

Ontario Superior Court grants interlocutory injunction to CÉPEO in response to OFSAA New By-Laws

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On August 27, 2015, the Ontario Superior Court of Justice granted an interlocutory injunction under the minority language education rights provisions of the *Canadian Charter of Rights and Freedoms* (*Charter*) suspending application of the Ontario Federation of School Athletic Associations' (OFSAA) new By-Laws to the francophone minority in Eastern Ontario and to maintain the status quo until the dispute between the parties is heard on its merits.

The motion for the interlocutory injunction was successfully argued by Emond Harnden's own Paul Marshall and Sophie Gagnier on behalf of the Plaintiffs, the Conseil des écoles publiques de l'Est de l'Ontario (CÉPEO) and Claude Provost, a French-language rights holder whose children are enrolled in one of CÉPEO's schools.

In 2014, the CÉPEO and Claude Provost commenced a civil action claiming that amendments to OFSAA's new By-Laws governing interscholastic sporting competitions infringe the *Charter* rights of French-language rights holders. In August 2015, pending determination of the constitutional challenge, the School Board and Mr. Provost sought an interlocutory injunction suspending application of the OFSAA's new By-Laws.

By way of background, CÉPEO had eliminated school boundaries for secondary school students living in Ottawa. Therefore, any student living on the CÉPEO's territory may attend any of the Board's secondary schools whether or not the chosen school is the closest of CÉPEO's secondary schools to the student's home. École Louis-Riel is the only French-language public secondary school in Ottawa to offer a speciality sports studies program. Students enrolled in sports schools are required to designate a sport of speciality.

In April 2012, the OFSAA amended its By-Laws governing the eligibility of students to participate in OFSAA sanctioned-events. The amendments, which came into force on September 4, 2012, prohibit students attending a sport school from competing in OFSAA sanctioned-events in their designated sport of speciality if the school is not the student's designated school according to school board boundaries (or not their closest school where no boundaries exist). This restriction applies as long as the student attends the sport school. The new By-Laws also provide that a school board that chooses not to have school boundaries is deemed to have them, thereby creating artificial boundaries.

The Plaintiffs' constitutional challenge is that OFSAA's new By-Laws have a discriminatory impact on the French language minority because students registered at anglophone high schools can take part in OFSAA sanctioned-events at the elite level since there are more of them at a given school.

Unlike the francophone minority, they are not required to group together at the same sports-study school in order to have access to higher classification competitions while receiving a quality public education. It was also argued that the new By-Laws have a significant impact on the CÉPEO's ability to attract, welcome and retain children of parents with rights under section 23 of the *Charter* at *Louis-Riel* and therefore promotes assimilation of the language minority.

Section 23 of the *Charter* constitutionally guarantees minority language education rights. Where the educational experience is perceived as inferior in minority language schools and if this discourages parents from having their children educated in the minority language, this creates a risk of assimilation inconsistent with the remedial objective of section 23 of the *Charter* as established in the Supreme Court of Canada's decision in *Arsenault-Cameron v. Prince Edward Island*. This failure also violates the principle of meaningfully similar quality of education to that of the majority, as recently reconfirmed by the Supreme Court in *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*.

In granting the interlocutory injunction pending the determination of the constitutional challenge on its merits, the Court found:

1.
There was a serious constitutional issue to be decided in this case, namely whether the students affected by OFSAA new By-Laws would receive a meaningfully similar quality educational experience to that received by the anglophone majority.

2.
The Plaintiffs would suffer irreparable harm if the interlocutory injunction was not granted, namely a reduction in student enrollment, the exclusion of many students at École Louis-Riel from OFSAA sanctioned-events, the impact on the ability of École Louis-Riel to attract and retain children of parents with French-language rights, therefore favouring assimilation of the linguistic minority.

3.
The balance of convenience, taking into account public interest, favoured granting the interlocutory injunction as it would have the effect of suspending the application of the new By-Laws to the francophone minority and maintain the status quo until the Court has resolved the legal issues on the merits of the dispute.

The Court also concluded that:

... education is not uniquely limited to classroom instruction, but extends to extracurricular activities that are part of the students' experience and learning. [...] If the overall educational experience is perceived as inferior in minority language schools and discourages parents from having their children educated in the minority language, I believe that this creates a risk of assimilation which is not consistent with the remedial objective of section 23 of the *Charter*. *[translation]*

We will keep readers informed of future developments in this case.

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