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Bintner v. Regina Public School Board District #4 (1966) 55 D.L.R. (2d) 646

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CIVIL RIGHTS

Bintner v. Regina Public School Board District #4 (1966) 55 D.L.R. (2d) 646.

EXCLUSION OF CHILD PLAINTIFF FROM PUBLIC SCHOOL BECAUSE OF THE RELIGIOUS FAITH OF HERSELF AND HER PARENTS—SCHOOL COMMUNITY —SASKATCHEWAN BILL OF RIGHTS AND RELEVANT SASKATCHEWAN SCHOOL LEGISLATION—COMPARATIVE ONTARIO LEGISLATION.

It is with a great deal of dismay that layman and lawyer alike look to a recent decision of the Court of Appeal of Saskatchewan. The case of *Bintner v. Regina Public School Board District #4*,[1] purports to make religious discrimination in education a matter of provincial public policy.

The fact that freedom of religion is a basic tenet of the Canadian political-legal structure,[2] seems not however to have imposed itself upon the thinking of Bence C.J.Q.B., nor Culliton C.J.S. and his brothers in the Court of Appeal. In view of the continuing public pressure for equality in all areas of community life in regard to race,

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82 *Id.*

83 [1939] A.C. 277, 293.

84 [1956] 3 All E.R. 683.

1 (1966) 55 D.L.R. (2d) 646.

2 Saumur v. Quebec, [1953] 2 S.C.R. 299.

religion, colour or nationality, this decision, with all due respect, seems a most unrealistic and retrogressive step.

The facts reported in the decision of the Court of Appeal are as follows: The Bintner family, all of the Roman Catholic faith, and former separate school supporters, notified the city assessor that they wished to be assessed from 1958 on, as public school supporters. The mother of the infant plaintiff then applied to enroll the child at a public school. This application was refused by the Principal of the school because of a directive issued by the school board, forbidding the enrollment of Roman and Greek Catholics in the public schools, whether they were separate or public school supporters. In June of 1965, the infant plaintiff, through her father as next friend, brought an action against the Board of Trustees for the Regina School Board District #4, seeking an injunction pursuant to the provisions of the Saskatchewan Bill of Rights Act.[3]

The main defence asserted by the school board was that their actions were not discriminatory on any ground because they were, as a result of the provisions in the School Act[4] under no obligation to educate the child. The plaintiff's response was clear: that the wording of the Saskatchewan Bill of Rights Act[5] is quite plain; that, to refuse her admission because she is a Roman Catholic is *ipso facto* proof of discrimination on religious grounds. This was substantiated by the plaintiff's reading into the record a portion of the oral discovery of the representative of the defendant, who admitted that the only ground for excluding the child was because of her religion.

Q. So the basis of exclusion is the Roman Catholic faith?

A. That is correct.

Q. And apart from that one exclusion it is general practice to admit all children within the geographical area of that particular age to kindergarten?

A. That's right.

At trial, the decision was given by Bench C.J.Q.B., who in denying the injunction, said,

> In my view the refusal was not an act of discrimination but was based on good and proper reasons.[6]

It is to the great misfortune of all concerned that the learned Chief Justice neglected to point out what those "good and proper reasons" were.

This unsatisfactory decision was taken on appeal by the infant plaintiff, who reasserted her rights under the provincial Bill of Rights Act. The Court of Appeal directed itself to the single question of

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3 R.S.S. 1953, c. 345, ss. 13(1), (2), 16.
4 R.S.S. 1965, c. 184.
5 R.S.S. 1953, c. 345, s. 13(1).
6 (1966) 55 D.L.R. (2d) 648.

whether the act of the school board in denying the plaintiff the right of enrollment, under the circumstances as disclosed by the evidence, constituted discrimination within the intent and purport of section 13(1) (now section 11(1)[7]). If so, the plaintiff was entitled to the relief sought under section 16 (now section 14[8]), and, if not, the trial Judge was right in dismissing the action.

Initially, Culliton C.J.S. rejected out of hand the plaintiff's contentions, which were based on the school board representative's admissions on discovery, coupled with the wording of the Saskatchewan Bill of Rights Act by stating:

> I do not think the problem can be so simply stated nor can the conclusion be drawn that entry was refused primarily because the Plaintiff was of the Roman Catholic faith.[9]

It was not entirely erroneous of the Chief Justice to point out the problem was not to be resolved so "simply", for an invaluable service might have been done the plaintiff and the community at large, had the Court conducted a more intensive search into the law of this area. A canvass of several jurisdictions might have added weight to the Court's conclusions; but to fail to accord any weight to the sworn testimony of a witness is evidence of a blatant disregard of relatively indisputable fact. While not *prima facie* determinative of the issue, it is submitted that the Court failed to place these facts in the proper perspective, in relation to the Plaintiff's statutory rights.

Culliton C.J.S. then expressed his point of view on the school board's alleged "right of denial". He pointed out that in 1963 the board changed its policy so that entry to the public school was dependent not upon the parents' taxpaying status, but upon whether the child was a "member of the public school community". Prior to this change, children of all public school supporters regardless of their faith were admitted to the public schools. The defendant refused to admit children who belonged to the "separate school community", taking the position that this was neither their responsibility nor their duty.

Since Saskatchewan law allows a minority group within a public school district to establish a separate school,[10] the Court felt that the board was justified in establishing as the "public school community" all those children other than those of the minority faith. The non-enrollment of the "minority faith Roman Catholic" plaintiff, the Court said, was *the inevitable result of the policy but not its purpose.*

> In my opinion the policy adopted by the public school board regardless of the result, is not an act of discrimination as intended and envisioned by the Legislature in the enactment of section 13(1).[11]

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7 R.S.S. 1965, c. 378.

8 *Id.*

9 (1966) 55 D.L.R. (2d) 653.

10 School Act, R.S.S. 1965, c. 184, s. 40 (formerly R.S.S. 1953, c. 169, s. 39).

11 (1966) 55 D.L.R. (2d) 653-4.

The Court of Appeal dismissed the appeal and concluded:

> The real issue between the parties is not one of discrimination but whether in law the Plaintiff has a right to attend the public school, or in other words, whether the policy adopted by the public school board resulting in the exclusion of the Plaintiff from the public school is right or wrong in law. This was not the issue before the trial Court or before this Court. The Plaintiff's claim for an injunction rested solely on the plea of discrimination under section 13(1). As this plea was not substantiated the trial Judge was right in dismissing the action.[12]

The question of discrimination under section 13(1) was clearly at issue here, and the Court of Appeal either misunderstood this action, or, for some unknown reason, purposely skirted the issue. In so doing the Court has clearly disregarded its duty. Whether it was not a part of plaintiff's submissions at all, or just not pressed in argument is of little consequence. The form of the action ought to have little relevance in modern courts to the merit of the respective positions of the parties. The school board's decision was clearly predicated on religious grounds, and the Court should have looked to this problem, whether or not (and it was) raised.

The Court of Appeal looked to find the intent of the Legislature in regard to sections 13(1) and 16, and held that "notwithstanding the result" the policy adopted by the board was not an act of discrimination. This is tantamount to saying that as long as one does not wish to discriminate, it is not discrimination, even if his actions result in discrimination. Thus, it was not caught within the Act. The motive of a defendant under section 16 (as it then was) is not at issue, since nowhere in the relevant sections is there a "motive type" escape clause which would justify a course of conduct which would be discriminatory if the escape clause was not present. The Saskatchewan Bill of Rights would be a nullity if, because of their motives, those caught in its sections could escape.

The Act is in force because the Legislature, in this instance the *conscience of the public of Saskatchewan,* found certain practices in the community repugnant to desired legal standards and hence abhorrent to the modern sense of public morals. When prejudice exposes itself publicly the Legislature is clearly incapable of eliminating it. This Act, then, is aimed at consequences; and where these consequences take the form of discrimination in 'education' (or unfair housing or work practices) the Court clearly must enjoin the conduct. Primarily, Culliton C.J.S. concerned himself with the rights of the school board, and their alleged power to take an arbitrary stand on "who may be educated where", but I would suggest that the learned Chief Justice misdirected his attention to the motives and not to the result.

It is undisputed that the plaintiff's father was, at the material time, assessed as a public school supporter, and had been so for the previous seven years, when he had notified the City of Regina assessor of his desire to be changed from separate school assessment. While neither the trial Court nor the Court of Appeal commented on the

[12] *Id.* at 654.

validity of the school board's interpretation of a ratepayer's rights, that religious faith not payment of taxes determined a child's admission into school, they seemed to impliedly agree with the school board's reasoning. Section 40 of the School Act[13] clearly sets out a religious minority's rights of education:

> The minority of ratepayers in any district, whether Protestant or Roman Catholic, may establish a separate school therein; and in such a case the ratepayers establishing the school shall be liable only to assessments of such rates as they impose upon themselves in respect thereof.

The 1963 directive issued by the school board purported to clarify its interpretation of the question of taxes by stating:

> (3) It is our interpretation that payment of taxes to the public school system does not entitle children to attend our schools. If parents are Catholic their taxes should be paid to the separate school system.[14]

Has the Court failed to determine the rights of a ratepayer under section 40 of the School Act? An examination must be made of two early Saskatchewan cases in which the rights of a ratepayer of school taxes were at issue. In *Neida*[15], it was held that a person not of the religious faith of a minority established separate school, cannot escape the obligation of being assessed for the support of the public school. Conversely *Bartz*[16], a Roman Catholic, was at his own request entered on the assessment roll as a public school supporter. The Court found that all the ratepayers of a separate school district of the religious faith of the minority establishing the district should be assessed as separate school supporters whether or not they voted for such establishment.[17]

The point was shortly put by Lamont J.:

> The test to be applied to determine whether any ratepayer is a public or separate school supporter is: Is he of the religious faith of the minority?[18]

These early cases then provide a base for the defendant's interpretation of the position of the ratepayer.

However, it will be seen that these cases were decided in 1917, and having regard, therefore, to changing social conditions, as seen in both educational policy and the provincial social legislation, these decisions can be distinguished, and are in effect not binding. The Regina of 1917, twelve years after Saskatchewan attained Provincial status, did not have a large number of school buildings or personnel to man them. Thus, it may be surmised, in order to prevent an overtaxing of the facilities of either school system, a harshly imposed quantitative limit had to be applied. This was done by restricting access to public schools to those of the populace who were not of a minority religious group, having their own school system. An arbitrary division along religious

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13 School Act, R.S.S. 1965, c. 184.
14 (1966) 55 D.L.R. (2d) 646, at 651.
15 [1917] 1 W.W.R. 1088.
16 [1917] 1 W.W.R. 1105.
17 *Id.*, at 1106, per Hamilton, C.J.
18 *Id.*, at 1116.

lines was conceivably proper in 1917 so as to produce separate but equal facilities in which each pays his own way. This archaic justification does not apply today where sufficient finances are available to accommodate an influx of minority religion school children. Of more import, however, is a consideration of the change in *official* social policy of the Province. Where freedom of religion, especially in regard to schooling, is part of provincial law (The Bill of Rights[19]), the above cases cannot remain authoritative; their basis, whatever justification may be envisioned for them, is securely attached to religious division in respect to schooling, and because of the freedoms guaranteed in the Bill of Rights Act, no division is allowable. Clearly the early decisions are out of step with present day legislative sentiment, and should be expressly overruled.

From 1958 to 1965 the City of Regina accepted Mr. Bintner's taxes and put them towards the payment of public school costs. On this basis, before the 1963 directive of the school board, the plaintiff would have been, presumably, admitted to school. Therefore it might be said that the City assessor and the school board have, by accepting his taxes, evidenced the fact that Bintner was for eight years accepted as a public school supporter. Clearly then, by the filing of his notice for change of school support, and the acceptance of it by the city assessor, it would be inequitable to deny a man, who has, in all good faith, done all required of him, those rights which he had assumed he had paid for, for eight years.

The problem of interpretation must turn on the meaning of section 40 of the School Act. Even assuming that the words "rate payers" in the second half of the section refer to the same words in the first part of section 40, as is implied by Haultain C.J. in the *Bartz* case[20], the interpretation of the section still falls to the plaintiff's advantage. Could it not be argued that the final words of the section,

> . . . shall be liable only to assessments of such rates as they impose upon themselves in respect thereof

evince the intent that the Legislature, having left the rates as "self-imposed", was allowing the ratepayer to "opt out" of payment of separate school taxes, if so desired? While the ratepayer would be, at law, still liable for payment of school taxes, these could clearly be put towards the public school's allotment.

Further support is forthcoming from section 27(2) of The School Assessment Act[21], which states:

> A person who is legally assessable in a public school district shall not be liable to assessment for a separate school district in the same area.

If then, Bintner is regarded as a public school supporter, section 27(2) places Bintner in exact contraposition to where he would be if forced to follow clause 3 of the March 19 directive:

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19 R.S.S. 1953, c. 345, s. 13(1), (2).
20 *Supra*, note 16 at 1113.
21 School Assessment Act, R.S.S. 1965, c. 187.

> . . . If parents are Catholic their taxes should be paid to the separate school system.

There is little argument that in ordering men's conduct the valid legislation of the Provincial Legislature has more force than a mere directive of a school board, when the two meet "head on".

Investigation will reveal considerable similarities in the respective legislative frameworks of Saskatchewan and Ontario. The Ontario Public Schools Act[22], as well as The School Attendance Act of Saskatchewan[23], give to a person who has attained the proper age, at or before a relevant date, the right to attend, in the following school year, a public school, in his school section, unless his parent or guardian is a separate school supporter. The Ontario Act then goes on to allow this right to persons, in specific circumstances, notwithstanding their religious affiliation:

> S. 6(2) Subject to section 5, where a child and his parent or guardian reside in a school section in a residence that is assessed to the support of the public schools . . . the child shall be admitted to a public school by the board of that section without payment of fee.
>
> (3) subject to section 5, where a child whose parent or guardian is not a separate school supporter moves in with his parent or guardian into a residence that is assessed for separate school purposes . . . upon the filing of a notice of change . . . the child shall be admitted to a public school by the board of the section without the payment of a fee.[24]

A recent decision of the Ontario High Court in the case of *Leblanc* v. *Board of Education*[25] examined this section of the Ontario legislation and found for the plaintiff, thereby completely differing from the principle held out in *Bintner*. In the *Leblanc* case, parents of school age children, who had been previously separate school supporters in another municipality, moved into a house whose previous owner was assessed on the public school assessment rolls. Under the purchase agreements they received the benefit of the prepayment of municipal school taxes. The Court held that the children were wrongfully denied admittance to the public school, the school board having classified the parents as separate school supporters. It was held that the parents could not be assessed as separate school supporters, and that since the children were living in a house assessed as supporting public schools, they were entitled to be enrolled, under sections 5(1)(a), and 6(2) of the Act. Ferguson J. stated:

> It must appear therefore, that prima facie the child must be admitted unless his parent or guardian is a separate school supporter.[26]

Look, also, to The Separate Schools Act[27], where, had there been an equivalent Saskatchewan enactment, Bintner's problem might have been solved:

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22 R.S.O. 1960, c. 330, s. 5(1)(a).

23 R.S.S. 1965, c. 186, ss. 3(1), 4.

24 R.S.O. 1960, c. 330.

25 Leblanc and Leblanc v. Bd. of Education for the City of Hamilton, [1963] 1 O.R. 20, (1963) 35 D.L.R. (2d) 548 (H.C.).

26 *Id.*, at 22, per Ferguson J.

27 Separate Schools Act, R.S.O. 1960, c. 368, s. 53(1).

> S. 53(1) A Roman Catholic who desires to withdraw his support from a separate school shall give notice thereof in writing to the clerk of the municipality on or before the 4th Wednesday in May in any year, otherwise he shall be deemed to be a supporter of the school.

While there is no Saskatchewan equivalent, this Ontario legislation may be compared to the "opting-out" interpretation of section 40 of The School Act of Saskatchewan, to add a further degree of weight.

A question which was, but slightly, touched upon by the Court, and one which raises a number of prickly questions, particularly as to its practical application, is the power of the school board to act on the question of the admission or exclusion of a child from a particular school. The school during its operative hours is a social unit within the community, and as such must be organized and regulated by a central superior power. This power, at an intermediate level, is exercised by the various school boards, and although it is not disputed that the power is present, certain restrictions must be placed on its scope. One of these restrictions is that the school board has nowhere in its statutory rights and duties, the power to exclude for reasons of religion. The responsibilities of the school board are found in the School Act of Saskatchewan,[28] and in no relevant provision of this Act is the school board granted a right to determine the admissability of a child to a school. Certainly they are granted wide discretionary power over the *conduct* of the school, *but only over those who are registered pupils of that school.* The admission of children is covered by a clear statutory enactment, and if a child conforms to this provision he must be admitted. (Conduct within the school rendering the child subject to suspension or expulsion is another matter.)

> Except as herein provided, every resident person between the ages of 6 and 21 years shall have the right to attend the school and to receive instruction appropriate to his or her grade.[29]

The Ontario legislation is to the same effect,[30] the public school boards operating schools in accordance with the provisions of The Public Schools Act,[31] The Schools Administration Act,[32] and the Department of Education Act.[33] Further, under the latter statute, the Minister is given certain powers as to the making of regulations governing the admission of pupils.[34]

Looking, now, to the authorities, it was held in *Yarwood* v. *Smith's Falls Board of Education,*[35] that children have a *prima facie* right to be admitted to a public school. This was a case of justified exclusion from the school by the board, because of a refusal by parents

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28 School Act, R.S.S. 1965, c. 184, s. 118(7)(9)(35)(37)(39)(43)(45), s. 212.
29 *Id.*, s. 246(3).
30 The Public Schools Act, R.S.O. 1960, c. 330, s. 74(a).
31 *Id.*
32 The Schools Administration Act, R.S.O. 1960, c. 361.
33 Department of Education Act, R.S.O. 1960, c. 94.
34 *Id.*, s. 12(i)(ii).
35 Yarwood v. Smith's Falls Board of Education, (1922) 23 O.W.N. 38.

to allow their children to be innoculated in the midst of a smallpox epidemic.

> In the absence of lawful excuse, parents are obliged by statute to send their children to school; and, on the other hand, they have a *prima facie* right, in general, to have their children of school age admitted to the public schools.[36]

Further, *in Saskatchewan itself,* it was held in the case of *Wilkinson* v. *Thomas et al,*[37] that the governing principle of the School Act[38] is that children between the ages referred to in the statute have a right to attend school and receive instruction. *The right being the right of the child itself, and not a matter left to the discretion of its parents or the school board.*

A final point for comment is the Court of Appeal's preoccupation with the question of a specific *school community.* It seems that the Court concurred in the school board's belief that the addition of Roman Catholic kindergarten pupils would "undermine" the concept of "public school community". Once again both the Saskatchewan and Ontario statutes are similar in their operative force.

In Saskatchewan, The School Act expressly points out that,

> No religious instruction except as hereinafter provided shall be permitted in the school of any district from the opening of the school until one half hour previous to its closing in the afternoon, after which time any such instruction permitted or desired by the board may be given.[39]

> no emblem of any regilious faith, denomination, order, sect, society or association shall be displayed in or on any public school premises during school hours, nor shall any person teach or be permitted to teach in any public school while wearing the garb of any religious faith, denomination, order, sect, society or association.[40]

Moreover, under the Ontario legislation,

> no pupil in public school shall be required to read or study in or from a religious book, or to join in an exercise of devotion or religion, objected to by his parent or guardian.[41]

In these sections, it can, in essence, be seen that a non-religious community was envisioned for the public schools, and clearly it was this type of "community" that the school board did not wish to disrupt. However, it is suggested, had the Court looked further into the legislation, the defendant school board's argument would have fallen.

> Any child shall have the privilege of leaving the school room when religious instruction is commenced as provided for in section 210, or of remaining without taking part in any religious instruction that is given, if the parents or guardian so desire.[42]

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36 *Id.,* at 39, per Lennox J.
37 Wilkinson v. Thomas et al., [1928] 2 W.W.R. 700 (K.B.).
38 R.S.S. 1920, c. 110.
39 School Act, R.S.S. 1965, c. 184, s. 210(1).
40 *Id.,* s. 269(1).
41 The Public Schools Act, R.S.O. 1960, c. 330, s. 7(1).
42 School Act, R.S.S. 1965, c. 194, s. 211.

The Court's failure to deal with decisions in other jurisdictions with similar legislation is incomprehensible. In *Donald* v. *Board of Education,*[43] the Ontario Court of Appeal held that under the relevant statutes and regulations, pupils in public schools (or their parents or guardians) who refuse on religious grounds to salute the flag or sing the national anthem are entitled to refrain from participation without forfeiting their right to attend school. The term, *religious exercises,* is left vague by the statute, and the Court would not take it upon itself to say that the conduct described was not included by the statutory expression. As to the claim that the plaintiff's conduct was disturbing and injurious to the moral tone of the school:

> The regulations . . . specifically contemplate that a pupil who objects to joining in religious exercise may be permitted to retire or to remain, provided he maintains decorous conduct during the exercises. To do just that could not . . . be viewed as conduct injurious to the moral tone of the school or class.[44]

The leading case on the subject is *Chabot v. School Commissioners,*[45] where the only public schools in the municipality were those operated by commissioners who were elected by taxpayers, the religious majority of which were Roman Catholics. It was held that a dissentient taxpayer (a Jehovah's Witness) who was a resident of the municipality was entitled to have his children admitted to those schools. This was so, notwithstanding that dissentients could establish their own schools or send their children to a school in a neighbouring municipality, and thereupon become exempt from paying taxes to maintain the schools in their own municipality. Furthermore, being compelled to send his children to school until age sixteen, he could also insist that they be exempted from Catholic religious instruction and acts of devotion.

> . . . I would conclude that Chabot had the right to demand that his children be admitted to the school of the respondents . . . it is necessary to conclude that children who attend a school are not obliged to follow a religious teaching to which their father is opposed.[46]

It is submitted that the *Bintner* decision is wrong, both in law and in the trend of modern public policy. At the least, the case deserved a far more intensive treatment than the Court of Appeal was prepared to give it, and for this reason it is unfortunate the Court of Appeal did not see fit to grant the plaintiff the leave applied for—to appeal to the Supreme Court of Canada.

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[43] Donald et al. v. Board of Education for the City of Hamilton, [1945] O.R. 518 (C.A.).

[44] *Id.*, at 530.

[45] Chabot v. School Commissioners of Lamordiere and A. G. Que. (1958), 12 D.L.R. (2d) 796.

[46] *Id.*, at 801.

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