# COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: *CSFY v. Yukon*
2011 YKCA 10

Date: 20111031
Docket: YU684

Between:



**La Commission Scolaire Francophone du Yukon No. 23**

Respondent
(Plaintiff)

**Procureure Générale du Territoire du Yukon**

Appellant
(Defendant)

Before: The Honourable Mr. Justice Groberman
(In Chambers)

On appeal from the Supreme Court of Yukon, July 26, 2011, (*La Commission Scolaire Francophone du Yukon No. 23 c. Procureure Générale du Territoire du Yukon*, 2011 YKSC 57, Whitehorse No. 08-A0162

## Oral Reasons for Judgment (English Translation)

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| Counsel for the Appellant: | Maxime Faille<br>François Baril |
| Counsel for the Respondent: | Roger J.J. Lepage<br>François Poulin |
| Place and Date of Hearing<br>(by teleconference): | Whitehorse, Yukon<br>October 28, 2011 |
| Place and Date of Judgment:<br>(by teleconference) | Whitehorse, Yukon<br>October 31, 2011 |

[1] **Groberman J.A.**: This is a motion for a stay of orders made by the trial judge on July 26, 2011. The orders were made after a trial of eight weeks. The reasons for judgment are 317 pages long.

[2] The case concerns the rights accorded to members of the francophone minority in Yukon under s. 23 of the *Canadian Charter of Rights and Freedoms*, and the corresponding obligations of the Yukon government. The judge at first instance found that the Yukon government has failed to fulfill its obligations under s. 23 and under the *Education Act,* R.S.Y. 2002, c. 61. He also found that the government had failed to respect the rights of the Commission Scolaire Francophone du Yukon ("CSFY") under the *Languages Act*, R.S.Y. 2002, c. 133. Further, he declared that the government had breached its fiduciary obligations to the CSFY.

[3] In the end, the judge made a complex order, composed of several provisions.

[4] The Attorney General of Yukon launched an appeal to this Court. Despite the fact that its factum is not yet filed, it is clear that the grounds of appeal will include several alleged errors. She contends that the judge interpreted s. 23 too broadly, and also that he made errors in interpreting the *Education Act* and *Languages Act.* Further, the appellant contends that the judge was biased, and that, because of his background, he was incapable of doing justice in this case.

**Principles applicable to an application for a stay**

[5] The parties agree that the principles applicable on a stay application are those discussed in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. That judgment established that a court must analyse the application in three stages. First, it must consider whether there is a serious question to be tried. The Supreme Court emphasized that the threshold to be met to satisfy this criterion is not a high one. At page 339, the Court said:

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[6] At the second stage of the analysis, the court must ask itself whether the appellant would suffer irreparable harm if the application for a stay were dismissed.

[7] If the court concludes that there is a serious question to be tried and that the appellant would suffer irreparable harm if the court rejected the application for a stay, the court must proceed to the third stage of the analysis. At that stage, the court must assess which of the two parties would suffer the greater harm depending on whether it grants or refuses the stay pending a decision on the merits.

**The matters in issue**

[8] The motion of the Attorney General seeks a stay of the order in its entirety. That position changed somewhat during the hearing, however. The Attorney General recognized that a number of the items in the order are incapable of creating irreparable harm to the Yukon government. In the end, the Attorney General sought a stay of the following orders (I have numbered the orders to facilitate discussion; the numbers in parentheses show the paragraph of the judgment wherein each order was made):

1. That the Supreme Court of Yukon remains seized of the matter (865);
2. That, regarding management of facilities, staff, programs and finances, the Yukon government not only respect the powers and obligations of the CSFY as set out in the *Education Act*, but also to take positive and active measures to implement them, taking into account francophone rights under the *Education Act* and s. 23 of the *Charter*. (868);
3. That the Yukon government, in consultation with the CSFY, establish a staffing formula taking into account the CSFY's particular needs and the requirements imposed by s. 23 of the Charter; (869);
4. That the CSFY may appoint the school principal for a fixed term, under a contract which is renewable at its pleasure (869);
5. That the CSFY has the right to manage the land and buildings, including the necessary annual operations and

maintenance budget, as provided under s. 174 of the *Education Act* (869);

6. That the Yukon government grant to the CSFY the human resources and funds necessary to enable it to fulfill its obligations under ss. 11, 15, 32, 33, 34, 42, 43, 44, 56, 116, 174, 175 and 178 of the *Education Act*, and the provisions of the *French Language Instruction Regulation* (O.I.C. 1996/099);(869);

7. That the Yukon government, in consultation with the CSFY, shall establish a professional development budget for its teachers, and provide funds according to that budget (869);

8. That the expansion of École-Émilie Tremblay will enable the CSFY to fulfill its mandate and carry out its obligations under s. 23 of the *Charter* and the *Education Act* and to accommodate students from kindergarten 3 (or of pre-school age) to Grade 12 (869);

9. That the CSFY has the right to enlarge École-Émilie Tremblay on the existing grounds to accommodate a secondary program offering courses similar to those available in the other secondary schools in Whitehorse (869);

10. That the Yukon government shall provide the capital budget necessary for the expansion of the secondary school (869);

11. That the expansion of École-Émilie Tremblay will be sufficient to accommodate up to 150 students from Grades 7 to 12, in keeping with the concept of a school community centre. The expansion will incorporate the following: single class rooms, a dedicated science laboratory, an area for plastic and visual arts, an area for theatre arts (music and theatre), an area for francization, an area for English first language, an area for traditional industrial arts, an area for modern industrial arts (computer and technologies), a functional cafeteria/canteen, the expansion of the École-Émilie Tremblay gymnasium to accommodate the secondary level, an area for teaching special needs children, an area for home economics, a student radio area, a working area for teaching staff, an area for specialists and cleaning and storage space (869);

12. That the Yukon government shall immediately undertake steps toward the construction, and the expansion work shall be completed within 24 months (869);
13. That the Yukon government shall give updates on its progress on a quarterly basis to the CSFY and the Court (869);
14. That the Yukon government shall provide, pending construction of the secondary school, two portables to accommodate an elementary and a secondary special needs resource room (869);
15. That the CSFY may manage the admission of individuals not expressly contemplated in s. 23 of the *Charter* (869);
16. That ss. 5, 6 and 9 of the *French Language Instruction Regulation* (O.I.C. 1996/099), are inconsistent with s. 23 of the *Charter* (870);
17. That policy 1.3.2.1, which makes English the administrative language of work in the Yukon public service, does not apply to the CSFY, nor to its staff (871);
18. That all communications between the Yukon government and the CSFY, whether written, verbal or electronic, as well as all services, be provided in French, in compliance with s. 6 of the *Languages Act.* (871);
19. That the Yukon government had a fiduciary duty to consult the CSFY prior to transferring, for other purposes, $1,954,228.00 which was designated by the federal government for teaching French first language from 2005 to 2009 (872);
20. A declaration imposing upon the Yukon government a constructive trust whereby $1,954,228.00 is held in trust for the CSFY (872).

**Serious question to be tried**

[9] The judgment on appeal granted the CSFY a very extensive level of management and control. The number of students at École-Émilie Tremblay is, at present, less than 200. In the judge's view, the number of children of rights-holders under s. 23 of the *Charter* is between 400 and 435. In my opinion, it is not clear that all of the measures ordered by the judge will be accepted as constitutionally mandated on the appeal. Given that the threshold that must be met in order to

satisfy the criterion is not high, I would not say that the appellant has failed to raise serious questions to be tried. I cannot conclude that the appeal will inevitably fail.

[10] That said, it seems to me that some of the orders that are in issue on this motion are not, in reality, controversial. For example, I am not convinced that order no. 1 (that the Supreme Court of Yukon remains seized of the matter) is itself genuinely controversial. The Supreme Court of Canada established in *Doucet-Bourdreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 that the court can, in appropriate circumstances, maintain jurisdiction in order to ensure that the remedial orders that have been made are fulfilled.

[11] As well, there are, among the orders, some that are effectively recitals of the law. Order no. 2, which requires the government to abide by the *Education Act* and to take active measures to take into account the rights of francophones under s. 23 of the *Charter* is simply a summary of the law. There is no reason to order a stay or to suspend that order. I am of the same view in respect of order no. 6, which requires the government to grant the CSFY the necessary resources to enable it to satisfy its statutory obligations. It is possible that there will be some debate over what resources are genuinely necessary. For that reason, the order is not particularly useful. Nonetheless, there is no reason to suspend the order until the Court deals with the merits of the appeal.

**Irreparable harm**

[12] The Attorney General has not, in my opinion, shown that each of the challenged orders will result in irreparable harm if not suspended. For example, I do not see why the government is applying to suspend order no. 3, which requires only consultation between the CSFY and the government in order to establish a staffing formula for the CSFY. Possibly, the government fears that the judge envisages the establishment of a formula that is much costlier than that which the government is prepared to provide. However, before having had the consultations, this fear is speculative. I am not, at this time, ready to conclude that the government would suffer irreparable harm as a result of order no. 3.

[13] In my view, it is also not clear that there is irreparable harm in respect of order no. 4, which stipulates that the CSFY may hire a principal under a fixed term contract. The collective agreement between the Yukon government and the union contains a provision that requires that after two years of service, a principal becomes a permanent employee. The CSFY prefers a more flexible arrangement, and wishes to employ its principal only for a 3 years renewable term.

[14] I am not convinced that the Yukon government will suffer irreparable harm if the CSFY must, for the present, be excluded from a provision of the collective agreement. The court clearly has jurisdiction to order that a provision of the collective agreement is inapplicable to the CSFY.

[15] The rest of the orders have financial implications for the Yukon government. I understand that the Yukon government is, for practical purposes, the only source of funding for the CSFY. In the result, if the government finances the implementation of the orders between now and the hearing of the appeal, it will be impossible for it to recover the expenditures. I accept that, under *RJR-Macdonald*, the expenses would constitute "irreparable harm". It is necessary, then, to move on to the third stage of the analysis.

**Who will suffer the greater harm**

[16] The majority of applications for stays must be decided at the third stage of the analysis. I have concluded that in this case, most of the orders carry a risk of irreparable harm. Thus, it is necessary to assess the harm that could befall the respondent if a stay were granted, and to compare it to the harm that could befall the appellant if a stay were not granted.

[17] There are certain principles that must be considered at the third stage of the analysis required by *RJR-Macdonald*. In general, the Court must recognize that the respondent has succeeded in the trial court, and has a right to the fruits of its victory. Therefore, the burden of showing that a stay is justified is on the appellant.

[18] I take into account, as well, that this case impacts the fundamental rights of the francophone minority in Yukon. Further, the Court's decision is focussed on children's education. I am aware that even a brief delay in bringing the remedial orders into force could eliminate important opportunities for young people. Obviously, they cannot delay their education.

[19] I return, now, to the remaining orders. In order no. 5, the judge ordered that the CSFY has the right to manage and maintain the land and buildings where its school is located. The government contends that economies of scale require that the government maintain responsibility for the maintenance and management of all schools in the Territory.

[20] I have no doubt that economies of scale can be advantageous for the government, as well as for the CSFY. However, the judge decided that it is important that the CSFY take control of the land and buildings where the school is situated. The evidence filed on this application does not show extensive financial harm will follow if maintenance and management are transferred to the CSFY. I am not persuaded that the harm is sufficient to justify a stay.

[21] Order no. 7 orders that the Yukon government, in consultation with the CSFY, establish a professional development budget for teachers. The government opposes this proposal. The Attorney General says that there is only one professional development fund for all Yukon teachers, and that it is in the hands of the union.

[22] It is readily apparent that the CSFY has particular needs in respect of professional development. I am convinced that the CSFY will suffer great harm if it cannot manage the professional development of its own teachers. Even taking into account the fact that the change ordered by the judge will require negotiations between the government and the union, or, perhaps, an increase in the amount of money allocated to professional development, I am not persuaded that a stay should be ordered.

[23] Orders nos. 8 to 12 envisage the construction of a new building to accommodate an expanded secondary program, and also to accommodate a Kindergarten 3 program. There are also other improvements that will result from the new construction.

[24] The evidence indicates that the new construction envisaged by the order would be expensive – about $30 million. The population of Yukon is about 30,000. The expenditure envisaged by the judge, then, is huge.

[25] The CSFY contends that the expenditure between now and the hearing of the appeal will be significantly less than $30 million. We are not, at present, at the point where construction is ready to commence – we are only at the beginning of the planning. Further, $30 million is a generous estimate for the cost of construction; it could cost, at a minimum, only $15 million.

[26] Notwithstanding the arguments of the CSFY, it is apparent that the planning and construction of a building like the one ordered by the trial judge will be expensive. On the other hand, I am not convinced that a delay until the hearing of the appeal will cause great harm to the CSFY or those that it represents. In the result, I am ordering a stay of orders 8-12 – that is, the orders in respect of the construction of a new building.

[27] I am aware that order no. 8 speaks, as well, of the inauguration of a new program for pre-schoolers – Kindergarten 3. The judge concluded that, because of assimilation of francophones in Yukon, it was necessary to have a "Francisation" program for young children. Though the *Charter* guarantees instruction in French only at the primary and secondary school levels, the judge decided that such instruction was not possible without an introductory program for pre-schoolers.

[28] Evidently, the judge determined that the Kindergarten 3 program is crucial for the education program. It is quite possible that the Attorney General will succeed on her appeal against the establishment of Kindergarten 3. Even though that is a possibility, I am not convinced that the CSFY must abandon its plans to introduce

Kindergarten 3. If I understood the arguments of its counsel correctly, it would like to continue with those plans. To the extent that the plans for Kindergarten 3 do not depend on the construction of a new building, I am not ordering a stay of the orders in respect of the inauguration of a Kindergarten 3 program.

[29] Order no. 13 requires the Yukon government to report on its progress in fulfilling the orders on a quarterly basis. I am not satisfied that this order represents a great potential harm for the Yukon government. I am not granting a stay in respect of this order.

[30] Order no. 14 deals with the construction of two portables to accommodate special needs classes pending construction of a new wing of the school. The Attorney General has filed, on the hearing of this motion, affidavits that indicate that the estimated cost of construction of the portables will be more than $800,000. Further, the new evidence puts in doubt the need to have portables to accommodate a special needs resource room. In my opinion, the Attorney General has satisfied the burden on her. I am persuaded that a stay of order no. 14 is fair.

[31] In respect of orders 15 and 16, which address the issue of the management of admission of persons who are not rights-holders under s. 23 of the *Charter* the Attorney General has not, in my view, shown that the government will suffer harm as a result of these orders. The parties agree that, up until now, the government has not attempted to enforce s. 9 of the *French Language Instruction Regulation*, (O.I.C. 1996/099). In effect, the judge granted the CSFY a power that it has already exercised for a long time. I am not convinced that it is now the time, between now and the hearing, to change the policy. I am not of the view that a stay is appropriate in respect of orders nos. 15 and 16.

[32] Orders nos. 17 and 18 order that communications between the CSFY and the government be in French. I am not convinced by the government's submissions that this will be impossible or very expensive. I am not inclined, for the time being, to grant a stay. If the situation proves more difficult than I foresee, the Attorney General can renew her application. In the meantime, I expect that there will be reasonable

cooperation between the parties to ensure that communications can continue. That may require a measure of compromise and cooperation.

[33] Finally, there are two orders, nos. 19 and 20, that concern a declaration of a fiduciary obligation. As I read the orders, they require the Yukon government to keep a $1,954,228 trust fund in reserve. It seems to me that there is no harm in granting a stay in respect of this order. The Yukon government will be able, in the end, to pay a judgment of that amount without the responsibility to keep it in cash. I am prepared to grant a stay in respect of orders 19 and 20.

[34] In summary, I am granting a stay against orders nos. 8-12, which concern the construction of a new building. As well, I am granting a stay against order no. 14, which concerns construction of portables. Finally, I am granting a stay against orders nos. 19 and 20, which order the holding of a trust fund. The balance of the application is dismissed.

The Honourable Mr. Justice Groberman