applied a 40 to 50 minute standard with respect to travel times, but this was an estimate of times for the province, not segregated with regard to the age of students and not reflective of travel time in the Summerside area, for which no evidence was presented. Although these travel times may be reasonable for official language minority students in some circumstances, they could not absolutely govern the decision in this case.

50 The travel considerations should have been applied differently for minority language children for at least two reasons. First, unlike majority language children, s. 23 children were faced with a choice between a locally accessible school in the majority language and a less accessible school in the minority language. The decision of the Minister fostered an environment in which many of the s. 23 children were discouraged from attending the minority language school because of the long travel times. A similar disincentive would not arise in the circumstances of the majority. Second, the choice of travel would have an impact on the assimilation of the minority language children while travel arrangements had no cultural impact on majority language children. For the minority, travel arrangements were in large measure a cultural and linguistic issue; they involved not only travel times but also a consideration of distances because of the impact of having children sent outside their community and of not having an educational institution within the community itself. As just mentioned, travel arrangements are a

possible method of providing services to official language minority students, but they have to be considered in the context of the pedagogical and cost requirements which pertain to the application of s. 23.

51 In our view, the Appeal Division erred in deciding that the sliding scale approach was governed by the "reasonable accessibility" of services without considering which services would best encourage the flourishing and preservation of the French language minority; see *Reference re Public Schools Act (Man.)*, *supra*, at p. 850. It also erred in accepting that the Minister could unilaterally decide the issue. We would instead affirm the conclusion of Hallett J. in the similar case of *Lavoie v. Nova Scotia (Attorney-General)* (1988), 50 D.L.R. (4th) 405 (N.S.S.C.T.D.), at p. 415, where he said: "Sending elementary school children on bus trips of 30 to 45 minutes each way when it is not necessary, is unreasonable if appropriate priorities are kept in mind." The question is also, whose priorities? Obviously, it has to be the priorities of the minority community because the determination of such priorities lies at the core of the management and control conferred on the minority language rights holders and their legitimate representatives by s. 23. Of course, these priorities must be determined and exercised in light of the role of the Minister.

F. *The Role of the Minister*

52 This is not to say that the Minister's role is not important. In *Mahe*, *supra*, Dickson C.J. accepted, at p. 393, that "the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met". This discretion is however subject to the positive obligation on government to alter or develop "major institutional structures" to effectively ensure the provision of minority language instruction and facilities and parental control on the scale warranted by the relevant number of children of the minority (see *Mahe*, at p. 365).

53 The province has a legitimate interest in the content and qualitative standards of educational programs for the official language communities and it can impose appropriate programs in so far as they do not interfere with the legitimate linguistic and cultural concerns of the minority. School size, facilities, transportation and assembly of students can be regulated, but all have an effect on language and culture and must be regulated with regard to the specific circumstances of the minority and the purposes of s. 23.

54 Section 23(3)(*a*) speaks of "wherever in the province", meaning that the calculation of the relevant numbers is not restricted to the existing school boundaries. That the numbers warrant test should be applied on a local basis was first discussed in *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 10 D.L.R. (4th) 491 (Ont. C.A.), at pp. 521-22, and approved in *Mahe*, at p. 386. When a minority language board has been established, the definition of the area is subject to the minority's exclusive powers of management and control over minority language instruction and facilities, subject to objective provincial norms and guidelines that are consistent with s. 23. Otherwise, the remedial and protective potential of s. 23 would be greatly impaired. As noted above, a number of complex and subtle factors go into the equation beyond counting the number of students and measuring travel distances to other schools. The representatives of the majority cannot be expected to fully appreciate the ramifications and consequences of the choices made by the minority in this regard.

55 In the present case, the French Language Board had the obligation, pursuant to s. 6.07 of the Regulations, to offer French language instruction where numbers warrant and, pursuant to s. 128(2) of the Act, to determine the location of the required classes or facilities, subject to the approval of the Minister. The Minister accepted that, according to the Regulations and s. 23 factors, numbers warranted instruction, but

objected to it being offered in Summerside. The Minister's decision is unconstitutional because the offer of classes or a facility came within the exclusive right of management of the minority and met with all provincial and 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. Indeed, the Minister confirmed on the appeal as he had throughout the litigation that there were no financial impediments. The Minister had no power to impose his own criteria as a substitute. Nor could the Minister substitute his decision for that of the Board simply because he was of the view that the decision of the Board was not a good one.

G. *The Requirement for Local Facilities*

56 The duty to promote French language and culture in Prince Edward Island cannot mean that the government can impose the concentration of all minority language students in one predominantly French region. Both a textual and purposive analysis of s. 23(3) of the *Charter* indicate that when the numbers of s. 23 children in a specific area warrant the provision of minority language instruction, that instruction should take place in facilities located in the community where those children reside. Section 23(3)(*a*) states that the right to minority language instruction applies "wherever in the province" (emphasis added) the number of children is sufficient to warrant such instruction. The words "wherever in the province" link the right to instruction to the geographic place where the conditions for the exercise of that right are present. As noted in *Reference re: School Act*, *supra*, at p. 516, the term "wherever in the province" when construed in relation to the numbers warrant test "will limit a particular area within the province in which minority language education will have to be provided".

57 Some have expressed concern that geographical boundaries are difficult to define, that they may change and that educational authorities should not be restricted in their ability to define the area for the reasonable assembly of students. It is argued that even minority language boards should be free to make decisions in this regard without the fear that any local community will require the opening of a school. This Court has recognized the diversity of circumstances and avoided adopting rigid formulae to govern these issues. The determination of the appropriate area for the provision of minority language instruction and facilities is something that has to be decided in each case with due consideration to the numbers involved as well as all of the important factors specific to the case. It is however important to note that the s. 23 standard is not neutral but favours community development. This is why Dickson C.J. stated in *Mahe*, *supra*, at p. 386: "In some instances it may be necessary to provide transportation for students, or perhaps to provide boarding, in order to meet the requirements of s. 23" (emphasis added). Another important consideration is that s. 23 was intended in part to protect the minority against the effect of measures adopted to suit the needs of the majority. It is therefore clear that minority language parents and their representatives are in the best position to identify local needs when it comes to defining the relevant areas. This decision will bring into play complex historical, social and geographical factors.

58 This does not mean that in a special situation a s. 23 right holder could not challenge the decision of a minority language board; it simply means that the decision is subject to the exclusive powers of the minority over the management and control of minority language instruction and facilities under s. 23 and that this is the context within which a challenge of that decision would have to be made. The province can also regulate this area, as previously mentioned, by fixing legitimate parameters to the exercise of the right of management by the Board. Regulations can therefore authorize the Minister to intervene in an appropriate manner to enforce the provincial norms.

V. Conclusion

59 The number of students that triggered the provision of instruction and facilities under the terms of s. 23 of the *Charter* was somewhere between 49 and 155. The potential demand for services could be determined by inferring that the established demand would increase after the services actually became available, as had been the case in Charlottetown. The Appeal Division erred in its application of the numbers warrant test in concluding that only 65 children would eventually take advantage of primary French language instruction in Summerside in the 1996-97 school year.

60 The Minister erred in determining that transportation to École Évangéline was sufficient to fulfill the government's obligation to provide French language education in Summerside. He also 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.

61 There was no legal basis for the Minister's refusal to accept the request of the Board since this request met with all provincial and constitutional requirements. The pedagogical arguments and reference to provincial transportation averages could not justify interference with the Board's decision. The Appeal Division erred in accepting that the decision of the Minister was consistent with the s. 23 obligations of the province to promote and provide instruction and facilities in the minority language and in concluding that buses could be considered educational facilities.

62 In particular, the Appeal Division failed to take into account the minority language children's specific circumstances and the importance of the French Language Board in deciding matters that affect the linguistic and cultural development of the community. The French Language Board has the exclusive power to decide how it will

provide services to the minority in the Summerside area, within the legitimate constraints set out by the province, its decisions also being subject to the rights of individual beneficiaries under s. 23.

63 For these reasons, we would allow the appeal, set aside the decision of the Appeal Division and restore the decision of DesRoches J. with costs on a solicitor-client basis, as decided by DesRoches J., throughout.

Appeal allowed with costs.

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