Court File No.: T-381-93

IN THE FEDERAL COURT OF CANADA

TRIAL DIVISION

B E T W E E N:

DEBORAH COYNE

Plaintiff

- and -

HER MAJESTY THE QUEEN, THE GOVERNOR GENERAL OF CANADA, THE ATTORNEY GENERAL OF CANADA, and THE ATTORNEY GENERAL OF NEW BRUNSWICK

Defendants

MEMORANDUM OF FACT AND LAW OF THE ATTORNEY GENERAL OF CANADA

PART I - THE FACTS

1. The Plaintiff is a resident of Ontario interested in issues of constitutional law.

Statement of claim, para. 1 and 2.

2. On December 4, 1992, the Legislative Assembly of New Brunswick adopted a resolution to amend the *Constitution Act, 1982* by adding thereto section 16.1 (the "New Brunswick amendment"):

(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the Legislature and Government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

(1) La communauté linguistique française et la communauté linguistique anglaise du Nouveau-Brunswick ont un statut et des droits et privilèges égaux, notamment le droit à des institutions d'enseignement distinctes et aux institutions culturelles distinctes nécessaires à leur protection et à leur promotion.

(2) Le rôle de la législature et du gouvernement du Nouveau-Brunswick de protéger et de promouvoir le statut, les droits et les privilèges visées au paragraphe (1) est confirmé."

Statement of claim, paragraph 3.

3. On December 16, 1992, the Senate of Canada adopted a resolution authorizing the New Brunswick amendment.

Statement of claim, paragraph 4

4. On February 1, 1993, the House of Commons adopted a resolution authorizing the New Brunswick amendment.

Statement of claim, paragraph 4.

5. By her action filed on February 15, 1993, the Plaintiff seeks to obtain a declaration to the effect that the Governor General has no jurisdiction, power or authority to issue a proclamation to amend the Constitution by adding thereto the New Brunswick amendment. The Plaintiff argues that the proclamation cannot be issued by the Governor General because the incorrect amending procedure has been followed to add the New Brunswick amendment.

Statement of claim, paragraphs 21 to 36.

6. In her statement of claim, the Plaintiff makes no claim to being affected by the New Brunswick amendment.

7. On March 12, 1993, the Governor General issued a proclamation under the Great Seal of Canada whereby the New Brunswick amendment was proclaimed into force as of that date.

Tab 1: *Proclamation*, (1993) 127 *Can. Gaz. II* 1588, SI/93-54.

PART II - QUESTIONS IN ISSUE

8. Does this Court have jurisdiction to entertain the action?

9. Does the Plaintiff have standing to challenge the procedure by which the New Brunswick amendment was authorized?

10. Does the statement of claim disclose a reasonable cause of action?

PART III - ARGUMENTS

a) Jurisdiction

11. Three essential requirements must be satisfied in order to support a finding of jurisdiction in the Federal Court:

1. There must be a statutory grant of jurisdiction by the federal Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

Tab 2: *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, per McIntyre J. at p. 766;

Tab 3: *Roberts v. Canada*, [1989] 1 S.C.R. 322, per Wilson J. at p. 330.

12. The Plaintiff's entire case rests upon the provisions of the Constitution. She claims that the New Brunswick amendment ought to have been enacted pursuant to the general amending formula specified in s. 38(1) of the *Constitution Act, 1982* rather than pursuant to the specific amending formula of s. 43 of that Act. However, the Constitution is not "a law of Canada" within the meaning of s. 101 of the *Constitution Act, 1867*:

> "The *Constitution Act, 1867*, as amended, is not of course a "law of Canada" in the sense of the foregoing cases because it was not enacted by the Parliament of Canada. The inherent limitation placed by s. 101, *supra*, on the jurisdiction which may be granted to the Federal Court by Parliament therefore might exclude a proceeding founded on the *Constitution Act*."

Tab 4: *Northern Telecom v. Communication Workers*, [1983] 1 S.C.R. 733, per Estey J. at p. 745.

Tab 5: *Kigowa v. Canada*, [1990] 1 F.C. 804 (C.A.), per Mahoney J.A. at p. 811.

Tab 6: *Southam Inc. v. Canada*, [1990] 3 F.C. 465 (C.A.), per Iacobucci C.J. at pp. 483-84.

13. Consequently, the Plaintiff's action fails to satisfy the third essential requirement listed above, and this Court lacks the jurisdiction to adjudicate upon it.

a) The Plaintiff's standing

14. The New Brunswick amendment applies only to the Province of New Brunswick. The Plaintiff has no apparent connection with the province, and her statement of claim does not allege that she is in any way affected by the amendment. Her action seeks a declaration from this Court which will have a direct impact on the rights of New Brunswickers, but which will not implicate her own rights in any way whatsoever.

15. The authoritative test for standing was stated by Martland J. for the majority in *Minister of Justice v. Borowski*:

> "I interpret these cases as deciding that to establish status as a Plaintiff in a suit seeking a declaration that legislation is invalid, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court."

Tab 7: *Minister of Justice v. Borowski*, [1981] 2 S.C.R. 575 at 598 per Martland J. for the majority.

Tab 8: *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236

16. As was pointed out by Laskin C.J.C., dissenting, in the same case, at p. 579, courts do not normally deal with cases "where there is no *lis* that engages their processes

or where they are asked to answer questions in the abstract merely to satisfy a person's curiosity or perhaps his or her obsessiveness with a perceived injustice in the existing law." This consideration was repeated by Le Dain J. for the Court in *Finlay v. Canada (Minister of Finance)*:

> "The judicial concern that in the determination of an issue a court should have the benefit of the contending views of the persons most directly affected by the issue - a consideration that was particularly emphasized by Laskin C.J. in *Borowski* - is addressed by the requirement affirmed in *Borowski* that there be no other reasonable and effective manner in which the issue may be brought before a court."

Tab 9: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at 633 per Le Dain J. for the Court.

17. Since the issue in this case is one which affects the people of New Brunswick directly, it should not be litigated outside of New Brunswick, in the absence of persons whose rights would be determined by the Court's decision, and at the instance of a Plaintiff who has no real stake in the outcome. There is no legal or practical obstacle which would prevent the claim from being asserted by someone who has been directly affected. Consequently, there is a more reasonable and effective manner in which the issue could be litigated.

c) No reasonable cause of action

18. The *Constitution Act, 1982* contains several amending formulae. Of concern here are the "general formula", found in sections 38 and 42, and the "bilateral formula", found in section 43.

19. The general formula involves authorizing resolutions adopted by the two Houses of Parliament and the legislative assemblies of two-thirds the provinces, with 50% of the population.

Tab 10: *Constitution Act, 1982*, s. 38 and 42.

20. For a constitutional amendment to be made by use of the bilateral formula, three conditions must be met: (1) the amendment must relate to an existing provision of the Constitution; (2) that provision must not apply to all provinces; and, (3) the amendment must have been authorized by the resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

Tab 10: *Constitution Act, 1982*, s. 43.

21. The New Brunswick amendment meets all three conditions: (1) it relates to subsection 16(2) of the *Constitution Act, 1982*; (2) the provision applies only to New Brunswick and; (3) it has been authorized by resolution of the Legislative Assembly of New Brunswick, of the Senate and of the House of Commons. Hence, the New Brunswick amendment clearly falls into section 43 and has been authorized according to its terms.

Tab 1: *Proclamation*, (1993) 127 *Can. Gaz. II* 1588, SI/93-54.

22. The Plaintiff takes issue only with the first two conditions. In support for her opinion that the New Brunswick amendment should be authorized only as a result of the general formula, the Plaintiff advances three arguments. In her submission, the first condition is not met because the New Brunswick amendment relates to linguistic communities, as opposed to language. Therefore, contends the Plaintiff, the New Brunswick amendment does not relate to an existing provision. She argues further that the second condition is not met because, even though the New Brunswick amendment applies on its face only to New Brunswick, it creates a different type of right which affects all provinces. Lastly, the Plaintiff raises an argument based on the division of powers. The amendment, in her opinion, reallocates the jurisdiction over cultural matters between the Parliament and the provincial legislatures, thereby bringing it within the general formula. These arguments are fallacious.

1) Relation to an existing provision

23. The nexus required by section 43 between the amendment and a provision of the Constitution so as to permit adoption of the amendment by the bilateral formula is minimal: the amendment has simply to relate to the same subject-matter already dealt with in the provision it amends. The words employed by section 43 to establish this nexus are "[...] the widest of any expression intended to convey some connection between two related subject matters".

Tab 11: *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 39 per Dickson J.

24. Section 43 is not confined to the two matters specified in it; nor does it require that an amendment simply parallel the provision being amended. The amendment may expand, contract, or otherwise modify the provision to which it relates.

25. This has been judicially observed in relation to language rights. Although amendments relating to language are an illustration of the potential scope of the bilateral formula, this formula is meant to be a flexible form of amendment designed to achieve the advancement of language rights.

Tab 12: *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents of Fairness in Education*, [1986] 1 S.C.R. 549 at 579 per Beetz J.

26. The New Brunswick amendment clearly relates to the use of the English and French languages in the province of New Brunswick. That it also speaks of culture and education does not alter its characterization since language cannot be separated from the culture associated with it and the institutions in which it is learned. The guarantee granted to language must, by definition, extend to the culture associated with it.

Tab 13: *Reference re Public Schools Act (Man)*, unreported, S.C.C., March 4, 1993, at 8-9 and 16 per Lamer C.J.

Tab 14: *Mahé v. Alberta*, [1990] 1 S.C.R. 342 at 362 per Dickson C.J.

27. The New Brunswick amendment, on its face, therefore meets the first of the two conditions in issue.

2) Creation of a new type of right

28. The suggestion that the type of right contained in the New Brunswick amendment is a new species of right foreign to the Constitution is erroneous. The Constitution is replete with illustrations of rights of a collective nature. Rights of a collective nature are granted either to individuals by reason of their being members of an identified group or to groups, to be exercised by their members.

Tab 10: *Constitution Act, 1982*, s. 15, 23, 25, 27, 29, 35.

See: *Constitution Act, 1867*, s. 93

29. For example, section 93 of the *Constitution Act, 1867* guarantees the right to denominational schools to "[...] any class of persons [...]". In the reasons of the majority in *Re Education Act*:

> "The Constitution of Canada, of which the Charter is now a part, has from the beginning provided for group or collective rights in ss. 93 and 133 of the *Constitution Act, 1867*. [...] The provisions of this "small bill of rights", now expanded as to the language rights of s. 133 by ss. 16 to 23 of the Charter, constitute a major difference from a bill of rights such as that of the United States, which is based on individual rights. Collective or group rights, such as those concerning language and those concerning certain denominational or separate schools, are asserted by individuals or groups of individuals because of their membership in the protected group. Individual rights are asserted equally by everyone despite membership in certain ascertainable groups. Collective rights protect certain groups and not others."

Tab 15: *Re Education Act* (1986), 53 O.R. (2d) 513 at 566 (C.A.) (aff'd by [1987] 1 S.C.R. 1151).

30. Likewise, section 35 of the *Constitution Act, 1982* recognizes and affirms rights to "[...] the aboriginal peoples of Canada [...]". To the Supreme Court of Canada, speaking through Chief Justice Dickson, this guarantee is held by a collective, a departure from traditional property rights.

Tab 16: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1112 per Dickson C.J.

31. The right to receive education in the language of the official language minority of a province has a collective aspect. Although conferred upon individuals, the exercise of the right depends upon the existence of a sufficient number of potential pupils ("[...] where numbers warrant [...]").

Tab 10: *Constitution Act, 1982*, s. 23(3).

Tab 13: *Reference re Public Schools Act (Man.)*, unreported, S.C.C., March 4, 1993, at 9-10, 15-16 and 20 per Lamer C.J.

32. Even if the New Brunswick amendment adds new rights or expands existing ones, it does not create a new type of right. In any event, it is nonetheless an amendment in relation to an existing provision of the Constitution that applies only to New Brunswick, properly falling within the ambit of section 43 of the *Constitution Act, 1982*.

3) Division of powers

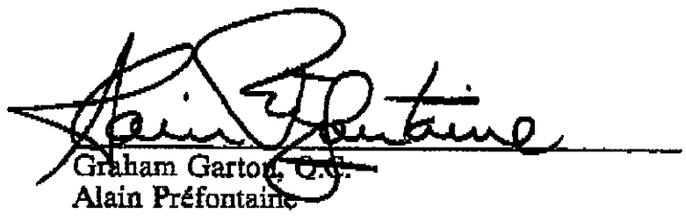
33. Finally, the New Brunswick amendment does not confer new powers on New Brunswick beyond those it already possesses by virtue of the Constitution. Section 16.1(2) simply affirms existing jurisdiction of the province with respect to linguistic communities; it does not purport to expand or alter it.

PART IV - RELIEF SOUGHT

34. That the statement of claim be struck out as disclosing no reasonable cause of action, without leave to amend, and that the action be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT OTTAWA, this 20th day of May, 1993.



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