Looking beyond the status quo

Blog on the decision in the CSFY case

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The Supreme Court judgement in the *Yukon Francophone School Board*[1] (YFSB) case confirms the status quo and both parties will now have to start afresh this whole process. Although it is difficult to say that this decision will help promote the evolution of educational language rights in Canada, it is possible to identify some positive elements.

The YFSB, managing the only Francophone School of the territory, started a long legal battle against its government on issues regarding section 23 of the *Canadian Charter of Rights and freedoms*. One of the questions raised by the appeal that caught our attention the most seeks to determine whether "section 23 grants the Board the unilateral power to admit students other that those who are "eligible" according to the *Regulation*."[2] The present *Regulation*, which governs francophone education within the territory, establishes which students are eligible to receive their education in French. The categories are limited to the ones that are already stated in section 23.[3] The YFSB could not, in theory, admit students that do not meet the criteria. However, in practice, it admitted non-eligible students up until the first day of trial.

The other provinces' approaches are quite diversified. The Northwest Territories and Nunavut are more restrictive since they are limiting the category of eligible students to what is stated in section 23. Quebec functions in a particular context due to the fact that section 23(1) a) does not apply to it. Therefore, the range of rights holders is narrowed and largely regulated. Alberta, Nova Scotia, Ontario, Saskatchewan, Newfoundland and Labrador and Prince Edward Island have a broader approach by allowing more or less explicitly non-rights holders (according to section 23) to have access to education in the minority language. Finally, British Columbia distinguishes itself by granting rights to immigrants who would have been right holders if they were Canadian citizens. By allowing students to receive their education in the language they choose, as long as their knowledge of it is sufficient, New Brunswick, the only bilingual province, is certainly the most permissive of all.

Following the decision, the situation is not changed for Yukon's francophone community. By exploring relations between section 93 of the *Constitution Act, 1867* and section 23 of the *Charter*, the Court concluded that it was impossible for the school board to use section 23 to limit the exclusive provincial field of competence on education or to prevent provinces from legislating within the scope of powers conferred to them. The YFSB cannot thus have a unilateral power to admit students other than the ones mentioned in the *Regulation*. This is all the more true since section 23 does not mention such power. The only way, according to the Court, to be granted discretion to admit children of non-rights holders would be if the government delegated that competence in its favour, which is not currently the case.

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[1] *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25
[2] *Ibid*, par. 66
[3] *French Language Instruction Regulation*, YOIC 1996/99, sections 2 and 9

Despite this, the Court does not completely close the door to the possibility of challenging the constitutionality of the *Regulation* at the new trial. By stating that "This does not preclude the Board from claiming that the Yukon has insufficiently ensured compliance with s. 23, and nothing stops the Board from arguing that the Yukon's approach to admissions prevents the realization of s. 23's purpose"[4], the Court puts forward the possibility for the YFSB to challenge the *Regulation* by claiming that it goes against section 23's aspiration of protection of the minority's culture and its remedial provision.

Finally, Yukon's government, in the appeal, claimed an apprehension of bias against the trial judge. Both the Court of Appeal and the Supreme Court decisions largely focused on that issue. One of the arguments supporting the government's proposition was that the trial judge's current service as governor of the *Fondation Franco-albertaine* substantially contributed to the apprehension of bias. The Supreme Court of Canada did not accept that argument by stating that the organism was not political and was not directly involved with the linguistic community in question in the appeal. It rather considered that it was the trial judge's conduct that lead to an apprehension of bias. That statement confirms the position taken by the Canadian courts that a judge's personal experiences and identity cannot be ignored but that judges need, despite them, to keep an open mind. Community service, such as the trial judge does for the *Fondation Franco-albertaine*, is not sufficient in itself to refute the presumption of judicial impartiality.[5]

Even if this is a mixed decision from the Supreme Court, there is still hope for Yukon's francophone community, who could, by following the Court's recommendations, be part of a future case that could prove to be an advancement for language rights.

[4] Ibid note 2, par. 74
[5] *Ibid*, par. 56 to 62