

CANADA / JUDGMENT

Francis School District v. Regina (East) School Unit No. 20

[1974] SCR 779

COURT

Supreme Court of Canada

DECIDED

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Collection

Supreme Court Judgments

Date

1973-08-27

Report

[1974] SCR 779

Judges

Martland, Ronald; Judson, Wilfred; Spence, Wishart Flett; Laskin, Bora; Dickson, Robert George Brian

On appeal from

Saskatchewan

Subjects

Statutes

Decision Content

Supreme Court of Canada

Francis School District v. Regina (East) School Unit No. 20, [1974] S.C.R. 779

Date: 1973-08-27

Board of Trustees of the Francis School District No. 777 of Saskatchewan et al. (Plaintiffs)
Appellants;

and

Board of the Regina (East) School Unit No. 20 of Saskatchewan (Defendant) Respondent.

1973: June 15; 1973: August 27.

Present: Martland, Judson, Spence, Laskin and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Statutes—Interpretation—Incorporation by reference—Whether curative provision of The School Act, R.S.S. 1965, c. 184, referentially incorporated into The Larger School Units Act, R.S.S. 1965, c. 185.

By an order of the Minister of Education, the Francis School District was included in the Regina (East) School Unit. Some years later, the Board of Trustees of the Francis School District and some of its ratepayers began an action to have the Minister's order declared null and void on the ground that certain provisions of The Larger School Units Act, R.S.S. 1953, c. 170, (now R.S.S. 1965, c. 185), had not been complied with. On an application for the determination of a question of law prior to the trial of the appellants' action, the Chambers judge held that s. 128 of The Larger School Units Act does not incorporate s. 274 (a curative provision) of The School Act, R.S.S. 1965, c. 184, into The Larger School Units Act. The said s. 128 reads: "The provisions of The School Act and of any Act relating to public school districts apply, except in so far as inconsistent herewith." The Court of Appeal, by a majority, reversed the order of the Chambers judge and dismissed the appellants' action. From that decision the appellants appealed to this Court.

Held (Judson J. dissenting): The appeal should be allowed.

Per Martland, Spence, Laskin and Dickson JJ.: The term "apply" in s. 128 of The Larger School Units Act, followed as it is by the words "except in so far as inconsistent herewith", was not apt to effect a referential incorporation mutatis mutandis of s. 274 of The School Act. Per Judson J., dissenting: The majority in the Court below were right in saying that s. 274 of The School Act was incorporated in The Larger School Units Act, and that, the section being applicable, it substantially disposed of the whole of the appellants' action.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment in Chambers of MacPherson J. Appeal allowed, Judson J. dissenting.

M.C. Shumiatcher, Q.C., for the plaintiffs, appellants.

F.L. Dunbar and W.N. Lawton, for the defendant, respondent.

J. Holgate, Q.C., for the intervenant, the Attorney General of Saskatchewan.

The judgment of Martland, Spence, Laskin and Dickson JJ. was delivered by

LASKIN J.—We are concerned in this appeal with two points. They arise out of an order, made at the instance of the respondents, for the determination of a question of law prior to the trial of the appellants' action. The first point is whether a so-called curative provision of The School Act, R.S.S. 1953, c. 169, s. 259 (now R.S.S. 1965, c. 184, s. 274) was referentially incorporated into The Larger School Units Act, R.S.S. 1953, c. 170 by s. 95 thereof (now R.S.S. 1965, c. 185, s. 128), so as to take effect as a curative provision of the latter Act in respect of its terms governing the integration of a public school district into a larger school unit by order of the responsible Minister. The second point, which arises if the alleged referential incorporation has been achieved, is whether the appellants' action must consequently be dismissed or whether, notwithstanding the incorporation by reference, there are still triable issues in the action. MacPherson J. in Chambers held that there was no such incorporation as was contended for by the respondents, but he did express the opinion that if that issue was decided in their favour that would be the end of the matter. The Saskatchewan Court of Appeal, by a majority, reversed the order of the Chambers judge and dismissed the action. Brownridge J.A., dissenting, would have affirmed the order below.

I am of the opinion that the appellants are entitled to succeed on both of the points in issue. On the first point, the construction and interrelation of relevant provisions of the two statutes lead me to answer the issue of incorporation by reference in favour of the appellants' contention. I refer to these provisions in their present form and numbering.

Section 274 of The School Act reads as follows:

No order purporting to be made under this Act, and being within the powers conferred thereby, shall be deemed invalid on account of non-compliance with any of the conditions required by this Act as preliminary to the order; and no misnomer, inaccurate description or omission in an order shall in any way suspend or impair the operation of the Act with respect to the matter so misdescribed or omitted.

It is alleged in the amended statement of claim that the order whereby the Francis School District No. 777 was absorbed by the Regina (East) School Unit No. 20 was not founded upon a valid agreement between the respective boards of the two school units and that this was a prerequisite to a valid order. Non-compliance with other alleged prerequisites was also asserted. The Larger School Units Act contains no such curative section as s. 274 of The School Act but it does have as its concluding provision s. 128, which is in these terms: 128. The provisions of The School Act and of any Act relating to public school districts apply, except in so far as inconsistent herewith.

The contention of the respondents is, of course, that s. 128 draws into The Larger School Units Act, so as to become part of it *mutatis mutandis*, the provisions of the aforesaid s. 274. Moreover, the respondents contend that the effect of this incorporation is to cure any want of compliance with the prescriptions for a valid order, the cure extending even to an order made in the absence of a prior agreement which is a requirement of the Act.

In addition to s. 128, The Larger School Units Act also includes s. 85 which is in these words:

85. Subject to the provisions of this Act every school unit and every unit board shall possess and exercise the rights, powers and privileges and be subject to the liabilities and methods of government conferred or prescribed by The School Act in respect of public school districts.

It seems to me that this express provision as to school units and unit boards indicates that the relevant prescriptions of The School Act would not otherwise apply; and, in any event, it would seem to me to be difficult to read them in under s. 128 without a *mutatis mutandis* clause.

Although this would not necessarily preclude a referential incorporation in other respects of provisions of The School Act, it does make it doubtful that the term “apply” in s. 128 can, without more, be sufficient to accomplish an incorporation by reference.

In my opinion, the term “apply” in s. 128 aforesaid, followed as it is by the words “except in so far as inconsistent herewith” is not apt to effect a referential incorporation *mutatis mutandis* of s.

274. I observe first that s. 128 leaves at large to what the provisions of The School Act are to apply; but, bestowing upon s. 128 a liberal interpretation, it may be said that it envisages application of provisions of The School Act to matters arising and not dealt with under The Larger School Units Act, unless inconsistent therewith. We are met then with the question whether a curative provision of one statute, which has the effect of relieving against non-compliance with certain of its prescriptions, is transferable to another statute by such general words as those in s. 128 so as to overcome non-compliance with certain prescriptions of the latter statute.

I do not see how s. 274, dealing as it does with orders under The School Act (“No order purporting to be made under this Act”) and with non-compliance with conditions required by that Act, can have any application to orders and conditions under The Larger School Units Act. Even if, strictly speaking, it would not be inconsistent with the latter Act’s terms to have in it a relieving provision such as s. 274, what the respondents must establish is not merely that it would be consistent but that it applies, by referential incorporation or otherwise. In my opinion, this result would have to be based on words more express than those found in s. 128.

The respondents rely on *Re Wood’s Estate*[2] in support of their submissions. What Lord Esher says there (at p. 615) about the effect of incorporation by reference is unexceptionable. It does not, however, answer the prior question whether there is an incorporation by reference in the present case. The referential clause in *Re Wood’s Estate* was of a completely different order than s. 128. It spoke of specified provisions in another Act which “shall be deemed to be herein repeated, with the alterations necessary to make the same applicable to the purpose of this Act, and to the Commissioners hereby incorporated, instead of the Commissioners by that Act incorporated, and so as to enable the Commissioners hereby incorporated to carry into effect the purpose of this Act” (at p. 609). There is simply no correspondence between these words and those of s. 128.

On the second point, the terms of s. 274, especially the words “being within the powers conferred thereby”, arguably require that an order of the Minister be based on a valid agreement. To give effect to the respondents’ contention, according to the scope sought for s. 274, would be to read it

as a privative as well as a curative provision. Moreover, it would mean that an agreement, which appears to be the foundation of the whole process, must be regarded as merely “a condition required by this Act as preliminary to the order” within s. 274. This would put it in the class of the procedures as to notice and demand for the taking of a vote as provided by s. 93 of The Larger School Units Act. There has been no finding as to the invalidity of the agreement, and although that may be taken as established for the purpose of the question of law which gave rise to the present appeal, I am not prepared to say that the referential incorporation of s. 274 would cure an invalid agreement. In short, this is not a position which is so clear as to warrant dismissal of the appellants’ action if it had failed on the first point.

I would, accordingly, allow the appeal, set aside the order of the Court of Appeal and restore the order of the Chambers judge. The appellants are entitled to their costs throughout.

JUDSON J. (dissenting)—Until 1944, the basic school unit in Saskatchewan was the district and the relevant legislation was The School Act. In 1944 The Larger School Units Act was enacted under which school districts may be grouped into units. By 1972, we are told, most of the school districts in Saskatchewan were parts of larger units. The School Act is the comprehensive statute. The Larger School Units Act is not a comprehensive statute. It deals for the most part with the creation of these larger units by the Minister and the duties and powers of the Boards. Once established these larger units became just as much part of the provincial school system as the district units which they were meant to replace. They needed and were given the benefit of the provisions of The School Act. This was done by s. 128 of The Larger School Units Act, which reads as follows:

128. The provisions of The School Act and of any Act relating to public school districts apply, except in so far as inconsistent herewith.

The scope of s. 128 was the main concern of the Court of Appeal in this case. I agree with the majority reasons, which dealt with the section in the following terms:

This section is unambiguous and clear in its meaning. The intent and purpose of the legislation must therefore be given full effect. The provisions of The School Act thus apply in toto and are to be read as part of The Larger School Units Act except where inconsistent with the provisions of the latter. Similarly the provisions of any other Act relating to public schools so apply. It follows, in my opinion, that said s. 274 is brought forward and becomes a provision of The Larger School Units Act, and is thus to be read and construed as a part thereof, unless it is inconsistent with the provisions of said latter Act.

The word “inconsistent” is a term of broad signification and varied meanings, depending on the circumstances under which it is used. I have however been able to find little judicial authority indicating its true meaning when found in a statute such as those here under consideration. To say that a section of an enactment, carried forward and becoming part of a new enactment, is inconsistent with a provision or provisions of the new enactment, it must be one the substance or purport of which is in direct conflict with the substance of a corresponding provision of similar purport of the new enactment. I find no such conflict here, and it cannot, I think, be said

that s. 128 is, in this sense, contradictory, inharmonious, or logically incompatible with a section or sections of the new enactment. The legislative intent of the applicability of said section, as a provision of the new enactment, can clearly be found in reading the two enactments together.

The actual problem dealt with by the Saskatchewan Courts was an order of the Minister of Education made on January 1, 1959, which included Francis School District in the Regina (East) School Unit. In 1972, thirteen years after the order had been made, difficulties arose with respect to the management of the schools in the Regina unit. The Board of Trustees of the Francis School District and some of its ratepayers began an action to have the Minister's order of 1959 declared null and void on the ground that s. 93 of The Larger School Units Act had not been complied with.

In its statement of defence the respondent, the Regina School Unit, said that it had not failed to comply with s. 93 and that even if it had, the order of the Minister of 1959 remained effective because s. 128 of The Larger School Units Act incorporated s. 274 of The School Act. Section 274 of The School Act reads:

274. No order purporting to be made under this Act, and being within the powers conferred thereby, shall be deemed invalid on account of non-compliance with any of the conditions required by this Act as preliminary to the order; and no misnomer, inaccurate description or omission in an order shall in any way suspend or impair the operation of the Act with respect to the matter so misdescribed or omitted.

In my opinion the majority in the Court of Appeal were right in saying that s. 274 was incorporated in The Larger School Units Act, and that, the section being applicable, it substantially disposed of the whole of the plaintiffs' action. I would affirm this judgment which dismissed the action.

I would dismiss the appeal with costs.

Appeal allowed with costs, JUDSON J. dissenting.

Solicitors for the plaintiffs, appellants: Shumiatcher and Associates, Regina.

Solicitor for the defendant, respondent: F.L. Dunbar, Regina.

[1] [1973] 2 W.W.R. 442, 33 D.L.R. (3d) 129.

[2] (1886), 31 Ch.D.607.

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