

**THE CASE OF *DOUCET-BOUDREAU* v.
*NOVA SCOTIA (MINISTER OF EDUCATION)***

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INTRODUCTION

In 1982, the right of parents to have their children educated in the language of the official language minority, where numbers warrant, was entrenched in section 23 of the *Canadian Charter of Rights and Freedoms*. In 1990, the ruling in the *Mahe*⁽¹⁾ case upheld the right to minority-language schools and parents' right to manage those schools. Those rights apply to primary and secondary education, which must be publicly funded.

In 1993, the *Reference Re Public Schools Act (Manitoba)*⁽²⁾ confirmed the right of parents to manage French-language schools, thus supporting the decision handed down three years earlier in the *Mahe* case. The Supreme Court emphasized the importance of taking the necessary steps in all provinces to accommodate the minority-language education rights in section 23 of the Charter. The Court confirmed that the linguistic obligations in the Charter are of a remedial nature.⁽³⁾ This implies that governments must take affirmative action to promote the development of official language minorities.

In 2000, the *Arsenault-Cameron* ruling⁽⁴⁾ acknowledged the predominant role that schools have in community development. The Supreme Court affirmed that the genuine equality of the two official languages presupposes that official language minorities may be treated differently, if necessary, to ensure that they receive a level of education equivalent to that of the official language majority.

(1) *Mahe v. Alberta*, [1990] 1 S.C.R. 342.

(2) *Reference Re Public Schools Act (Man.)*, [1993] 1 S.C.R. 839.

(3) This remedial nature is asserted in subsection 24(1) of the *Charter*, which states, "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

(4) *Arsenault-Cameron v. Prince Edward Island*, [2000], 1 S.C.R. 3.

Recent case law has not clearly identified the type of educational institution that should be provided in order to meet the obligations set out in the Charter. Depending on circumstances, provinces have established schools that are mixed (i.e., anglophone and francophone groups in the same school), bilingual (i.e., hours of instruction evenly split between English and French) or French-language (i.e., homogeneous schools in which all the students have the right to be educated in French).

THE *DOUCET-BOUDREAU* CASE

A. Background

The *Doucet-Boudreau* case⁽⁵⁾ covered in this paper originated in Nova Scotia. It is part of recent case law on minority-language education. It is important to note at the outset that there are long-standing tensions in Nova Scotia's Acadian communities about what type of educational institution will best foster community development. Until very recently, the province offered educational services to its Acadian population in the form of mixed or bilingual programs. Many parents, however, believed that bilingual schools would not accommodate the rights guaranteed by section 23 of the Charter. Other parents opposed the establishment of homogeneous schools, believing that using only French as the language of instruction would hinder the development of their children's bilingual skills.

In October 1999, parents from five school districts, in conjunction with the Fédération des parents acadiens de la Nouvelle-Écosse, launched a court challenge. They argued that the province had failed to meet its obligations since the entry into force of section 23 of the Charter, because it had not guaranteed access to homogeneous French schools, even though the establishment of such schools was warranted by the numbers of French-language students in those districts. The parents therefore applied to the Supreme Court of Nova Scotia for an order directing the provincial government and the Conseil scolaire acadien provincial to provide publicly funded, homogeneous, French-language secondary schools and programs within a reasonable length of time.

(5) *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62; hereafter cited as *Doucet-Boudreau*.

B. Decisions Rendered

1. Trial Court

The provincial government did not deny the existence or substance of the rights set out in section 23 of the Charter. The parents criticized the provincial government for the series of delays in starting construction of homogeneous schools that would help combat assimilation and correct the deficiencies in French-language education, where numbers warranted. The main argument advanced by the Attorney General of Nova Scotia to justify the delays was the lack of consensus within the province's Acadian communities regarding the type of educational institution that should be provided.

In a decision handed down in June 2000, Justice Arthur LeBlanc of the Supreme Court of Nova Scotia ordered the provincial government to build homogeneous French-language facilities in the Kingston/Greenwood, Chéticamp, Île Madame/Petit-de-Grat, Argyle and Clare districts within a specified time frame. In his ruling, Justice LeBlanc emphasized that the obligations in the Charter were of a remedial nature, compelling the government to take affirmative action to slow the assimilation of francophone children in those districts. The judge ordered the government to appear before him at future dates to present progress reports on the establishment of the schools and on the measures taken to comply with the order within the prescribed period.⁽⁶⁾ The real issue in this action was the government's compliance with the schedule for building the school facilities.

2. First Level of Appeal

In June 2001, the Nova Scotia Court of Appeal overturned the trial court's decision, arguing that Justice LeBlanc did not have the jurisdiction to order the provincial government to report to him on the implementation of his ruling. The Court of Appeal did not dispute the rights guaranteed by section 23 of the Charter, or the remedy proposed by Justice LeBlanc, who ordered the province to use its best efforts to provide homogeneous French-language school facilities and programs. Although the imposition of remedies may be warranted under subsection 24(1) of the Charter, the Court of Appeal emphasized the importance of the separation of powers between the judicial and executive branches. Thus, the Court can order a remedy, but it does not have the authority to oversee its execution. The courts must avoid involvement in the administration of public affairs, and assume that their orders will be carried out diligently and in good faith by the governments concerned.

(6) Between July 2000 and March 2001, the provincial government appeared four times before Justice LeBlanc to make progress reports.

3. Supreme Court of Canada

In a November 2003 decision, the Supreme Court of Canada ruled that Justice LeBlanc had the authority to order concrete remedial measures to combat assimilation and actively enhance the vitality of minority-language communities in the context of obligations under section 23 of the Charter. The Supreme Court concluded that Justice LeBlanc could indeed retain jurisdiction in the case to supervise execution of the required remedies.⁽⁷⁾ Such a practice was not unfair to the provincial government. It was “a creative blending of remedies and processes already known to the courts in order to give life to the rights in section 23.”⁽⁸⁾ It should be noted that the Supreme Court awarded full costs to the Fédération des parents acadiens on a solicitor-client basis.

C. Issues Raised

A number of interveners testified in the *Doucet-Boudreau* case. Most of them did not dispute the dangers associated with assimilation, or the importance of institutional support for the survival of a minority language. The Commissioner of Official Languages, the Fédération nationale des conseillères et conseillers scolaires francophones and the Fédération des associations de juristes d’expression française de common law (FAJEFCL) emphasized the remedial nature of section 23 and argued in favour of more assertive intervention by the courts to enforce the implementation of Charter obligations. According to the FAJEFCL,

Since 1982, one of the major problems for applicants has been to obtain an effective remedy for violations of section 23. We submit that a declaration is often insufficient when a government is slow in implementing section 23. We submit that Justice LeBlanc observed a delay and concluded that the remedy had to include a court order and retention of jurisdiction to supervise it.⁽⁹⁾

(7) Four of the nine justices, however, dissented from the Supreme Court’s decision in this case. In their view, the courts do not have the authority to order governments to report on the execution of a ruling. The four dissenting justices believed that, in accordance with the principle of the separation of powers, courts must avoid interfering in the way in which the State chooses to administer a court order and must presume that their judgments will be executed with reasonable diligence and in good faith.

(8) *Doucet-Boudreau*, para. 61.

(9) Fédération des associations de juristes d’expression française de common law, Brief of the intervener, 12 August 2002, para. 10 [translation].

The Attorney General of Newfoundland and Labrador and the Attorney General of Ontario, who were among the interveners in the *Doucet-Boudreau* case, maintained that the courts have no power to supervise the enforcement of language rights. In their view, there was no reason to believe that the Government of Nova Scotia would not voluntarily comply with Justice LeBlanc's order. The Attorney General of New Brunswick argued that direct intervention by a judge in the administration of public affairs had to be considered an exceptional act. The Attorney General of Canada took no official position on the matter of retention of jurisdiction. He nevertheless supported the idea that the courts should use binding measures only in rare circumstances.

D. Reactions to the Decision

Representatives of the various francophone and Acadian communities expressed satisfaction with the Supreme Court's ruling in the *Doucet-Boudreau* case. The applicants were convinced that Justice LeBlanc's order prompted the provincial government to proceed quickly with the homogeneous French-language facilities. Indeed, the schools were built within the specified time frames. The Commissioner of Official Languages believed that the Supreme Court's decision clarified the courts' role in protecting language rights. She stated:

In its decision, the Supreme Court confirms that where there is a right, there is recourse. I am delighted with this decision because it clarifies how far the courts must go in granting useful and effective remedy when a Charter right has been violated. This decision will have significant repercussions on official-language minority communities across the country, over and above education rights.⁽¹⁰⁾

POTENTIAL IMPACT

The chief criticism levelled at the *Doucet-Boudreau* ruling by its opponents is that the decision will further politicize the judicial branch to the detriment of the separation of powers. Daniel Thériault, executive director of the Société des Acadiens et Acadiennes du Nouveau-Brunswick, has stated that governments must take action to protect the language rights

(10) Office of the Commissioner of Official Languages, "The Supreme Court of Canada Clarifies the Role of the Courts in Protecting Language Rights," News Release, 6 November 2003, http://www.ocol-clo.gc.ca/archives/nr_cp/2003/2003-11-06_e.htm.

entrenched in the Charter. Yet, following the announcement of the Supreme Court's decision, he said, "I hope we won't have to use this decision in court. I'd rather use this argument politically and be listened to by governments. But we'll go to court with it if we have to."⁽¹¹⁾

The ruling in the *Doucet-Boudreau* case should have a positive impact on the advancement of official languages across Canada. It is consistent with the tenor of decisions since 1990 in favour of a broad, liberal interpretation of the minority-language education rights set out in the Charter. It confirms the role of the courts, which is to provide real protection for language rights by ordering, if necessary, remedies to be implemented by governments within a reasonable period of time. It also acknowledges that the courts can play a supervisory role in the application of such remedial measures.

Other francophone communities may well use the decision to hasten the construction of homogeneous schools in their own provinces. However, some participants doubt that the ruling in the *Doucet-Boudreau* case is likely to have such an effect. According to Bernard Laprade, solicitor for the Attorney General of Canada, "the fact that things turned out as they did in Nova Scotia doesn't mean that such measures would be appropriate in other jurisdictions."⁽¹²⁾

(11) Philippe Ricard, "La décision confirme le pouvoir des tribunaux de demander des comptes aux gouvernements," *L'Acadie Nouvelle*, 8 November 2003, p. 9 [translation].

(12) Yves Lusignan, "La Cour suprême du Canada devra déterminer jusqu'où un juge peut aller pour faire respecter les droits scolaires," *Association de la presse francophone*, 4 October 2002, http://www.fpane.ca/communi_detail.cfm?IDCommunique=49 [translation].