Small & Ryan v. New Brunswick (Minister of Education), 2008 NBQB 201
DATE : 20080611

S/M/32/08

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

B E T W E E N:	PAULA SMALL and PATRICK JAMES RYAN Applicants - and - PROVINCE OF NEW BRUNSWICK, as represented by the Minister of Education Respondent
BEFORE:	Mr. Justice H. H. McLellan
AT:	Saint John, NB
DATE OF HEARING:	June 4, 2008
DATE OF DECISION:	June 11, 2008
COUNSEL:	E. Thomas Christie, Q.C. for the Applicants C. Clyde Spinney, Q.C. and Heather Doyle Landry for the Respondents

DECISION

McLellan, J.:

1. The applicants Paula Small of Saint John and Patrick James Ryan of Fredericton ask the court to quash the decision of the Minister of Education of New Brunswick to phase-out the Early French Immersion Program for Anglophone elementary students. The Minister's decision was announced on March 14, 2008 and cuts EFI beginning with Grade 1 in September 2008.

2. The applicants and their respective spouses are anglophone parents of children who were registered to begin Grade 1 in EFI in September, 2008. Mr. Ryan and his family were living in Saskatchewan until 2007. Their older child attended kindergarten and Grades 1 and 2 in total French immersion in Saskatoon. Now that older child is in Grade 3 in EFI in Fredericton.

Charter Challenge

3. The applicants say that the Minister's decision infringed their rights under the *Canadian Charter of Rights and Freedoms*, sections 16 (Official Languages), 16.1 (English and French Linguistic Communities in New Brunswick) and 23 (Minority Language Educational Rights).

4. The Supreme Court of Canada has made clear regarding section 23(2) of the *Charter* that:

> "… it would be contrary to the purpose of the provision to equate immersion with minority language education."
> *Solski (Tutor of) v. Québec (A.G.)*, [2005] 1 S.C.R. 201 at para. 50; see also *Gosselin (Tutor of) v. Québec (A.G.)*, [2005] S.C.R. 238 at paras 28-34.

5. Thus in my opinion Early French Immersion for anglophones in New Brunswick, the linguistic majority in this province, is not protected by the *Charter* provision for Minority Language Educational Rights. As well, I am not convinced that

the general words regarding bilingualism and linguistic communities in section 16 and 16.1 of the *Charter* provide any legal basis to challenge the decision of Minister of Education regarding Early French Immersion.

Common Law Challenge

6. The applicants also challenge the Minister's decision on the common law basis that it was made:

> "contrary to the rights of the Applicants to natural justice and procedural fairness".

7. As parents with children registered to begin Grade 1 Early French Immersion in September 2008, the applicants say that they had legitimate expectations that the EFI program would not be cancelled before they had a reasonable opportunity to make representations.

8. When commissioners were appointed in July 2007 to review French second-language programming for the Province, their terms of reference included:

> "The Government and Minister of Education will respond to the recommendations of the report within two months of receipt." (Record, page 331)

9. The Minister of Education, the Honourable Kelly Lamrock, was reported in the media on July 24, 2007 as saying that the commissioners would

> "…report to him by February or March of 2008. This will allow for a full debate and cabinet response, Lamrock said, in time to begin changing the system in September next year." (Record page 332-333)

10. The 99 page report of the commissioners was released to the public on February 27, 2008. The news release from Communications New Brunswick was headlined "Changes recommended to French second-language programs and services

(anglophone sector)". The opening sentence was: "Beginning French second-language programming in Grade 5 with Intensive French for all students within the Anglophone school system is among 18 recommendations released today…". Approximately 38 lines further the news release noted the recommendation that "Late Immersion, beginning in Grade 6, be adopted as the sole French Immersion program for Anglophone students in New Brunswick". (Record, pages 341-342)

11. That news release did not use plain language such as "Commissioners recommend that Early French Immersion be cut".

12. On February 29, 2008, the Friday before the March break school vacation, there was a further news release from Communications New Brunswick headlined "Public comment invited on the review of French second-language programs and services (anglophone sector)". The text of news release was as follows:

> "New Brunswickers are being invited to comment on the review of French second-language programs and services within the Anglophone sector of the Department of Education, Education Minister Kelly Lamrock said today.
>
> "The report was undertaken and completed between July 2007 and February 2008 by Jim Croll and Patricia Lee, and was released Feb. 27. It contained 18 recommendations on improving the state of French second-language learning in New Brunswick.
>
> "It is important that we hear from New Brunswickers regarding the findings and recommendations contained in the report on the delivery of French second-language programs within the anglophone school system," Lamrock said. I encourage everyone to take this opportunity to submit their views and comments before any decisions are made by government.
>
> "Views and comments may be sent by email to fsl@gnb.ca or by fax to 457-4810.

> "Information about the French second-language and programming services review, the final report and how to submit comments, is available online." (Record, page 127)

13. That news release did not warn the public that the Minister was considering making a decision within two weeks to phase-out Early French Immersion.

14. As noted, in July 2007 the terms of reference of the commissioners had anticipated a response to the report by the Government and the Minister of Education within two months. That appears to have implied that a White Paper would eventually be issued to focus public debate on possible policy changes. Also in July the Minister had represented that there would be time to "allow for a full debate".

15. On March 14, 2008 Communications New Brunswick issued another positively worded news release headlined "Improvements being made to French second-language programs and services (anglophone sector)". Again, that news release did not use plain language such as "Early French Immersion to be cut".

16. Thus within two weeks of inviting comments with no deadline on a 99 page report, the Minister decided to accept and implement the recommendations in the report phasing-out Early French Immersion.

17. The Minister himself had told the media that there would be time to "allow for a full debate" and a cabinet response to the report. The terms of reference regarding the report had anticipated a decision within two months.

18. Instead there was little opportunity for debate and a decision was made in about two weeks, one week of which was the March break school vacation.

Issue

19. The applicants say that the Minister breached a duty of fairness to them and violated their legitimate expectations that they would have reasonable notice and a reasonable opportunity to be heard before any decision would be made that the Early French Immersion program would be cut. The Province says the Minister made a policy decision within his legislative authority and that his decision is not subject to the rule of legitimate expectation or to judicial review. If the rule of legitimate expectation does apply, the Province says the applicants had enough opportunity to express their views to the commissioners and to the Minister after the news release of February 29, 2008.

Precedents

20. The courts in many decisions have emphasized the importance of fairness by public decision makers. Recently the Supreme Court of Canada noted in *Dunsmuir v. New Brunswick,* [2008] S.C.J. No. 9, at para 79:

> "Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, 'the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case'."

21. The Supreme Court explained the doctrine of legitimate expectations in *Old St. Boniface Residents v. Winnipeg*, [1990] 3 S.C.R. 1170, at p. 1204:

> "The principle developed in these cases is simply an extension of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The Court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation."

22. In reviewing various factors that should be considered in such cases, the Supreme Court noted in *Baker v. Canada*, [1999] 2 S.C.R. 817, at para 26:

> "…Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision makers, and that **it will generally be unfair for them to act in contravention of representations as to procedure**, or to backtrack on substantive promises without according significant procedural rights." [emphasis added]

23. This is not new law. For example, in 1993 Mr. Justice Stevenson of this court allowed an application for judical review of a decision of a Board of School Trustees in Fredericton, *MacDonald v. New Brunswick (Board of Education) et al.* (1993), 141 N.B.R.(2d) 81 and said:

> "… the applicants assert that they had a legitimate expectation that they would be consulted prior to the decision of May 20 and that the Board proceeded unfairly and contrary to the rules of natural justice by failing to consult with the applicants.
>
> "I am satisfied by the evidence presented that the policies and practices of the Board and its predecessors attract to it a reasonable or legitimate expectation on the part of parents of school-age children that major decisions affecting the school system in the district will not be made without some form of consultation or an opportunity to make representations to the Board before such decision are made. I am also satisfied that the Board's actions leading up to its decision of May 20 did not satisfy the requirements of consultation and representation."

Conclusion

24. In this case I must apply the principles from the precedents including the factors identified in *Baker*. In my opinion the disputed decision of the Minister in March 2008 was made in contravention of his own representation in July 2007 that the decision-making procedure would have time to "allow for a full debate".

25. Because of that representation by the Minister I am satisfied that the applicants as parents of children registered to begin Early French Immersion in Grade 1 in September 2008 had a reasonable and legitimate expectation that program would not be cut without them having a real opportunity to be heard by the Minister.

26. In my view the news releases on February 27 and 29, 2008 and the Minister's invitation for comments did not satisfy the requirements of consultation created by his own "full debate" representation.

27. Thus the decision of the Minister was unfair and unreasonable. The application for judicial review is allowed. The Minister's decision to phase-out Early French Immersion is removed into the Court and quashed.

28. Following the precedent of the *MacDonald* case, I remit the matter back to the Minister. The Minister may if he wishes again consider the matter. Any further decision by the Minister should not be influenced by any expectations, consequences or possible waste caused by the March decision that has been quashed. Also any further decision should be made in accordance with the principles of fairness after an appropriate opportunity for interested citizens and organized groups to be heard to satisfy the Minister's representation that there would be time to "allow for a full debate".

29. Counsel will be heard with respect to costs.

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H. H. McLellan
A Judge of the Court of Queen's Bench
of New Brunswick