Pouvez-vous dire violation de la *Charte*? Minority Language Education Rights in Canada

How does the *Charter of Rights and Freedoms* regulate provincial governments' funding decisions with respect to minority language schools? In a recent decision, *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Conseil Scolaire),*[1] the Supreme Court of Canada (SCC) confronted this question in relation to French-language education in British Columbia. Prior to this decision, Canadian courts had repeatedly confirmed the existence of a link between language, culture and the overall sense of well-being for individuals and linguistic communities.[2] The SCC has stressed that "[l]anguage is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it."[3] School plays a role in promoting the development of minority linguistic communities as "a setting for socialization where students can converse with one another and develop their potential in their own language and, in using it, familiarize themselves with their culture."[4] This begins to explain why the right to receive instruction in one of Canada's official languages is entrenched in the Canadian Constitution under section 23 of the *Canadian Charter of Rights and Freedoms, 1982*.[5]

The Conseil scolaire francophone de la Colombie-Britannique (CSF) is the only French-language school board in British Columbia, with responsibility for 37 schools across the province.[6] In 2010, CSF, the Fédération des parents francophones de Colombie-Britannique (a provincial French parents' association), and three parents filed a civil claim against the province.[7] They argued the B.C. government was violating section 23 of the *Charter* by not funding Francophone schools to the same standard as Anglophone schools.[8] The following sections will explain what section 23 rights encompass before providing additional information about CSF's claim against the B.C. government.

Section 23 promotes Canada's two official languages

Section 23 of the *Charter* protects minority language education rights by imposing a positive obligation on governments to offer publicly funded elementary and secondary education in the official minority language of a province.[9] This encompasses an obligation to provide public instruction in the language of the minority wherever there are sufficient numbers of eligible students to warrant the expense.[10] The correlative rights are conferred on parents rather than children and extend to:

1. Canadian parents whose first language is the French or English minority language in their province (except Quebec);
2. Canadian parents whose primary school instruction in Canada was in French or English and who live in a province where this is the minority

language, and;

3. Canadian parents with one child who attended or is attending school in a minority language.[11]

In general, section 23 rights holders have the right to have their children instructed in their first language, and to a standard comparable to that provided to the majority language population in their province. Where numbers warrant, section 23 rights holders also have the right to their own educational facilities, such as separate classrooms or schools, and a measure of management and control over the education program.[12] The purpose of these rights is threefold: "to prevent the erosion of official language communities, redress past injustices and promote the development of [minority official language] communities."[13] In doing so, the rights "enhance Canada's bilingualism and biculturalism, and maintain the unique partnership between language groups that sets the country apart among nations."[14]

CSF claimed the B.C. government violated their section 23 *Charter* rights

In its legal action against the B.C. government, *Conseil scolaire francophone de la Colombie-Britannique* claimed that the province violated its section 23 rights by underfunding its French-language schools and failing to provide money to upgrade school buildings and property.[15] They cited numerous funding shortfalls that included not receiving "an annual grant for building maintenance," "a lack of funding for school transportation," and "a lack of space for cultural activities."[16] CSF also claimed that the B.C. government failed to provide new schools in eight communities where census numbers showed a large enough Francophone population to sustain homogeneous French-language schools.[17] This shortfall meant Francophone parents were faced with a difficult choice between enrolling their children in a Francophone school with a substandard learning environment or an Anglophone school with a better learning environment but a much higher risk of linguistic assimilation (and the erosion of the Francophone community in B.C.).[18]

In response, B.C. claimed that fulfilling these obligations would be too costly, as most communities in the province lack enough Francophone students to justify the spending needed to achieve educational parity.[19] In making this claim, the province argued that the application of section 23 rights depends on a "proportionality" criterion regarding the number of Francophone versus Anglophone students.[20] The assumption underlying this criterion is that "the quality of a school depends primarily on the size of its student body,"[21] so a smaller student body should expect a school of inferior quality.

Prior to the Supreme Court decision, the case wove through an initial trial and then an appeal at the British Columbia Court of Appeal. The trial judge awarded damages[22] to CSF as a remedy for the government's failure to provide adequate funding of school transportation.[23] The trial judge also concluded that some communities were entitled to "substantively equivalent" French-language facilities and experience, but that certain smaller communities were only entitled to a "proportionately equivalent" experience.[24] When CSF appealed and B.C. cross-appealed, the Court of Appeal determined that the trial

judge was correct in her analysis of the rights at stake, but set aside her award of damages to CSF.[25] In the wake of this ruling,[26] the SCC granted CSF's request to hear an appeal, which resulted in the decision under examination here. The SCC took the opportunity to clarify the approach courts should use when assessing section 23 claims.

The SCC clarified a "sliding scale approach" for minority language education requirements

When a claimant alleges that their *Charter* rights have been violated, courts generally ask two questions: 1) has a *Charter* right been violated, and 2) is that violation nonetheless legally justifiable? When addressing the first of these questions in relation to a section 23 claim, the SCC has emphasized the applicability of a "sliding scale approach," which the Court clarified in *Conseil Scolaire*. The "sliding scale" approach is a three-part test for determining the type and level of rights and services appropriate to provide minority language instruction for the number of students involved. As the number of eligible students rises in a community, so does the amount of control the minority are legally entitled to over the provision of instruction.[27] At the low end of the scale, section 23 rights holders are entitled to have their children receive education in the official language minority, but have no right to management or control over instruction.[28] In the middle of the scale, the minority language group might are entitled to control over a classroom or part of the school, as well as hiring of teaching staff and certain expenses.[29] At the high end of the scale, the minority language group is entitled to control over separate educational facilities, referred to as homogeneous schools.[30]

The sliding scale analysis involves three steps:

1. Establish the number of students eligible to receive the minority language schooling in a given area.[31]
2. Compare these numbers with the numbers of students attending majority language schools located across the province to determine an appropriate minimum number of students from the standpoint of teaching and cost.[32]
3. Determine the appropriate level of services for the number of eligible students.[33]

The SCC examined CSF's claim to homogeneous schools for communities with 55 to 98 eligible Francophone students.[34] However, when using the above approach to compare the number of eligible students in these communities to English language schools across the province, the SCC found comparable communities with majority language schools instructing a similar number of students.[35] This meant that from the standpoint of teaching resources and costs, separate schools within this same range are acceptable to the province.[36] The SCC found that most of the communities with eligible students had comparable enrolment to small majority language schools.[37] For the court, this meant that these communities fall at the high end of the sliding scale, and are entitled to homogeneous

minority language schools.[38]

The SCC also found that where the number of official language minority students is *not* comparable to the numbers of majority language students, the students must nonetheless have "substantive equivalence" in "the quality of [their] educational experience."[39] This means that the quality of instruction and facilities must not be "meaningfully inferior" to that which majority language students receive.[40] Communities with 55 (or fewer) eligible Francophone students fall below the comparable number of majority language students at small schools in B.C. The SCC held that in such cases, "where the number of students falls in the middle or at the low end of the sliding scale, deference must be shown to the level of services contemplated by the school board." [41] CSF did not have the opportunity to make submissions in court about the services they would provide for the students in such communities.[42] Therefore, the question of providing a homogeneous school for a community of 55 or fewer students could only be decided back at the court of local jurisdiction.[43]

Section 23 violations should be difficult for the government to justify

Even if a law or government policy is found to violate a *Charter* right, a claimant's *Charter* action will fail if the government can convince the court that its actions are nonetheless legally justifiable through the balancing section of a *Charter* analysis. To do this, the government must demonstrate two things. First, it must show that its public interest goals are pressing and substantial enough to potentially override the negative effects of its action – that is, the impact resulting from the violation of the right to education in a minority language. Second, it must show that the means chosen to pursue these important goals are "proportionate." A measure is proportionate if:

1. It is rationally connected to the government's important goals;
2. It impairs the "right or freedom in question as little as possible,"[44] and;
3. It has a benefit that is substantial enough to outweigh the harm of the *Charter*

Writing for the SCC majority in *Conseil Scolaire*, Chief Justice Wagner found that three factors weigh in favor of applying a very stringent version of this test to make it difficult for the government to justify violations of a section 23 right.[45] "First, the framers of the *Charter* imposed positive obligations on the provincial and territorial governments in s. 23."[46] In other words, to fulfill their obligations, governments must provide public funding for minority language instruction; they cannot simply decide not to act. Second, section 23 is excluded from the scope of the notwithstanding clause in section 33 of the *Charter*.[47] This means that a legislature cannot "opt out" of its positive obligations toward minority language groups within its jurisdiction; these obligations are non-negotiable.[48] Third, section 23 contains an internal limit, in that the right to minority language instruction is only warranted if there is a sufficient number of children.[49] This takes into account the financial burden section 23 rights place on a provincial government, and balances the costs of minority language education with the right to receive this instruction by setting a

minimum threshold.[50]

The B.C. government argued that "the fair and rational allocation of limited public funds" justified the section 23 violation.[51] However, Chief Justice Wagner rejected this argument, noting that "public funds are limited by definition," and that the "fair and rational allocation of limited public funds represents the daily business of government."[52] If the court were to allow a government to use this "daily business" as an excuse for violating *Charter* rights, then it would "risk watering down the scope of the *Charter.*"[53] The Chief Justice accordingly concluded that the daily objective of the government cannot double as a "pressing and substantial" objective for the purposes of justifying a violation of *Charter* rights.[54]

Conclusion

The key takeaway from *Conseil Scolaire* is that provinces and territories owe a positive duty to official linguistic minority groups in their jurisdictions under section 23 of the *Charter.* It is not enough for the province to provide minimum minority language instruction; "the quality of the overall educational experience must be meaningfully similar to that of the experience provided to the majority."[56] Provincial and territorial governments that fail to provide adequate minority language education to rights holders may be liable to pay *Charter* damages to remedy the shortfall.

[1] *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 .

[2] *Ibid* at paras 13, 14.

[3] *Mahe v Alberta*, [1990] 1 SCR 342, 1990 CanLII 133 (SCC) at 362.

[4] *CSF SCC, supra note 1* at para 1.

[5] *Ibid.*

[6] *Ibid* at para 27.

[7] *Ibid* at para 28.

[8] *Ibid*.

[9] *Ibid* at para 190.

[10] *Canadian Charter of Rights and Freedoms*, s 23, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[11] *Ibid.*

[12] *CSF SCC, supra* note 1 at para 24.

[13] *Ibid* at para 15.

[14] *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2016 BCSC 1764, at para 123.

[15] *CSF SCC, supra* note 1 at para 28.

[16] *Ibid.*

[17] *Ibid.*

[18] Stephanie Chouinard, "SCC decision sends stern message to provinces, but for official-language minorities, the battle continues" *iPolitics* (16 June 2010), online: https://ipolitics.ca/2020/06/16/scc-decision-sends-stern-message-to-provinces-but-for-official-language-minorities-the-battle-continues/.

[19] *CSF SCC, supra* note 1 at para 144.

[20] *Ibid* at para 117.

[21] *Ibid* at para 119.

[22] A discussion on damages is beyond the scope of this article.

[23] *CSF SCC, supra* note 1 at para 166.

[24] *Ibid* at para 38.

[25] *Ibid* at paras 48-49.

[26] *Ibid* at paras 29, 48, 49.

[27] *Ibid* at para 24.

[28] *Ibid*.

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid* at para 98.

[32] *Ibid* at para 99.

[33] *Ibid* at para 92.

[34] *Ibid* at para 98.

[35] *Ibid* at para 101.

[36] *Ibid.*

[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid* at para 123.

[40] *Ibid*.

[41] *Ibid* at para 102.

[42] *Ibid.*

[43] *Ibid* at para 103.

[44] *Ibid* at para 146.

[45] *Ibid* at para 147.

[46] *Ibid* at para 147.

[47] *Ibid* at para 148.

[48] *Ibid.*

[49] *Ibid* at para 150.

[50] *Ibid.*

[51] *Ibid* at para 152.

[52] *Ibid* at para 153.

[53] *Ibid.*

[54] *Ibid* at paras 153-154.

[55] *Ibid* at paras 185-186.

[56] *Ibid* at para 105.