

Saskatchewan



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QUEEN'S BENCH FOR SASKATCHEWAN

Citation: 2012 SKQB 217

Date: 20120528
Docket: QBG 820 of 2011
Judicial Centre: Regina

BETWEEN:

CONSEIL SCOLAIRE FRANSASKOIS,
L'ASSOCIATION DES PARENTS FRANSASKOIS INC.,
YVAN LABEL, ÉLIZABETH PERREAULT

PLAINTIFFS
(APPLICANTS)

- and -

THE GOVERNMENT OF SASKATCHEWAN

DEFENDANT
(RESPONDENT)

Counsel:

Roger J.F. Lepage and Francis P. Poulin
Alan F. Jacobson and Barbara C. Mysko

for the plaintiffs (applicants)
for the defendant (respondent)

FIAT
May 28, 2012

CHICOINE J.

NATURE OF THE APPLICATION

[1] On April 27, 2011, the applicants, Conseil Scolaire Fransaskois ("CSF"), L'Association des Parents Fransaskois Inc., Yvan Lebel and Élizabeth Perreault, commenced an action by Statement of Claim against the respondent, the Government of Saskatchewan ("the Government"), in which they seek declaratory orders and permanent injunctive relief requiring the Government to provide sufficient funding to

the minority language school system which they allege has been chronically underfunded since its inception in 1995.

[2] On May 24, 2011, the applicants brought an application in for an interlocutory mandatory injunction to order the Government to immediately provide extra funding to the CSF to meet an anticipated 2.3 million dollar shortfall in its 2011-2012 budget, as well as to provide sums to cover a newly negotiated local bargaining agreement, to provide staffing for an anticipated increase in student enrollment in the Fall of 2011, and to establish a reserve to cover urgent but unforeseen expenditures in the next budget year.

[3] On May 30, 2011, this Court rendered its decision on the interlocutory application and ordered the Government to pay to the CSF an additional 2.3 million dollars from its general revenue fund in addition to the budgeted allocation of 26 million dollars for the 2011-2012 school year. In addition, the Government was ordered to pay to the CSF the sum of \$500,000 for the purpose of replenishing its reserves and to cover unforeseen expenditures or emergencies which might arise during the 2011-2012 fiscal period. No amount was ordered in respect of the newly negotiated local bargaining agreement or for extra staffing in the event of an enrollment increase in the Fall of 2011. This Court indicated that in the event that the matter had not proceeded to trial or that no new funding agreement was reached between the CSF and the Government prior to the commencement of the 2012-2013 fiscal year, then either party could apply on 14 days notice for a review of the order based on circumstances then prevailing.

[4] On April 13, 2012, the CSF filed a Notice of Motion for another interlocutory mandatory injunction requesting an amount of \$704,000 in respect of an anticipated budget shortfall for the 2011-2012 fiscal year ending August 31, 2012; an additional sum of \$2,039,962 to cover an anticipated budget shortfall for the 2012-2013 fiscal

year; \$450,000 for the rental and renovation of a building in the City of Lloydminster which they plan to open as a school in September of 2012; and an amount of \$500,000 to once again replenish its reserves and to meet unforeseen expenditures over the course of the next fiscal period ending August 31, 2013.

[5] This application was heard on May 22, 2012. Following is the court's decision in regard to the renewed application for further funding over and above that which this Court had ordered for the 2011-2012 fiscal period, and for further funding in addition to the amount which the Government has allotted for the 2012-2013 fiscal year beginning September 1, 2012.

THE ISSUES

[6] In the decision rendered on May 30, 2011, which is cited as *Conseil Scolaire Fransaskois v. Saskatchewan*, 2011 SKQB 210; 336 D.L.R. (4th) 174, 378 Sask.R. 1, [2012] 2 W.W.R. 528, this Court came to the conclusion that the applicants had satisfied the three-fold test which had to be met before a court could award an interlocutory injunction, namely: that there was a serious question to be tried; that the applicant would suffer irreparable harm if the injunction was not granted; and that the applicant would suffer the greater harm if the injunction was refused than would befall the Government if the injunction was granted.

[7] In the previous decision, this Court began its analysis with a cursory review of the history and development of minority language education rights since the introduction of s. 23 of *Canadian Charter of Rights and Freedoms* in 1982. Among the Supreme Court of Canada cases referred to in that decision was *Mahe v. Alberta*, [1990] 1 S.C.R. 342, [1990] 3 W.W.R. 97, wherein Chief Justice Dickson stated (at para. 31) that the general purpose of s. 23 "is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language

flourishes, as far as possible, in provinces where it is not spoken by the majority of the population.” Also mentioned was the case of *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, [2000] S.C.J. No. 1 (QL), wherein Justices Major and Bastarache wrote (at para. 26) that s. 23 “mandates that provincial governments do whatever is practically possible to preserve and promote minority language education”, and (at para. 27) that s. 23 was included in the *Charter* for the purpose of “redressing past injustices and providing the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced.”

[8] At the heart of the dispute between the CSF and the Government in this case is whether the funding provided by the Government to the CSF should be used solely for French language educational instruction or whether it should also be used to pay for programs and activities which transmit and reinforce the French culture and a Francophone identity—which the CFS refers to as its triple mandate. It is the position of the Government that programs for the purpose of promoting the French culture and identity are not its responsibility and that its obligations are fulfilled by the provision of funding for primary and secondary school instruction equivalent to that provided to the Anglophone schools. In this context, for example, the Government denies that it has any obligation to provide funding for preschool programs which it says are not included in the definition of “primary” schooling.

[9] In the context of this renewed application for an interlocutory mandatory injunction there is no question that there is “a serious issue to be tried” in this court action given the fundamental matters in dispute between the parties. The issues remaining to be determined are whether the applicant would suffer irreparable harm if the interlocutory injunction was not granted pending the trial of the action and who would suffer the greater harm by granting or not granting the injunction at this juncture. The amount to be paid, if any, also remains to be determined.

THE BUDGETARY IMPASS CONTINUES

[10] There has been continual tension between the CSF and the Government over the funding of French language education since the inception of the CSF in 1995.

[11] Prior to 2002, the basis for financing of the Fransaskois schools was the same as that provided to the Anglophone public and separate school systems, being the "Foundation Operating Grant". This system was based on a cost per pupil formula and it was supplemented by various sums for educational, administrative, or governance factors as well as transportation and school facility operations. For a number of years, the CSF was able to supplement the amount allocated to it by the Government of Saskatchewan by using funds which came from the Federal government and other sources in order to balance its budgets. In 2002, the Government acknowledged that the CSF's operating budget was underfinanced and it introduced a "Francophone factor" which increased the operating grant by eight percent.

[12] As mentioned in the previous decision, by 2003 the CSF had used up most of its reserves to make up its budgetary shortfalls and in 2004 it commenced a court action against the Government to deal with what it considered to be chronic underfunding. The CSF discontinued its action when the Government agreed to a 1.3 million dollar annual increase in funding. The "Francophone factor" was arbitrarily increased to thirty three percent, meaning that Francophone schools would receive thirty three percent more than the amount allocated to Anglophone schools for various budget items.

[13] According to the CSF, however, underfunding persisted due in part to cancellation of other programs which formerly made up part of the foundation operating grant. By February of 2009, the CSF was again threatening to bring court action to resolve the underfunding issue, but the matter was resolved when the

Government paid to the CSF 4.4 million dollars as part of its transition plan relating to the takeover of the education component of property taxation from the public and separate school systems. The Government began consultations with its partners in education on a new and revamped education financing formula. With these funds, the CSF was able to balance its 2008-2009 budget and the amount remaining was placed in reserve.

[14] As an example of the continued tension between the CSF and the Government in the Spring of 2009 the CSF submitted its proposed budget for the 2009-2010 school year to the Minister of Education for approval. CSF indicated that it needed 31 million dollars to fulfill its constitutional mandate. The Government refused to approve this budget and requested that the CSF submit a balanced budget. Eventually, the CSF obtained approval for a budget of 25.4 million dollars, which budget was supplemented by its reserves.

[15] For the 2010-2011 school year, the CSF submitted a budget request of 37.1 million dollars. The CSF eventually obtained approval for a budget of 28.3 million dollars, but this budget completely used up all of its reserves and accumulated surplus.

[16] For the 2011-2012 school year, the CSF submitted a budget request of 39 million dollars. The Government again refused to approve this budget and requested that the CSF submit a balanced budget of 26 million dollars. While this amount represented an increase of \$640,000 over the previous year's contribution from the Government, it would have required a cut of 2.3 million dollars from the amount that the CSF spent in the 2010-2011 school year of 28.3 million dollars.

[17] The CSF decided that it could not suffer such a drastic reduction in its budget without seriously impairing delivery of educational instruction and services to its

students. It therefore commenced the present action and made the application for interim funding which resulted in the decision made on May 30, 2011, to order the Government to pay an additional 2.3 million dollars so that the CSF's budget could be maintained at the same level as the previous year and \$500,000 was ordered to be paid to the CSF to replenish its reserves and to cover unforeseen or emergency expenditures.

[18] In November of 2011 the Government provided the CSF with preliminary information regarding the proposed new funding formula that would be applied to all school divisions in the province starting with the 2012-2013 school year. The CSF quickly concluded that the new formula failed to address its specific needs and immediately suggested to the Government that they should enter into mediation to address the funding issues. Meetings were held at which the CSF raised three issues: 1) inadequate funding for the current 2011-2012 fiscal period; 2) the anticipated funding shortfall under the proposed new financing formula; and 3) the need for a funding formula that would meet the unique needs of the CSF. The CSF reminded the government that it had been promising a new financing model since 2009.

[19] Two meetings were held in January 2012. The Government agreed to fund the new LINC agreement and has already paid \$620,000 of the total anticipated \$700,000 cost of implementing the new contract. Discussions are ongoing with regard to the balance and the CSF is in the process of providing further information to the Government with regard to the balance. It is not a matter in issue on this application.

[20] With regard to the current year's financing, one of the outstanding issues is the decision of the Government to withhold an amount of \$145,000 which is the amount the school division saved in salary costs during three days of teacher work stoppages in June of 2011. More will be said about this matter later in this decision.

[21] On March 21, 2012, the CSF received a statement of its 2012-2013 budget allocation from the Government. The Recognized Funding Total, after certain adjustments, was \$24,331,000. The CSF immediately informed the Government that the proposed budget failed to account for the anticipated shortfall in the current year; that the proposed 2012-2013 allocation would be insufficient to meet all of the school division's needs; and that the proposed 2012-2013 allocation failed to take into consideration the CSF's need for a larger school in Lloydminster for the Fall of 2012.

[22] The Government takes the position that the CSF is generously funded on a per student basis and that it must adjust its expenditures to match the budgeted revenues. The CSF argues that the Government is failing to recognize that past funding shortfalls are impairing the CSF's ability to provide needed instructional and support services for its students in accordance with its constitutional mandate. Some of the more contentious matters in issue between the parties require further analysis to determine if they can be or should be addressed by means of interlocutory order of mandamus.

FUNDING DEFICIENCIES FROM THE PERSPECTIVE OF THE CSF

Covering the 2010-2011 deficit

[23] The CSF states that chronic underfunding over a number of years has resulted in the CSF having had to use all of its reserves. The school division is legally required to submit its budget to the Minister of Education for approval before the commencement of each new fiscal year and it is not allowed to do deficit financing. Past year's deficits must be paid out of the next year's allocation. In this regard, the CSF has provided a summary prepared by its auditors which indicates that for the 2010-2011 fiscal period ending August 31, 2011, the CSF incurred an operating deficit of \$451,034. This deficit would have been even higher but for the application

of \$340,333 from the \$500,000 which this Court ordered the Government to pay to the school division for replenishment of its reserves in May of 2011. The CSF claims that this operating budget shortfall from 2010-2011 has implications for the current fiscal period.

The anticipated 2011-2012 deficit

[24] According to the CSF, one of the reasons for chronic underfunding year after year is the Government's refusal to make any adjustments for increasing student enrollment. For example, in May of last year the CSF had asked this Court to award an additional amount of \$435,000 to hire an additional six teachers in anticipation of increased enrollment of at least 77 students in the Fall of 2011. No amount was awarded for the reason that this Court had deemed the enrollment projection to be somewhat speculative and that the matter could be addressed by the parties if and when it happened. In actual fact, the school division did have an enrollment increase of 71 students over the previous year, 19 of which were in Kindergarten to Grade 12 and 52 were in preschool programs for three and four year olds. In addition, between September 30, 2011 and March 30, 2012 another 33 students were enrolled, bringing the total increase to 104 students. The Government has refused to allocate any additional funding for this increased enrollment in the current year. The Government's policy is to require all school divisions to cover increased enrollments from their existing budgets, which the CSF says is unfair when such large enrollment increases continually occur year after year.

[25] Another reason for the Government's refusal to provide extra funding for these new students is that 45 of these 71 students are in preschool programs for children aged three and four. The Government's position is that these students are not included in the definition of "primary" education in s. 23 of the *Charter*. The Government does not prohibit or discourage the CSF from offering programs to children in this age

bracket, but simply takes the position that it must fund these programs from its allotted funding. The CSF's position is that early childhood education programs are essential to the Frenchifying, recruitment and retention of children of the parents who have the s. 23 *Charter* right to have their children educated in French. Without these programs, the CSF fears that it would lose a large number of these children to the Anglophone school systems, which would cause irreparable harm. The CSF also points to the recent decision of Mr. Justice Ouellette in *La Commission Scolaire Francophone du Yukon no. 23 c. Procureure générale du Territoire du Yukon*, 2011 YKSC 57, [2011] Y.J. No. 132 (QL) in support of its argument that these preschool programs are included in the definition of primary education in s. 23 of the *Charter*.

[26] Also a point of contention between the parties is the fact that a number of these new students who are enrolled in the CSF school in Lloydminster are in fact residents of the Province of Alberta, for whom the Province of Saskatchewan has no responsibility under s. 23 of the *Charter*. The CSF is of the view that under *The Lloydminster Charter* O.C. 208/79 adopted pursuant to s. 4 of *The City of Lloydminster Act*, S.S. 2004, C-11.2, the Government of Saskatchewan has indeed accepted responsibility to educate all students in the Lloydminster district, including those who reside on the Alberta side of the border. The Government suggests that the CSF deal directly with the Government of Alberta or the Francophone School Division on the Alberta side of the border for funding for these students.

[27] Another source of controversy between the CSF and the Government is in regard to the CSF's decision, for reasons of student safety, to replace its entire fleet of 15 passenger vans used to transport students to extracurricular, sporting and cultural activities with 23 passenger white shuttle buses. Apparently, no special licence is necessary to drive a white bus, which means that anyone with a Class 5 licence is able to operate one of these vehicles. In July of 2010 the CSF had applied to the Minister of Education for approval to borrow funds to purchase nine of these 23 passenger

buses but the approval was refused on the ground that the CSF did not have the means to repay the loan. The CSF decided, however, to proceed with the purchase of two used buses at that time at a cost of \$100,988. Furthermore, in August and September 2011, the CSF decided that it could not do without these vehicles and proceeded to purchase four new ones at a cost of \$248,955. The CSF intended to apply the payroll savings resulting from the teacher walkout in June 2011 toward the purchase of these buses as it had been informed by the Government that those savings would be available for the use of all school divisions as they in their discretion would decide. The Government later reversed itself and decided that these savings would be applied to the salary increase in the final negotiated teacher contract. The CSF had already committed the money based on the earlier representation. The CSF also claims that these vehicles are indispensable because they are needed to provide safe transportation to and from sporting, cultural and social activities for their students, and in large measure they are instrumental for the retention of students in their schools, especially in the rural areas.

[28] The CSF has also determined that it will incur budget shortfalls in the current year as a result of the adjustment of administrator salaries that were increased proportionately with the increase in teacher salaries; for the cost of two more caretakers (due in part to ongoing construction and increased space usage); and increased costs of services to students who are boarded at the Gravelbourg school. All in all, with the \$435,000 expenditure for six teachers to cover increased enrollments and \$248,955 for the white buses, the CSF estimates that it will have a cost overrun of \$863,902 in its current 2011-2012 fiscal period, of which \$159,667 can be covered from the balance of the \$500,000 reserve, leaving a projected deficit of \$704,235.

[29] The CSF states that it would be virtually impossible to cover this kind of shortfall by cutting programs or salaries at this late date in the school year. The CSF would have to give notice or pay in lieu of notice to any employee who would be

terminated and because there is only one month left in the school year, any adjustment to program spending would have little effect.

The 2012-2013 funding allotment

[30] The CSF is of the opinion that the new funding formula proposed by the Government for the 2012-2013 fiscal year will result in a shortfall of \$2,039,962. This is despite the offer by the Government to pay an additional 2.3 million dollars as it did in 2011 in accordance with the Court Order.

[31] The CSF estimates that 2011-2012 budget expenditures will come in at about \$29,209,435. By comparison, the new funding formula used by the Government for the 2012-2013 budget indicates recognized expenses totaling \$25,901,877. Much to the dismay of the CSF, however, the Government also includes as revenue the tuition that the CSF receives for 15 students from Manitoba who attend the school in Bellegarde, but at the deemed rate of \$20,617 per student—an amount which the Government expects the CSF to charge for a student attending a Francophone school. In reality, the CSF receives only \$12,000 per student from the neighboring Manitoba school division. The deemed tuition amount has the result of penalizing the CSF \$129,264 because it accepts students from Manitoba at this school.

[32] Another problem is that the Government has decided to deduct \$1,533,911 from the CSF's budget for the coming year as a transition adjustment for the implementation of the new funding formula for all school divisions in Saskatchewan. The new funding formula will result in substantial decreases in provincial funding for some school divisions and substantial increases for others as a result of the Government having taken over control of the education component of property tax. The transition adjustment will be made over the next three or four years in order to allow those school divisions that were formally flush with property tax revenues to

make appropriate changes to their programming as a result of decreased revenues. The application of this transition adjustment to the CSF seems somewhat anomalous in that the CSF has never had access to property tax and as a result has never been able to build up substantial reserves like other school divisions that did have access to this source of income. The CSF is adamant that it cannot operate on a budget of \$24,331,111 allocated to it by the Government for the 2012-2013 school year with these kinds of negative adjustments.

[33] The CSF also points out that within the various expenditure categories found in the new recognized funding formula there are a number of items which simply do not correspond with the CSF's actual expenditures in those categories. For example, in the new funding formula, \$2,806,630 is allocated for transportation while the CSF will spend \$3,643,129 for transportation in 2011-2012. More than eighty percent of students require busing to attend a Francophone school. Another example is in cost of governance (school board expenses) where \$293,854 is allocated, yet actual expenses are \$422,142. The CSF has nine board members because it requires regional representation throughout the province. It also pays per diem compensation to the members of its 13 school councils in recognition of the fact that their responsibilities under the *Education Act, 1995*, are more onerous than those of the public and separate school councils.

[34] In 2011-2012 the Government paid a total of \$26,089,371 to the CSF, which included \$22,589,371 from the budget allocation; \$2,300,000 by court order; \$700,000 to cover the costs of implementing the new LINC agreement; and \$500,000 paid to replenish its reserves. By comparison, for 2012-2013, the Government is proposing to pay to the CSF \$24,331,111 from the budget allocation and \$2,300,000 as a good will gesture—the same amount as was awarded by the court last year to maintain the status quo—for a total of \$26,631,111. This is an increase of \$541,740

over 2011-2012. The CSF counters, however, that inflationary pressures and salaries increases alone will cost the CSF \$1,194,214 more in the next year.

[35] The CSF is adamant that the new funding formula, which was created to respond to the needs of the majority school systems, is totally unresponsive to the specific needs of the minority Francophone school system. If the budget is not increased, the CSF says that it will be forced to terminate 22 or more teachers and class sizes will have to increase dramatically, to the detriment of the students and the teaching staff. The affidavit of Bernard Roy, the Director of Education for the school division filed on this application describes other cutbacks to administration and programming which would also detrimentally affect the Francophone school system should further funding not be forthcoming.

[36] The CSF also argues that simply awarding an amount to maintain the status quo as was done last year in the Order of May 30, 2011, would not be satisfactory this time around. The CSF asks this Court to take into consideration that there is likely to be a substantial enrollment increase of 131 students or more in the 2012-2013 school year. This will mean that eight more teachers will be required at an average cost of \$75,000 per teacher for a total cost of \$600,000. The CSF also intends to proceed with the hiring of an out-of-province agency to assess and provide service to special needs students at a cost of \$464,488. These services will be provided in French. When special needs services are not provided, parents move their children to the public schools. The CSF is also obligated to implement new science, math and social sciences programs at a cost considerably higher than other school divisions would pay because the resource materials are more expensive in French than in English. The CSF anticipates paying \$98,000 more in the next year than it did in the current year to implement new curricula. The CSF would also like to hire three more teachers so that it can offer more applied practical arts courses to Grade 11 and 12 students—an area where they lag far behind the offerings in the majority schools.

[37] Also included in the current funding request is consideration for the expansion of the Francophone school in Lloydminster. The CSF opened a Francophone school in Lloydminster in September 2010 with an enrollment of six students. The school is located in a former bank building in downtown Lloydminster. The CSF paid the salary for one and a half teachers and paid for renovations to the facility out of its operating budget. In September of 2011, 18 students were enrolled in preschool to Grade 3. However, by March of 2012, enrollment had increased to 37 students, of which 28 were in the three and four year old age group. The CSF expects to have 41 students enrolled by the end of this school year, nine of whom will be in Kindergarten to Grade 9. By September of 2012, the CSF predicts that total enrollment will be between 57 and 67 students. The former bank facility can only accommodate a maximum of 45 persons before breaching fire regulations. For this reason, the CSF has been searching for a larger facility to accommodate its Lloydminster students in September of 2012.

[38] In this regard, the CSF has found a former rehabilitation centre which could be converted into a school facility to accommodate up to 150 students. This facility would accommodate its program for the next five years based on projected enrollment growth. The facility would be leased but would require about \$200,000 in renovations to convert it into a school. The CSF is satisfied that there is no other existing structure in Lloydminster that could accommodate its growing Francophone school.

[39] Meanwhile, the Government has refused to recognize any of the costs associated with the start-up of a Francophone school in Lloydminster, citing as its main reason that a large number of the students are residents of Alberta and that three and four year olds are not included in the definition of "primary" education in s. 23 of the *Charter*. The CSF counters with the argument that even if the Alberta residents are not counted, the school has now attained the "numbers warranted" threshold for

the establishment of a minority language school. It also points to the success of the Lloydminster Catholic Separate School which now has a French Immersion school with 340 students, sixty percent of whom would be entitled to attend a Francophone school. The CSF prefers that the Government of Saskatchewan negotiate directly with the Government of Alberta regarding funding for a Francophone school, but the Government has instructed the CSF that it will have to make its own arrangements with the Government of Alberta.

[40] According to the CSF, the anticipated increased costs of operating a Francophone school in Lloydminster in 2012-2013 will be \$450,000, of which \$117,600 will be the rental, \$200,000 will be required for renovations, and the balance will be needed for caretaking, utilities, maintenance and transportation of students.

Replenishment of its reserves

[41] By the end of the current fiscal period on August 31, 2012, the CSF will have used up all of the \$500,000 reserve awarded by this Court in May 2011. It is of the view that a new \$500,000 reserve should be granted to cover unanticipated expenses or emergencies. This is less than two percent of its nearly 30 million dollar budget. The CSF states that it will be operating near the limit of its 2.5 million dollar line of credit by August 31, 2012.

ANALYSIS

[42] A threefold test must be applied to determine whether an applicant is entitled to an interlocutory order of mandamus. Each test will be considered in turn.

1) Is there a serious issue to be tried?

[43] As was mentioned above, there is no question that there is “a serious issue to be tried” in this case given the fundamental matters in dispute between the parties. The CSF remains of the view that chronic underfunding has not allowed it to fulfill its constitutional mandate as contemplated under s. 23 of the *Charter*. It is of the opinion that in accordance with jurisprudence emanating from the Supreme Court of Canada, the s. 23 right to minority language education is not limited to the provision of educational facilities for primary and secondary school instruction in French, but requires the Government to provide financial resources to enable it to promote and preserve the culture associated with the language. It takes the position that the Government must act proactively to assist the CSF to fulfill its triple mandate to preserve and promote the French language, to transmit and reinforce the French culture, and to establish a Francophone identity within the community.

[44] In this regard, the CSF sees the establishment of early childhood education programs for three and four year olds as essential to the growth of Francophone schools given that most of its students are from homes where only one of the parents qualifies for s. 23 minority language education rights. These children must be given the opportunity to learn French from the earliest age possible so that by the time they have reached Kindergarten and Grade 1 they are already able to function in French. It is obvious that this question whether early childhood programs should be included in the definition of “primary” education will be an important issue to be resolved in this action.

[45] A second major issue to be determined is whether there is any logic in tying funding for minority language schools in this province to funding on a per pupil formula which was designed to apply to the majority language schools. There is no doubt that a Francophone school division which encompasses all of Saskatchewan

cannot achieve the economies of scale that are available to the public and separate school systems. The CSF is required to operate 15 schools in 12 communities spread throughout the province, most of which have enrollments of less than 100 students. The CSF wants adequate public funding for all of its current programs. However, it also does not want to stand still. It wants to continue to expand its services to its existing students and to establish new schools wherever the numbers warrant.

[46] The Government continues to take the position that non primary and secondary school programming, such as day-care, preschool, full-time kindergarten, community centers and out-of-school cultural and linguistic services are not guaranteed by s. 23 of the *Charter*. The Government is of the view that the CSF and the Francophone community have already achieved much success with the current level of funding. It allows that the CSF is entitled to management and control of its educational facilities and that it is free to allocate its resources as it wishes, but the Government takes the position that there is a limit to the amount which the province is required to finance beyond the core programming needed to fulfill its s. 23 obligations.

[47] The above are all serious issues that will have to be resolved at a trial if the parties are unable to come to an agreement on a funding formula on their own.

2) Would the applicants suffer irreparable harm?

[48] With regard to the 2011-2012 fiscal year, I am convinced that there is little which the CSF can do to reduce the anticipated budget shortfall at this late date. To require the school division to carry the entire amount of the shortfall into the 2012-2013 fiscal year would cause irreparable harm. However, I am not satisfied that the CSF should receive the full amount of \$704,235 which it has requested. It is apparent that the CSF was under considerable pressure from parents to discontinue the use of 15 passenger vans, especially when one of its vans was involved in a rollover in

which some of its students were injured and hospitalized for observation. The decision to purchase two new buses with the monies saved during the teacher walkout seems reasonable, but the decision to purchase four buses without approval from the Government appears less reasonable. I am therefore inclined to require the Government to cover the cost of the first two new buses that were purchased with the salary savings that were clawed back, but not for the third and fourth which the CSF will have to recover from future transportation allotments. Being satisfied that the bulk of the shortfall is as a result of an enrollment increase and other inflationary pressures, I will order the Government to cover the shortfall, less the purchase price of the last two buses, being \$123,428, which results in a net payment of \$580,807.

[49] Having reviewed the affidavit material filed on this application and having heard the arguments of counsel for the CSF and counsel for the Government, I have come to the conclusion that the CSF has proved on a balance of probabilities that it does require an additional \$2,039,962 to cover the anticipated expenditures in its 2012-2013 budget. These funds would enable the CSF to cover the increase in teacher salaries, the increase in salaries for other staff, the increased costs of materials and services due to inflation, the cost of hiring professionals for special needs assessments and consultations, the salaries for more teachers to handle the anticipated increase in student enrollment of possibly 117 students, the increased cost of implementing new curricula, and the cost of hiring new teachers to augment an otherwise spartan applied practical arts program. While some of these items are intended to maintain the status quo, others will assist the school division to take moderate steps forward while awaiting a decision with regard to the matters in issue in the underlying action. Without the requested increase of \$2,039,962, the CSF would be required to make serious reductions in teacher and support staffing levels as well as further reduction and/or denial of services which would cause irreparable harm to the Francophone school system.

[50] In this regard, I would consider the acquisition of the proposed school facility in Lloydminster to accommodate the growing enrollment in the Francophone school to be constitutionally mandated as the enrollment of students resident in Saskatchewan has now reached the “wherever numbers warrant” condition for a minority language school. While the Government may not agree that it should be contributing to the cost of early childhood programs simply for the purpose of introducing children to Francophone schools, there is no denying that the program does have the desired effect—one which the Government should endorse if it takes seriously its obligation under s. 23 to preserve and promote the two official languages of Canada and their respective cultures. The issue whether these preschool programs fall within the definition of “primary” education has yet to be resolved in this jurisdiction but there is no question that the Francophone school division considers these programs to be essential for the recruitment and retention of students whose parents have the s. 23 *Charter* right to French education. It is in reality already the status quo as far as the CSF is concerned with the only issue being the method of financing the preschool programs, not whether they should be established.

[51] In addition, the issue of Saskatchewan’s responsibility to provide education to all residents of the Lloydminster district under *The Lloydminster Charter* lends support to the position of the CSF that it should be entitled to accept children resident in Alberta into its schools in the same way as they are welcomed into the public and separate schools in the City of Lloydminster. This, too, appears to be the status quo.

[52] In the circumstances, the Government must contribute to the cost of acquiring a suitable school facility for the Francophone school in Lloydminster. Failure to provide funding for this purpose would cause the applicant irreparable harm which could not be compensated by monetary damages. As was stated in the *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 29: “For every school year that governments do not meet their obligations under s. 23,

there is an increased likelihood of assimilation which carries the risk that numbers might cease to 'warrant'." The Supreme Court also stated, in the same paragraph: "The affirmative promise contained in s. 23 of the *Charter* and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected ..." I will therefore order the Government to pay \$200,000 immediately to the CSF for leasehold improvements to the new school facility and the further sum of \$250,000 to cover the rental and maintenance costs for the next fiscal period as well as student transportation. It now behoves the Government to approach the appropriate authorities in the Province of Alberta to request reimbursement of reasonable tuition and transportation costs for the Francophone school students resident in Alberta at least equivalent to the amounts paid to the public and separated school divisions in Lloydminster.

[53] With regard to the request of an amount of \$500,000 to replenish reserves, I am of the opinion, for the same reasons given in my decision of May 30, 2011, that some amount should be made available to the CSF for the purpose of meeting emergencies or unforeseen budgetary circumstances, being part and parcel of the minority school division's right to manage and control its educational facilities. However, unlike last year, the cost of implementing the LINC agreement is now fully funded. Similarly, the cost of hiring of more staff to handle the anticipated enrollment increase in the Fall of 2012 has been included in the global budget which will be topped with the additional payment of \$2,039,962. I will therefore reduce the amount for the purpose of replenishing reserves to \$250,000 for the 2012-2013 fiscal period.

[54] In short, I am of the opinion that monetary damages would not replace the lost opportunity to attract and retain Francophone students if the above noted sums were not awarded to the CSF on this application, and that therefore the CSF would suffer irreparable harm.

3) Which of the parties would suffer greater harm from the granting or refusal of the remedy?

[55] As was the case last year, I am again satisfied that greater harm would befall the CSF if a mandatory injunction is refused than would befall the Government if the remedy was granted. Both parties in this case are constitutionally mandated to promote and protect the s. 23 *Charter* right. The balance of inconvenience, in my view, favours the applicants since they are least able to tolerate any budgetary deficiency.

DECISION

[56] Upon review of the evidence and taking into consideration the able arguments of counsel for all parties, I have concluded that the CSF is entitled to a mandatory injunction requiring the Government to pay to it an amount of \$580,807 to cover the anticipated 2011-2012 budget shortfall, an additional amount of \$2,039,962 to cover all planned expenditures for the 2012-2013 fiscal period, an amount of \$450,000 to assist in the establishment of the Lloydminster Francophone school, and \$250,000 for the replenishment of the CSF's reserves.

[57] The amount of \$580,807 for the 2011-2012 budget shortfall, the amount of \$200,000 required for leasehold improvements to the Lloydminster school facility, and the amount of \$250,000 to replenish reserves should be paid immediately.

[58] The amount of \$2,039,962 which will be added to the 2012-2013 budget allocation and the additional amount of \$250,000 required for the operation of the Lloydminster Francophone school during the 2012-2013 fiscal period may be paid by way of equal monthly installments commencing September 1, 2012.

[59] It is my expectation that this order will resolve all funding issues to the end of the 2012-2013 fiscal period. In the event that this matter has not proceeded to trial or that no new funding agreement has been reached between the CSF and the Government prior to the commencement of the 2013-2014 fiscal year, then either party will have leave to apply to this Court on 14 days notice for a review of this order should circumstances warrant.

ORDER

[60] For the reasons stated above, it is hereby ordered as follows:


1. The Government shall immediately pay the sum of \$1,030,807 to the CSF from its general revenue fund for the purpose of covering the 2011-2012 budget shortfall, for leasehold improvements to the Lloydminster school facility and to replenish the CSF's reserves.
2. The Government shall pay to the CSF an amount of \$2,289,962 from its general revenue fund in addition to the budgeted allocation of \$26,631,111 for the 2012-2013 fiscal period by equal monthly installments commencing September 1, 2012.

COSTS

[61] Leave is granted to either party to request an opportunity to speak to the issue of costs. In the interim, the matter of costs on this application is reserved.

TRANSLATION

[62] The hearing of this application and the material filed in support was in both French and English. In view of the need for a decision before May 31, 2012, this decision has been released in the English language only. A translation of this fiat in the French language will be provided in due course.



G.A. Chicoine J.