Inter-Office Memo
Note interservices

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Date:	July 7, 2022		File #5694-CON
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Subject/Objet:	Opinion re privatization of school bus system		

We have been advised that government is looking into transforming busing for public school students in time for September 2023. The proposal would eliminate mandatory duality in busing, so that a single service provider services both the Anglophone and Francophone systems. You are seeking legal advice as to the risks associated with this vision, specifically constitutional barriers and how to mitigate those risks.

In New Brunswick, and since the early 80's, there are two distinct education sectors, one consists of school districts organized in the English language, the other of school districts organized in the French language. There are no bilingual schools in this province; schools are fully separated based on language. As such, this creates full duality in the education system. The legislation reflects this at s. 4 of the *Education Act*, and as such, courts have held that bilingual schools are no longer permitted to exist (*Société des Acadiens du Nouveau-Brunswick Inc. v New Brunswick Minority Language School Board No. 50* (1983) 48 NBR (2d) 361).

Section 23 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") confers to the parents of the New Brunswick linguistic minority the right to have their children educated at the primary and secondary school level out of public funds, and, where numbers warrant, within their own minority language educational facilities. This provision has been the subject of many judicial pronouncements. However, the question as to whether "transportation" falls within the rights covered by s. 23 has not been determined by our courts.

Section 23 reads as follows:

> **Language of instruction**
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> 23 (1) Citizens of Canada

> (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
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> (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,
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> have the right to have their children receive primary and secondary school instruction in that language in that province.
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> **Continuity of language instruction**
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> (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
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> **Application where numbers warrant**
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> (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
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> (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
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> (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Before delving into the s. 23 analysis and how it potentially impacts the proposal for the elimination of duality in the busing system, a quick look at the *Education Act* provides that educational programs and services within a school district shall not be provided in the other official language. Educational programs and services are not defined in the *Act*. It would be possible for opponents of this idea to argue that school transportation is an "educational service" and as such, this would represent a potential barrier to the proposal. Of course, legislation can always be amended, but doing so would then trigger constitutional problems, in my view.

Since the Supreme Court of Canada decision in the case of *Mahe v. Alberta* [1990] 1 SCR 347 ("*Mahe*"), it is well settled that s. 23 of the *Charter* contains, for a linguistic minority, the right to manage to some extent its educational facilities. In *Mahe*, where the government had a policy not to create French school districts, the Supreme Court of Canada came to the conclusion that the linguistic minority had a constitutional right to be represented on common school districts but with the exclusive authority to its representatives to deal with:

- the expenditures of funds provided for their instruction and facilities;

- the appointment and direction of those responsible for the administration of their instruction and facilities;
- the establishment of the programs of instruction;
- the recruitment and assignment of teachers and other personnel; and
- making agreements for the education and services for minority language pupils.

In New Brunswick, school districts are the representatives of the rights holders pursuant to s. 23 and have the rights of management and control afforded by the Supreme Court of Canada. As such, school transportation is the responsibility of districts. This is also reflected in the legislation. Where a school district has the rights of management and control, it is who decides what is necessary for the fulfillment of the cultural and linguistic requirements of its population. Should government impose its vision on school transportation and remove duality in busing, this could be a violation of the rights of management and control of the school districts provided by s. 23.

Schools are usually perceived as considerable components of the preservation of language and cultures. Particular context plays an important role in the court's analysis under s. 23. In the decision of *Arseneau-Cameron v. Prince Edward Island* 2000 SCC 1 ("*Arsenault-Cameron*"), the Supreme Court of Canada refers to *Mahe* to set the stage to say that language rights cannot be separated from a concern for the culture associated with the languages and that s. 23 was designed to correct, on a national scale, the historically progressive erosion of official language groups and bring the languages back to an equal partnership in the context of education. Section 23 therefore mandates that provincial governments do whatever is practically possible to preserve and promote minority language education (para 26).

The court also went on to refer to the *R v Beaulac* [1999] 1 SCR 768 decision where it was held that language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official languages communities in Canada.

That being said, the Supreme Court of Canada has also been fairly clear that provincial governments maintain a substantial interest in the provision of educational facilities and school curriculum. In *Mahe*, the Court said that government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met. However, the discretion is subject to the positive obligation on government to alter or develop major institutional structures to effectively ensure the provision of minority language instruction and facilities and parental control on the scale warranted by the relevant number of children of the minority. Specifically, the court then went on to say that facilities, school size, transportation and assembly of students can be regulated but they all have an effect on language and culture and as such, must be regulated with regard to the specific circumstances of the minority and the purpose of s. 23 (*Arsenault -Cameron* para 53).

Section 23 deals with the right to "instruction" and this wording permeates the entire section, along with its headings. One could argue that the word "instruction" does not include services such as school transportation. When we look at the legislative framework, it might be possible to argue that pupil conveyance tends to be categorized as an administrative matter, dealt with by way of regulation, as opposed to curriculum and teaching. This would allow us to argue that school transportation is not captured by s. 23. However, this would seem to fly in the face of the top court's comments in *Arsenault-Cameron* where it was held that transportation, although it can be regulated by government, has to be regulated with regard to the specific circumstances of the minority and the purpose of s. 23. Such a narrow interpretation of s. 23 is likely not to pass muster.

Travel considerations, whether it be distance, time or, in our opinion, the composition of the travelers, is a crucial component of the analysis under s. 23. The Supreme Court of Canada alluded to this concept as follows, in *Arsenault-Cameron*:

> 50 The travel considerations should have been applied differently for minority language children for at least two reasons. First, unlike majority language children, s. 23 children were faced with a choice between a locally accessible school in the majority language and a less accessible school in the minority language. The decision of the Minister fostered an environment in which many of the s. 23 children were discouraged from attending the minority language school because of the long travel times. A similar disincentive would not arise in the circumstances of the majority. Second, the choice of travel would have an impact on the assimilation of the minority language children while travel arrangements had no cultural impact on majority language children. For the minority, travel arrangements were in large measure a cultural and linguistic issue; they involved not only travel times but also a consideration of distances because of the impact of having children sent outside their community and of not having an educational institution within the community itself. As just mentioned, travel arrangements are a possible method of providing services to official language minority students, but they have to be considered in the context of the pedagogical and cost requirements which pertain to the application of s. 23.

The object of s. 23 rights is remedial. It is not meant to reinforce the status quo by adopting a formal vision of equality that would focus on treating the majority and minority official language groups alike. Rather, section 23 is premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority. This lead the Supreme Court of Canada to develop the concept of "sliding scale". It was explained as follows in the most recent decision on the subject by the country's top court in *Conseil scolaire francophone de la Colombie-Britannique v British Columbia* 2020 SCC 13:

> 23 In *Mahe*, this Court rejected what was called the "separate rights" approach, according to which s. 23 provides for only two rights: a right to educational facilities where there are a specific number of students and a right only to instruction where the number of students is smaller. The Court held that s. 23 must instead be understood "as encompassing a 'sliding scale' of requirement" (p. 366).
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> 24 By virtue of this "sliding scale" concept, s. 23 provides a basis for a range of educational services. The low end of the scale corresponds to the right only to instruction that is provided for in s. 23(3)(a), while the high end corresponds to the "upper level of management and control" provided for in s. 23(3)(b) (*Mahe*, at p. 370). In other words, at the low end, s. 23 rights holders are entitled to have their children receive instruction in the language of the official language minority, but the extent to which the minority exercises control over the provision of instruction rises with the number of children of rights holders. At the low end of the scale, the minority is entitled only to instruction in its language. In the middle, it might

> have control over one or more classrooms in a school of the majority or over one part of a school it shares with the majority. It might also have control over the hiring of teaching staff and over certain expenditures. At the high end, the minority has control over separate educational facilities, that is, over a homogeneous school. The number of children of rights holders might also entitle the minority to the management and control of a separate school board. In short, once the minimum threshold of s. 23(3)(a) is crossed, the sliding scale applies to determine the level of services that corresponds to the extent to which the minority will have control over the provision of educational services.
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> (My underline)

It will not be easy for government to argue (especially in this province where we are at the top of the sliding scale) that the purpose of s. 23 is met when school transportation is no longer provided under the duality model. The rights under s. 23 seem to apply not only to schools themselves, but to the environment surrounding the schools, such as the playground, and activities. The Supreme Court of Canada alluded to this in its decision in *Reference re Public Schools Act (Manitoba)* [1993] 1 SCR 839:

> 26 Once the threshold of entitlement to minority language education is met, if "minority language educational facilities" are, as determined in *Mahe*, to "belong" to s. 23 parents in any meaningful sense as opposed to merely being "for" those parents, it is reasonable that those parents must have some measure of control over the space in which the education takes place. As a space must have defined limits that make it susceptible to control by the minority language education group, an entitlement to facilities that are in a distinct physical setting would seem to follow. As Twaddle J.A. held in the court below (at p. 112):
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> > To be "of the minority" ("de la minorité"), the facilities should be, as far as reasonably possible, distinct from those in which English-language education is offered. I do not question the importance of milieu in education. In the playground and in extra-curricular activities, as well as in the classroom, French-speaking pupils should be immersed in French. The facility should be administered and operated in that language, right down to the posters on the wall.
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> 27 Such a finding would also be consistent with the recognition that minority schools play a valuable role as cultural centres as well as educational institutions. While this Court in *Mahe* did not explicitly refer to distinct physical settings in its discussion on schools as cultural centres, it seems reasonable to infer that some distinctiveness in the physical setting is required to successfully fulfil this role. In my view, the overall objectives of s. 23 expressed in the reasons in *Mahe* as a whole support such a conclusion.
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> (My underline)

Given that there is no explicit *Charter* wording or jurisprudence that clearly says that minority language rights extend to school transportation, there is some uncertainty as outlined above as to how a court would interpret school transportation and whether it would find that it is encompassed within s. 23 or not. However, New Brunswick, as the only officially bilingual province, has additional, unique obligations in terms of language which are found at s. 16.1 of the *Charter:*

> **English and French linguistic communities in New Brunswick**
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> **16.1 (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.
>
> **Role of the legislature and government of New Brunswick**
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> **(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.

This provision, also qualified as the equality provision, gives to each official linguistic community equality of status, rights and privileges (including the right to distinct educational institutions). This provision further states that it is the role of the legislature and government to preserve and promote such status, rights and privileges. There is still a substantial amount of debate regarding the scope of this provision and its particular nature, i.e. whether it creates enforceable rights or it remains in the sphere of declaratory principles, and it has not been the subject of much jurisprudence. However, its scope is much broader than s. 23, and in my view, could be used to support the arguments of those that would oppose government's proposal.

Section 16.1 has not been the subject of much pronouncement by our courts. However, it was discussed quite extensively in the decision in *Charlebois c. Mowat* 2001 NBCA 117, where the court held the following as to how s. 16.1 should be viewed:

> 80 In my opinion, the interpretation of section 16.1 is related to the interpretation of subsection 16(2) and the conclusions set out by the Supreme Court in *Beaulac* as to the nature and scope of the principle of equality are applicable to section 16.1. Its purpose seems clear to me. While different rights flow from the collective aspect of the equality guaranteed, its purpose is similar to that which the courts have ascribed to section 16. The purpose of this provision is to maintain the two official languages, as well as the cultures that they represent, and to encourage the flourishing and development of the two official language communities. It is remedial in nature and has concrete consequences. It imposes on the provincial government an obligation to take positive measures to ensure that the minority official language community has equality of status and equal rights and privileges with the majority official language community. The obligation imposed on the government derives both from the remedial nature of subsection 16.1(1), in recognition of past inequalities that have gone unredressed, and the constitutional commitment made by the government to preserve and promote the equality of official language

> communities. The principle of the equality of the two language communities is a dynamic concept. It implies provincial government intervention which requires at a minimum that the two communities receive equal treatment but that in some situations where it would be necessary to achieve equality, that the minority language community be treated differently in order to fulfill both the collective and individual dimensions of a substantive equality of status. This last requirement derives from the underpinning of the principle of equality itself.

If government intends to provide school transportation, one would be able to argue it must be provided equally to members of both linguistic communities in this province. "Equal" does not mean the same thing or same service. Rather, substantive equality, as provided for in s. 16.1, might mean the maintenance of a distinct school transportation system for francophones to ensure that this service is not provided in a manner than undermines the preservation and promotion of the French linguistic community or which detracts from the educational experience of members of this community. However, to get to this right, it would have to be demonstrated that a school bus can fit within the definition of "distinct educational facility".

Finally, section 23 is arguably more restrictive, with the use of the word "instruction" at its core. Section 16.1 could be taken to mean equality extends to all matters relating to education (including transportation), not merely those relating to teaching or instruction. This might be interpreted as an intent to confer broader educational rights to the minority in New Brunswick than elsewhere in the country.

In a nutshell, the constitutional concerns relating to the elimination of duality in the school transportation system are considerable. When the above is considered through the language rights lens, and particularly through the remedial nature of s. 23, it can lead to the conclusion that the school bus is the extension of the school as such that government would have the obligation to ensure the protection of the language and culture of the minority as pertains to school transportation. Our courts are likely to be reluctant to take away minority language rights which have been present in this province since the early 80s. Rather, the current from the Supreme Court of Canada recently is to favour the development of language rights and extend the constitutional guarantees of minorities.

I trust this will be of assistance. Please do not hesitate to contact me if you have further questions or concerns

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