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Annotated Language Laws of Canada - Constitutional, Federal, Provincial and Territorial Laws

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ABSTRACT: The *Annotated Language Laws of Canada - Constitutional, Federal, Provincial and Territorial Laws* ("*Annotated Language Laws of Canada*" or "the publication") is a comprehensive and evergreen legal reference tool. It inventories all constitutional, federal, provincial and territorial legislation and regulations relating, in whole or in part, to the use of language(s) with and within government institutions and in commercial or private activities. The publication covers a large variety of legislative and regulatory provisions and relevant case law excerpts relating to the official languages of Canada, aboriginal languages and the language rights of those who speak neither French nor English. The publication is being made available online progressively, beginning with the *Canadian Charter of Rights and Freedoms*, which is available as of July 27, 2017 in addition to other constitutional laws, which are available as of October 2017. The other chapters on federal, provincial and territorial laws were completed in January 2018.

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Jones v. A.G. of New Brunswick, [1975] 2 S.C.R. 182, 1974 CanLII 164 (SCC)

Lalonde v. Ontario (Commission de restructuration des services de santé), 2001 CanLII 21164 (ON CA)

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

Westmount (Ville de) v. Québec (Procureur Général du), 2001 CanLII 13655 (QC CA) [judgment available in French only]

R. v. Simard, [1995] O.J. No. 3989, 27 O.R. (3d) 116 (ON CA) [hyperlink not available]

Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings, 1987 CanLII 204 (SK CA)

R. v. Gaudet, 2010 NBQB 27 (CanLII)

R. v. Pare, 1986 CanLII 1189 (BC SC)

R. v. Gaudet, 2009 NBPC 8 (CanLII)

See also:

R. v. Kapp, [2008] 2 S.C.R. 483, 2008 SCC 41 (CanLII)

Galganov v. Russell (Township), 2012 ONCA 409 (CanLII)

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 F.C.R. 276, 2004 FCA 263 (CanLII)

R. v. Schneider, 2004 NSCA 151 (CanLII)

City of Toronto v. Braganza, 2011 ONCJ 657 (CanLII)

R. v. Rodrigue, 1994 CanLII 5249 (YK SC), the appeal of this judgment was dismissed on other grounds by the Yukon Court of Appeal and the application for leave to appeal to the Supreme Court of Canada was dismissed.

R. c. Car-Fre Transport Ltd., 2015 ABPC 280

16.1. (1) English and French linguistic communities in New Brunswick

16.1. (2) Role of the legislature and government of New Brunswick

Annotations – Subsection 16.1(1)

Charlebois v. Saint John (City), [2005] 3 S.C.R. 563, 2005 SCC 74

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

R. v. Gaudet, 2010 NBQB 27 (CanLII)

Small & Ryan v. New Brunswick (Minister of Education), 2008 NBQB 201 (CanLII)

Annotations – Subsection 16.1(2)

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

See also:

Sonier v. Ambulance New Brunswick Inc., 2016 NBQB 218 (CanLII)

17. (1) Proceedings of Parliament

17. (2) Proceedings of New Brunswick legislature

Annotations – General

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, 1993 CanLII 153 (SCC)

Annotations – Subsection 17(1)

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 1986 CanLII 65 (SCC)

Knopf v. Canada (Speaker of the House of Commons), 2007 FCA 308 (CanLII)

Annotations – Subsection 17(2)

Jones v. New Brunswick (Attorney General), [1975] 2 S.C.R. 182, 1974 CanLII 164 (SCC)

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

Cormier v. Fournier, 1986 CanLII 92 (NB QB)

18. (1) Parliamentary statutes and records

18. (2) New Brunswick statutes and records

Annotations – General

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, 1993 CanLII 153 (SCC)

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

Kilrich Industries Ltd. v. Halotier, 2007 YKCA 12 (CanLII)

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

Ashely v. Marlow Group Private Portfolio Management Inc., 2006 CanLII 31307 (ON SC)

Annotations – Subsection 18(1)

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

See also:

The King v. Dubois, [1935] SCR 378, 1935 CanLII 1 (SCC)

Canada (Attorney General) v. Goguen, 1989 CanLII 158 (NB CA)

Canada v. Aquarius Computer & Peripherals Ltd., [1989] O.J. No. 1935 (ON SC) [hyperlink not available

Annotations – Subsection 18(2)

Charlebois v. Saint John (City), [2005] 3 S.C.R. 563, 2005 SCC 74 (CanLII)

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

R. v. Butler, 2002 NBQB 325 (CanLII)

See also:

Town of Riverview v. Charlebois, 2014 NBQB 154 (CanLII)

19. (1) Proceedings in courts established by Parliament

19. (2) Proceedings in New Brunswick courts

Annotations – General

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

Ochapowace Indian Band v. Saskatchewan (Minister of Justice), 2004 SKQB 486 (CanLII)

R. v. Deveaux, 1999 CanLII 3182 (NS SC)

Cormier v. Fournier, 1986 CanLII 92 (NB QB)

See also:

R. v. Car-Fre Transport Ltd., 2015 ABPC 280 (CanLII) [judgment available in French only]

Annotations – Subsection 19(1)

R. v. Mercure, [1988] 1 S.C.R. 234, 1988 CanLII 107 (SCC)

Industrielle Alliance, Assurance et services financiers inc. v. Mazraani, 2017 FCA 80 (CanLII)

Yamba v. Canada (Minister of Justice), 2016 BCCA 219 (CanLII)

R. v. T.D.M., 2008 YKCA 16 (CanLII)

Kilrich Industries Ltd. v. Halotier, 2007 YKCA 12 (CanLII)

R. v. MacKenzie, 2004 NSCA 10 (CanLII)

Lavigne v. Canada (Human Resources Development), 1995 CarswellNat 1272, [1995] F.C.J. No. 1629, 106 F.T.R. 308 (FC TD) [hyperlink not available]

Lavigne v. Canada (Human Resources Development), 1995 CarswellNat 239, [1995] F.C.J. No. 737, 55 A.C.W.S. (3d) 735 (FC TD) [hyperlink not available]

R. v. Rodrigue, 1994 CanLII 5249 (YK SC)

St. Jean v. R., 1986 CarswellYukon 10, [1986] Y.J. No. 76, [1987] N.W.T.R. 118, 2 Y.R. 116 (NWT YK SC) [hyperlink not available]

Thibeault J.R.N.J. (Captain), R. v., 2014 CM 3022 (CanLII)

See also:

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 1986 CanLII 65 (SCC)

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

Ewonde v. Canada, 2017 FCA 112 (CanLII)

Noiseux v. Belval, 1999 CanLII 13667 (QC CA)

Cross v. Teasdale, 1998 CanLII 13063 (QC CA) [judgment available in French only]

Beaudoin v. Canada (Minister of National Health and Welfare), [1993] 3 FCR 518, 1993 CanLII 2961 (FCA)

Annotations – Subsection 19(2)

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

Bujold v. R., 2011 NBCA 24 (CanLII)

Chiasson v. Chiasson, 1999 CarswellNB 599, 1999 CarswellNB 600, [1999] N.B.J. No. 621, 222 N.B.R. (2d) 233 (NB CA) [hyperlink not available]

Ville de Saint-Jean v. Charlebois et 042504 NB INC (February 25, 2004), Saint-Jean, No. 04939902 (NB PC), Vautour J. [hyperlink not available] [judgment available in French only]

See also:

Charlebois v. Saint John (City), [2005] 3 S.C.R. 563, 2005 SCC 74 (CanLII)

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

20. (1) Communications by public with federal institutions

20. (2) Communications by public with New Brunswick institutions

Annotations – Subsection 20(1)

DesRochers v. Canada (Industry), [2009] 1 S.C.R. 194, 2009 SCC 8

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

Knopf v. Canada (Speaker of the House of Commons), 2007 FCA 308 (CanLII)

R. v. Simard, [1995] O.J. No. 3989, 27 O.R. (3d) 116 (ON CA) [hyperlink not available]

St-Onge v. Canada (Office of the Commissioner of Official Languages) (C.A.), [1992] 3 FCR 287, 1992 CanLII 8671 (FCA)

Tailleur v. Canada (Attorney General), 2015 FC 1230 (CanLII)

Abbasi v. Canada (Citizenship and Immigration), 2010 FC 288 (CanLII)

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

Doucet v. Canada, [2005] 1 F.C.R. 671, 2004 FC 1444 (CanLII)

R. v. Doucet, 2003 NSSCF 256 (CanLII) [judgment available in French only]

Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001 FCT 239 (CanLII)

Professional Institute of the Public Service v. Canada, [1993] 2 F.C.R. 90, 1993 CanLII 2921 (FC)

Tucker v. Supreme Court of Canada, 1992 CarswellNat 1344, [1992] F.C.J. No. 1116, 12 C.R.R. (2d) 295, 37 A.C.W.S. (3d) 850 (FC TD) [hyperlink not available]

R. v. Brewer, 2009 NBPC 5 (CanLII)

R. v. Beaupré (January 7 1998), Smithers, B.C. 14311C (BC PC) [hyperlink not available] [judgment available in French only]

R. v. Desgagne, [1997] A.J. No. 1307, Ticket No. A 06115443 T (AB PC) [hyperlink not available]

R. v. St. Pierre (March 21 1995), (Ont. C. Gen. Div) [hyperlink not available] [judgment available in French only]

R. v. Rodrigue, 1994 CanLII 5249 (YK SC)

R. v. Saulnier, 1989 CarswellNS 305, [1989] N.S.J. No. 131, 230 A.P.R. 77 (N.S. Co. Ct.) [hyperlink not available]

St. Jean v. R., 1986 CarswellYukon 10, [1986] Y.J. No. 76, [1987] N.W.T.R. 118, 2 Y.R. 116 (NWT YK SC) [hyperlink not available]

R. v. Jervis, 1984 CarswellMan 294, 11 C.R.R. 373, 12 W.C.B. 195, 27 Man. R. (2d) 217 (Man. Co. Ct.) [hyperlink not available]

R. v. Holman, 1983 CarswellAlta 163, [1983] A.W.L.D. 875, [1983] A.J. No. 1043, 28 Alta. L.R. (2d) 35 (AB PC) [hyperlink not available]

See also:

R. v. Car-Fre Transport Ltd., 2015 ABPC 280 (CanLII) [judgment available in French only]

Musa v. Canada (Citizenship and Immigration), 2012 FC 298 (CanLII)

Thompson v. Canada (Citizenship and Immigration), 2009 FC 867 (CanLII)

Toma v. Canada (Minister of Citizenship and Immigration), 2006 FC 779 (CanLII)

R. v. Larcher (19 September 2002), J. Lalonde (ON SC) [hyperlink not available]

Annotations – Subsection 20(2)

Société des Acadiens v. Association of Parents, 2008 SCC 15, [1986] 1 S.C.R. 549 (CanLII)

R. v. Losier, 2011 NBCA 102 (CanLII)

R. v. Losier, 2011 NBQB 177 (CanLII)

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

R. v. McGraw, 2007 NBCA 11 (CanLII)

Maillet v. R, 2006 NBCA 22 (CanLII)

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

R. v. Haché, 1993 CanLII 5351 (NB CA)

R v. Nde Soh, 2014 NBQB 14 (CanLII)

Evenson v. Saskatchewan (Ministry of Justice), 2013 SKQB 296 (CanLII)

McGraw v. R., 2012 NBQB 358 (CanLII)

R. v. Theriault, 2012 NBQB 184 (CanLII)

R. v. Furlotte, 2010 NBQB 228 (CanLII)

R. v. Gaudet, 2010 NBQB 27 (CanLII)

R. v. Butler, 2002 NBQB 325 (CanLII)

R. v. Bastarache, 1992 CarswellNB 106, [1992] A.N.B. No. 529, [1992] N.B.J. No. 529, 128 N.B.R. (2d) 217 (NB QB) [hyperlink not available]

R. v. Robinson, 1992 CarswellNB 408, [1992] A.N.B. No. 146, [1992] N.B.J. No. 146, 127 N.B.R. (2d) 271, 319 A.P.R. 271 (NB QB) [hyperlink not available]

R. v. Gautreau, 1989 CarswellNB 292, 1989 CarswellNB 360, [1989] N.B.J. No. 1005, 101 N.B.R. (2d) 1, 254 A.P.R. 1 (NB BR) [hyperlink not available]

R. v. Lavoie, 2014 NBPC 43 (CanLII)

R. v. Robinson, 2014 NBPC 37 (CanLII)

R. v. Robichaud, 2011 NBCP 2 (CanLII) [judgment available in French only]

Canadian Union Of Public Employees, Local 1252 v. Service New Brunswick, 2016 CanLII 96056 (NB LA)

See also:

Charlebois v. Town of Riverview and Attorney General of New Brunswick, 2015 NBCA 45 (CanLII)

City of Toronto v. Braganza, 2011 ONCJ 657 (CanLII)

Sonier v. Ambulance New Brunswick Inc., 2016 NBQB 218 (CanLII)

R. v. Maurice Frenette, 2007 NBCP 33 (CanLII)

R. v. Mario Régis Mazerolle, 2008 NBPC 31 (CanLII)

R. v. Cormier (21 July 1999), Moncton (NB PC), Savoie J [hyperlink not available]

Bourque v. R. (20 August 1992), M/M/141/92 (NB QB) J. Landry [hyperlink not available]

R. v. Bertrand, 1992 CanLII 5946 (NB BR) [judgment available in French only]

Moncton Firefighters Association, International Association of Firefighters, Local 999 v. Moncton (City), 2015 CanLII 19678 (NB LA)

Canadian Union of Public Employees, Local 1190 v. New Brunswick (Transportation and Infrastructure), 2015 CanLII 38685 (NB LA)

New Brunswick Union of Public And Private Employees v. Horizon Health Network, 2015 CanLII 38678 (NB LA)

21. Continuation of existing constitutional provisions

Annotations

Lavigne v. Canada Post Corporation, 2009 QCCA 776 (CanLII)

Reference re an Act to Amend the Education Act, 1986 CanLII 2863 (ON CA)

McDonnell v. Federation des Franco-Colombiens, 1985 CarswellBC 388, [1985] B.C.W.L.D. 3428, [1985] B.C.W.L.D. 3452 (B.C. Ct.C.) [hyperlink not available]

22. Rights and privileges preserved

Annotations

Reference re an Act to Amend the Education Act, 1986 CanLII 2863 (ON CA)

Minority Language Educational Rights (section 23)

23. (1) Language of instruction

23. (2) Continuity of language instruction

23. (3) Application where numbers warrant

Annotations – General

Association des parents de l'école Rose-des-vents v. British Columbia (Education), [2015] 2 S.C.R. 139, 2015 SCC 21 (CanLII)

Nguyen v. Quebec (Education, Recreation and Sports), [2009] 3 S.C.R. 208, 2009 SCC 47 (CanLII)

Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14 (CanLII)

Gosselin (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 238, 2005 SCC 15 (CanLII)

Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General), [2005] 1 S.C.R. 257, 2005 SCC 16 (CanLII)

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 2003 SCC 62 (CanLII)

Arsenault-Cameron v. Prince Edward Island, [2000] 1 S.C.R. 3, 2000 SCC 1 (CanLII)

Reference re: Education Act (Que.), [1993] 2 S.C.R. 511, 1993 CanLII 100 (SCC)

Mahe v. Alberta, [1990] 1 S.C.R. 342, 1990 CanLII 133 (SCC)

A.G. (Que.) v. Quebec Protestant School Boards, [1984] 2 S.C.R. 66, 1984 CanLII 32 (SCC)

Perron v. Perron, 2012 ONCA 811 (CanLII)

Perron v. Perron, 2011 ONCA 776 (CanLII)

Lavoie v. Nova Scotia (Attorney-General), 1989 CanLII 5221 (NS CA)

Reference re School Act, 1988 CanLII 1363 (PESCAD)

Reference re Education Act of Ontario and Minority Language Education Rights, 1984 CanLII 1832 (ON CA)

Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764 (CanLII)

Conseil des Écoles Publiques de l'Est de l'Ontario v. Ontario Federation of School Athletics Associations, 2015 ONCS 5328 (CanLII) [judgment available in French only]

Clermont v. Consortium de transport scolaire d'Ottawa, 2014 ONCS 948 (CanLII) [judgment available in French only]

Van Vlymen v. Canada (Solicitor General), [2005] 1 FCR 617, 2004 FC 1054 (CanLII)

Buckland v. Prince Edward Island, 2004 PESCTD 66 (CanLII)

Whittington v. Saanich Sch. Dist. 63, 1987 CanLII 2642 (BC SC)

Conseil Scolaire Acadien Provincial (Re), 2016 NSUARB 115 (CanLII)

Annotations – Subsection 23(1)

Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General), [2015] 2 S.C.R. 282, 2015 SCC 25 (CanLII)

Gosselin (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 238, 2005 SCC 15 (CanLII)

Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14 (CanLII)

A.G. (Que.) v. Quebec Protestant School Boards, [1984] 2 S.C.R. 66, 1984 CanLII 32 (SCC)

Northwest Territories (Attorney General) v Commission Scolaire Francophone, Territoires du Nord-Ouest, 2015 NWTCA 1 (CanLII)

Northwest Territories (Attorney General) v Association des parents ayants droit de Yellowknife, 2015 NWTCA 2 (CanLII)

R. v. Conseil Scolaire Fransaskois, 2013 SKCA 35 (CanLII)

K.K. v. Québec (Ministre de l'Éducation, du Loisir et du Sport), 2010 QCCA 500 (CanLII) [judgment available in French only]

Reference re School Act, 1988 CanLII 1363 (PE SCAD)

Reference re Education Act of Ontario and Minority Language Education Rights, 1984 CanLII 1832 (ON CA)

Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764 (CanLII)

Saskatchewan v. Conseil scolaire Fransaskois, 2014 SKQB 285 (CanLII)

Dauphinee v. Conseil Scolaire Acadien Provincial, 2007 NSSC 238 (CanLII)

Chubbs, et al v. HMQ et al, 2004 NLSCTD 89 (CanLII)

Annotations – Subsection 23(2)

Nguyen v. Quebec (Education, Recreation and Sports), [2009] 3 S.C.R. 208, 2009 SCC 47 (CanLII)

Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14 (CanLII)

Northwest Territories (Attorney General) v. Commission Scolaire Francophone, Territoires du Nord-Ouest, 2015 NWTCA 1 (CanLII)

Northwest Territories (Attorney General) v. Association des parents ayants droit de Yellowknife, 2015 NWTCA 2 (CanLII)

Abbey v. Essex County Board of Education, 1999 CanLII 3693 (ON CA)

Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764 (CanLII)

Annotations – Subsection 23(3)

Association des parents de l'école Rose-des-vents v. British Columbia (Education), [2015] 2 S.C.R. 139, 2015 SCC 21 (CanLII)

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 2003 SCC 62 (CanLII)

Arsenault-Cameron v. Prince Edward Island, [2000] 1 S.C.R. 3, 2000 SCC 1 (CanLII)

Reference re Public Schools Act (Man.), s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, 1993 CanLII 119 (SCC)

Mahe v. Alberta, [1990] 1 S.C.R. 342, 1990 CanLII 133 (SCC)

Northwest Territories (Attorney General) v. Association des parents ayants droit de Yellowknife, 2015 NWTCA 2 (CanLII)

Reference re School Act, 1988 CanLII 1363 (PE SCAD)

Reference re Education Act of Ontario and Minority Language Education Rights, 1984 CanLII 1832 (ON CA)

Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764 (CanLII)

Assn. des parents francophones de la Colombie Britannique v. British Columbia, 1998 CanLII 3969 (BC SC)

L'Association des parents francophones de la Colombie-Britannique, la Fédération des francophones de la Colombie-Britannique v. Woods, 1996 CanLII 1455 (BC SC)

Griffin v. Commission scolaire régionale Blainville Deux-Montagnes, 1989 CanLII 5176 (QC SC)

See also:

Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission), [2012] 1 S.C.R. 364, 2012 SCC 10 (CanLII)

Adler v. Ontario, [1996] 3 S.C.R. 609, 1996 CanLII 148 (SCC)

British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City), 2015 BCCA 142 (CanLII) [décision disponible en anglais seulement]

Fédération des parents francophones de Columbie-Britannique v. British Columbia (Attorney General), 2012 BCCA 422 (CanLII)

Commission Scolaire Francophone du Yukon v. Procureure Générale du Yukon, 2011 YKCA 10 (CanLII)

Szasz v. Lakeshore School Board, 1998 CanLII 12919 (QC CA) [judgment available in French only]

Assoc. Francaise des Conseils Scolaires de l'Ontario v. Ontario (Ont. C.A.), 1988 CanLII 4759 (ON CA)

Commission des Ecoles Fransaskoises Inc. v. Saskatchewan, 1991 CanLII 7999 (SK CA)

Commission Scolaire Francophone du Yukon v. Tribunal d'Appel de l'Éducation du Yukon, 2015 YKSC 24 (CanLII)

Conseil Scolaire Fransaskois v. Government of Saskatchewan, 2012 SKQB 217 (CanLII)

Conseil Scolaire Fransaskois v. Saskatchewan, 2011 SKQB 210 (CanLII)

East Central Francophone Education Region No. 3 v. Alberta (Minister of Infrastructure), 2004 ABQB 428 (CanLII) [judgment available in French only]

Conseil des écoles séparées catholiques romaines de Dufferin et Peel v. Ontario (Ministre de l'éducation et de la formation), 1996 CanLII 11789 (ON SC)

Colin v. Québec (Commission d'appel sur la langue d'enseignement), [1995] R.J.Q. 1478, [1995] J.Q. no 1874 (QC SC) [hyperlink not available]

Marchand v. Simcoe County Board of Education et al. (No. 2), 1987 CanLII 4129 (ON SC)

Marchand v. Simcoe County Board of Education et al., 1986 CanLII 2671 (ON SC)

Re Ottawa Board of Education et al. and Attorney-General of Ontario, 1986 CanLII 2773 (ON SC)

Marchand v. Simcoe (1984), 10 C.R.R.169, [1984] O.J. No. 282 (ON SC) [hyperlink not available]

Re Ottawa Board of Education et al. and Attorney General of Ontario (1987), 57 O.R. (2d) 722, [1986] O.J. No. 1374 (ON SC) [hyperlink not available]

Stopnicki v. Québec (Éducation), 2004 CanLII 64045 (QC ATQ)

Enforcement (section 24)

24. (1) Enforcement of guaranteed rights and freedoms

24. (2) Exclusion of evidence bringing administration of justice into disrepute

Annotations – Subsection 24(1)

Association des parents de l'école Rose-des-vents v. British Columbia (Education), [2015] 2 S.C.R. 139, 2015 SCC 21 (CanLII)

Thibodeau v. Air Canada, [2014] 3 S.C.R. 340, 2014 SCC 67 (CanLII)

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 2003 SCC 62 (CanLII)

R. v. Tran, [1994] 2 S.C.R. 951, 1994 CanLII 56 (SCC)

R. v. Munkonda, 2015 ONCA 309 (CanLII)

Northwest Territories (Attorney General) v. Association des parents ayants droit de Yellowknife, 2015 NWTCA 2 (CanLII)

Northwest Territories (Attorney General) v. Commission Scolaire Francophone, Territoires du Nord-Ouest, 2015 NWTCA 1 (CanLII)

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

Commission des Ecoles Fransaskoises Inc. v. Saskatchewan, 1991 CanLII 7999 (SK CA)

Paquette v. Canada, 1987 ABCA 228 (CanLII)

Reference re Education Act of Ontario and Minority Language Education Rights, 1984 CanLII 1832 (ON CA)

Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings, 1987 CanLII 204 (SK CA)

Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764 (CanLII)

Conseil des écoles publiques de l'est de l'Ontario v. Ontario Federation of School Athletics Associations, 2015 ONCS 5328 (CanLII) [judgment available in French only]

Association des parents ayants droit de Yellowknife et al v. Attorney General of the Northwest Territories et al, 2012 NWTSC 43 (CanLII)

R. v. Furlotte, 2010 NBQB 228 (CanLII)

R. v. Gaudet, 2010 NBQB 27 (CanLII)

Doucet v. Canada, [2005] 1 F.C.R. 671, 2004 FC 1444 (CanLII)

Assn. des parents francophones de la Colombie Britannique v. British Columbia, 1998 CanLII 3969 (BC SC)

Conseil scolaire fransaskois de Zenon Park v. Saskatchewan, 1998 CanLII 13468 (SK QB)

R. v. Lavoie, 2014 NBPC 43 (CanLII)

R. v. Boudreau, 2008 NSPC 78 (CanLII)

Lavoie v. Nova Scotia (Attorney-General), 1988 CanLII 5684 (NS SC)

See also:

R. v. MacKenzie, 2004 NSCA 10 (CanLII)

Lavigne v. Canada (Human Resources Development), 1998 CanLII 7820 (FCA)

Sonier v. Ambulance New Brunswick Inc., 2016 NBQB 218 (CanLII)

Saint-Quentin (Municipality) v. New Brunswick, 2015 NBQB 169 (CanLII)

Saskatchewan v. Conseil scolaire fransaskois, 2014 SKQB 285 (CanLII)

L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique, 2011 BCSC 89 (CanLII)

Association des parents ayants droit de Yellowknife v. Territoires du Nord Ouest (Procureur général), 2005 NWTSC 58 (CanLII) [judgment available in French only]

Annotations – Subsection 24(2)

R. v. Losier, 2011 NBCA 102 (CanLII)

R. v. Allen Brideau, 2016 NBQB 197 (CanLII)

R. v. Mathieu, 2014 ONCS 6124 (CanLII) [judgment available in French only]

R. v. Arjun, 2013 BCSC 2076 (CanLII)

R. v. Gaudet, 2010 NBQB 27 (CanLII)

R. v. Irving, 2016 QCCQ 2697 (CanLII)

R. v. Lavoie, 2014 NBPC 43 (CanLII)

R. v. Jacky Savoie, 2012 NBPC 10 (CanLII)

See also:

R. v. Ippak, 2015 NUCJ 3 (CanLII)

R. v. Robichaud, 2012 NBQB 359 (CanLII)

R. v. Hnatusko, 2012 ONCJ 35 (CanLII)

R. v. Hernandez, 2012 QCCQ 1435 (CanLII) [judgment available in French only]

R. v. Landry, 2012 NBBR 185 (CanLII) [judgment available in French only]

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Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14 (CanLII)

R. v. Tran, [1994] 2 S.C.R. 951, 1994 CanLII 56 (SCC)

Mahe v. Alberta, [1990] 1 S.C.R. 342, 1990 CanLII 133 (SCC)

Entreprises W.F.H. Ltée v. Québec (Procureure Générale du), 2001 CanLII 17598 (QC CA) [judgment available in French only]

Lavoie v. Nova Scotia (Attorney-General), 1989 CanLII 5221 (NS CA)

R. v. Punch, 1985 CanLII 120 (NWT CA)

Reference re Education Act of Ontario and Minority Language Education Rights, 1984 CanLII 1832 (ON CA)

R. v. Sidhu, 2005 CanLII 42491 (ON SC)

Mutual Tech Canada Inc. v. Law, 2000 CanLII 22637 (ON SC)

Alavehzadeh v. Canada (Citizenship and Immigration), 2016 CanLII 73710 (CA IRB)

See also:

Incredible electronics Inc. v. Canada (Attorney General of), 2002 CanLII 16056 (ON SC)

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33. (4) Re-enactment

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Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, 1988 CanLII 19 (SCC)

Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790, 1988 CanLII 20 (SCC)

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 1986 CanLII 65 (SCC)

Entreprises W.F.H. Ltée c. Québec (Procureure Générale du), 2001 CanLII 17598 (QC CA) [judgment available in French only]

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35. (4) Aboriginal and treaty rights are guaranteed equally to both sexes

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Adoption — 09201, 2009 QCCA 1583 (CanLII)

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Kativik (School Board) v. Makivik Corp., 2004 CanLII 12449 (QC SC)

Ochapowace Indian Band v. Saskatchewan (Minister of Justice), 2004 SKQB 486 (CanLII)

First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2 (CanLII)

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WSANEC School Board v. B.C. Government and Service Employees' Union, 2016 CIRB 838 (CanLII)

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Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

Potter v. Québec (Procureur général du), 2001 CanLII 20663 (QC CA) [judgment available in French only]

43. Amendment of provisions relating to some but not all provinces

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Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

Potter v. Québec (Procureur général du), 2001 CanLII 20663 (QC CA) [judgment available in French only]

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

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R. v. Pare, 1986 CanLII 1189 (BC SC)

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Bertrand v. Quebec (Attorney General), 1996 CanLII 12476 (QC SC)

P.G. (Québec) v. Langlois (December 5, 1997), Québec 200-73-000514-979, decision on application (QC CQ) [hyperlink not available] [judgment available in French only]

56. English and French versions of certain constitutional texts

57. English and French versions of this Act

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Caron v. Alberta, [2015] 3 S.C.R. 511, 2015 SCC 56 (CanLII)

Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 1998 CanLII 793 (SCC)

Re Manitoba Language Rights, [1985] 1 S.C.R. 721, 1985 CanLII 33 (SCC)

R. v. MacKenzie, 2004 NSCA 10 (CanLII)

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

Lalonde v. Ontario (Commission de restructuration des services de santé), 2001 CanLII 21164 (ON CA)

Westmount (Ville de) v. Québec (Procureur Général du), 2001 CanLII 13655 (QC CA) [judgment available in French only]

Gigliotti v. Conseil d'administration du Collège des Grands Lacs, 2005 CanLII 23326 (ON SCDC)

See also:

Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14 (CanLII)

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Regina v. Murphy, Ex Parte Belisle and Moreau, 1968 CanLII 732 (NB CA)

Lavigne v. Canada (Human Resources Development), [2002] 2 F.C.R. 164, 2001 FCT 1365 (CanLII)

R. v. Paquette, 1986 CanLII 1634 (AB QB)

R. v. Pare, 1986 CanLII 1189 (BC SC)

See also:

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92. Subjects of exclusive Provincial Legislation

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R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 1998 CanLII 793 (SCC)

Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790, 1988 CanLII 20 (SCC)

R. v. T.D.M., 2008 YKCA 16 (CanLII)

See also:

Quebec (Attorney General) v. 156158 Canada Inc. (Boulangerie Maxie's), 2015 QCCQ 354 (CanLII)

Annotations – Subsection 92(8)

Attorney General of Quebec v. Blaikie et al., [1981] 1 S.C.R. 312, 1981 CanLII 14 (SCC)

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

Westmount (Ville de) v. Québec (Procureur Général du), 2001 CanLII 13655 (QC CA) [judgment available in French only]

Annotations – Subsection 92(14)

Jones v. A.G. of New Brunswick, [1975] 2 S.C.R. 182, 1974 CanLII 164 (SCC)

R. v. T.D.M., 2008 YKCA 16 (CanLII)

R. v. Thim, 2015 BCSC 1677 (CanLII)

Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001 FCT 239 (CanLII)

R. v. Pare, 1986 CanLII 1189 (BC SC)

Annotations – Subsection 92(16)

Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790, 1988 CanLII 20 (SCC)

See also:

Att. Gen. of Quebec v. Blaikie et al., [1979] 2 S.C.R. 1016, 1979 CanLII 21 (SCC)

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Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General), [2015] 2 S.C.R. 282, 2015 SCC 25 (CanLII)

Gosselin (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 238, 2005 SCC 15 (CanLII)

Reference re: Education Act (Que.), [1993] 2 S.C.R. 511, 1993 CanLII 100 (SCC)

Ottawa Separate School Trustees v. Mackell (1916), 32 D.L.R. 1 (UK JCPC)

Westmount (Ville de) v. Québec (Procureur Général du), 2001 CanLII 13655 (QC CA) [judgment available in French only]

Lavoie v. Nova Scotia (Attorney-General), 1989 CanLII 5221 (NS CA)

Reference re Education Act of Ontario and Minority Language Education Rights, 1984 CanLII 1832 (ON CA)

Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212, 2017 SKQB 109 (CanLII)

Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764 (CanLII)

See also:

Potter v. Québec (Procureur général du), 2001 CanLII 20663 (QC CA) [judgment available in French only]

Commission des Ecoles Fransaskoises Inc. et al. v. Saskatchewan, 1988 CanLII 5128 (SK QB), aff. by Commission des Ecoles Fransaskoises Inc. v. Saskatchewan, 1991 CanLII 7999 (SK CA)

Hirsch v. Montreal Protestant School Board of School Commissioners, [1928] J.C.J. No. 2 [hyperlink not available]

Annotations – Subsection 93(1)

Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General), [2001] 1 S.C.R. 470, 2001 SCC 15 (CanLII)

Adler v. Ontario, [1996] 3 S.C.R. 609, 1996 CanLII 148 (SCC)

Mahe v. Alberta, [1990] 1 S.C.R. 342, 1990 CanLII 133 (SCC)

Berthelot v. Ontario (Education Improvement Commission, 1998 CanLII 19424 (ON SCDC)

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Québec (Procureure générale) v. Association des communautés scolaires franco-protestantes du Québec, 2001 CanLII 40079 (QC CA) [judgment available in French only]

Potter v. Québec (Procureur général du), 2001 CanLII 20663 (QC CA) [judgment available in French only]

IX. Miscellaneous Provisions

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133. Use of English and French Languages

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R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

Doré v. Verdun (City), [1997] 2 S.C.R. 862, 1997 CanLII 315 (SCC)

Sinclair v. Quebec (Attorney General), [1992] 1 S.C.R. 579, 1992 CanLII 126 (SCC)

Reference re Manitoba Language Rights, [1992] 1 S.C.R. 212, 1992 CanLII 115 (SCC)

Ford v. Québec (Attorney General), [1988] 2 S.C.R. 712, 1988 CanLII 19 (SCC)

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 1986 CanLII 65 (SCC)

Re Manitoba Language Rights, [1985] 1 S.C.R. 721, 1985 CanLII 33 (SCC)

Attorney General of Quebec v. Blaikie et al., [1981] 1 S.C.R. 312, 1981 CanLII 14 (SCC)

Att. Gen. of Quebec v. Blaikie et al., [1979] 2 S.C.R. 1016, 1979 CanLII 21 (SCC)

Attorney General of Manitoba v. Forest, [1979] 2 S.C.R. 1032, 1979 CanLII 242 (SCC)

Jones v. A.G. of New Brunswick, [1975] 2 S.C.R. 182, 1974 CanLII 164 (SCC)

Miller and Kyling v. R., [1970] S.C.R. 214, 1969 CanLII 116 (SCC)

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Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

Noiseux v. Belval, 1999 CanLII 13667 (QC CA)

Cross v. Teasdale, 1998 CanLII 13063 (QC CA) [judgment available in French only]

Pilote v. Corporation de l'hôpital Bellechasse de Montréal, 1994 CanLII 6005 (QC CA) [judgment available in French only]

R. v. Massia (C.A.), 1991 CanLII 7381 (ON CA)

A.-G. Quebec v. Collier, 1985 CanLII 3056 (QC CA)

Motard v. Canada (Procureure générale), 2016 QCCS 588 (CanLII)

Contenants industriels Ltée v. Québec (Commission des lésions professionnelles), [2002] J.Q. no 432 (QC CS) [hyperlink not available] [judgment available in French only]

R. v. Cotton, 1991 CarswellQue 1235, J.E. 91-735, EYB 1991-75882 (QC CS) [hyperlink not available] [judgment available in French only]

Alcan Aluminium Limitée v. R. (June 15 1995), Chicoutimi 150-27-001626-908 (QC CQ) [hyperlink not available] [judgment available in French only]

Walsh v. City of Montreal, 1980 CarswellQue 330, [1980] C.S. 1054, 55 C.C.C. (2d) 299, J.E. 80-879 (QC SC) [hyperlink not available]

Vaskaganish Band v. Blackned, 1986 CarswellQue 559, [1986] 3 C.N.L.R. 168 (QC PC) [hyperlink not available]

Kennedy et Danesco Inc., 1999 CanLII 24638 (QC CLP) [judgment available in French only]

See also:

Re Bachmann and St. James-Assiniboia School, 1984 CanLII 3036 (MB CA)

Ferncraft Leather inc. v. Roll, Harris, Hersh & Dainow, [1979] J.Q. no 268 (QC CA) [hyperlink not available] [judgment available in French only]

Deschambault v. R., 2010 QCCS 6851 (CanLII) [judgment available in French only]

Lavigne v. Quebec (Attorney General), 2000 CanLII 30033 (QC CS) [judgment available in French only]

Ville d'Outremont v. Habitations Mont-Pinacle Ltée (September 12, 2001), Montréal No. 001 1000-14751, juge Raiche [hyperlink not available]

Morand et al. v. P.G. du Québec (August 19, 1991), Montréal 500-05-003482-872 (QC CS) [hyperlink not available] [judgment available in French only]

Syndicat professionnel des infirmières et infirmiers de Chicoutimi v. Hôpital de Chicoutimi inc., [1989] J.Q. no 2409 (QC CS) [hyperlink not available] [judgment available in French only]

Développement des ressources humaines Canada v. Société canadienne des postes, 2006 QCCQ 16815 (CanLII) [judgment available in French only]

R. v. May, 2008 ABPC 59 (CanLII)

Allen Entrepreneur général inc. et Couturier, 2017 QCTAT 2949 (CanLII) [judgment available in French only]

Other Constitutional Laws

Rupert's Land and North-Western Territory Order (1870) U.K. (Reprinted in R.S.C. 1985, App. II. No. 9)

Schedule A

Annotations

Caron v. Alberta, [2015] 3 S.C.R. 511, 2015 SCC 56 (CanLII)

Manitoba Act, 1870, c. 3 (Reprinted in R.S.C. 1985, App. II, No. 8)

23. English and French Languages to be Used

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Caron v. Alberta, [2015] 3 S.C.R. 511, 2015 SCC 56 (CanLII)

Reference re Manitoba Language Rights, [1992] 1 S.C.R. 212, 1992 CanLII 115 (SCC)

Bilodeau v. A.G. (Man.), [1986] 1 S.C.R. 449, 1986 CanLII 64 (SCC)

Re Manitoba Language Rights, [1985] 1 S.C.R. 721, 1985 CanLII 33 (SCC)

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Attorney General of Manitoba v. Forest, [1979] 2 S.C.R. 1032, 1979 CanLII 242 (SCC)

R. v. Dickson (W.A.), 2013 MBCA 58 (CanLII)

R. v. Simard, [1995] O.J. No. 3989, 27 O.R. (3d) 116 (ON CA) [hyperlink not available]

Red River Forest Products Inc. v. Ferguson, 1992 CanLII 8557 (MB CA)

Waite v. Man. (Min. of Highways & Tpt.), 1987 CarswellMan 191, [1987] 4 W.W.R. 540, 2 W.C.B. (2d) 100, 47 Man. R. (2d) 247 (MB CA) [hyperlink not available]

Robin v. College de St-Boniface, 1984 CanLII 42 (MB CA)

Forest v. Manitoba (Court of Appeal), 1977 CanLII 1635 (MB CA)

Northwest Child and Family Services Agency v. E.L., 1992 CanLII 8505 (MB QB)

Bertrand v. Dussault and Lavoie (January 30, 1909), Saint-Boniface, Prud'homme J., reproduced in Re Forest and Court of Appeal of Manitoba 1977 CanLII 1635 (MB CA)

Pellant v. Hébert (March 9 1892), County Court of Saint-Boniface (Manitoba), Prud'homme J. unreported decision that was published in (1981) 12 R.G.D. 242 [hyperlink not available] [judgment available in French only]

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The objective of protecting official language minorities […] is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. […]

This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State [...]. It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation. [...]

Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada […].

- *R. v. Beaulac*, [1999] 1 S.C.R. 768 at paras 20, 24 and 25, 1999 CanLII 684 (SCC)

The protection of linguistic minorities is essential to our country. Dickson J. captured the spirit of the place of language rights in the Constitution in Société des Acadiens […]: "Linguistic duality has been a longstanding concern in our nation. Canada is a country with both French and English solidly embedded in its history." As stated by La Forest J. in R. v. Mercure […], "rights regarding the English and French languages . . . are basic to the continued viability of the nation."

As we have already mentioned, the [Canadian] Charter [of Rights and Freedoms] enhanced language rights. The entrenched guarantee of equality in s. 15 and the provisions requiring the respect and protection of aboriginal rights enhanced the protection of the rights of other minorities and the right to be free from discrimination. As the Supreme Court of Canada explained in the Secession Reference […], "There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights."

The principle of respect for and protection of minorities is a fundamental structural feature of the Canadian Constitution that both explains and transcends the minority rights that are specifically guaranteed in the constitutional text. This is an area where, as the Supreme Court of Canada explained in the Secession Reference […], "[a] superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading." This structural feature of the Constitution is reflected not only in the specific guarantees in favour of minorities. It infuses the entire text and, as we have explained, plays a vital role in shaping the content and contours of the Constitution's other structural features: federalism, constitutionalism and the rule of law, and democracy.

- *Lalonde v. Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA) at paras. 112-4

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I. Publication Structure

1. CONSTITUTIONAL LAWS
2. FEDERAL LAWS
3. BRITISH COLUMBIA
4. ALBERTA
5. SASKATCHEWAN
6. MANITOBA
7. ONTARIO
8. QUEBEC
9. NEW BRUNSWICK
10. NOVA SCOTIA
11. PRINCE EDWARD ISLAND
12. NEWFOUNDLAND AND LABRADOR
13. YUKON
14. NORTHWEST TERRITORIES
15. NUNAVUT

II. About the Authors

This update and expansion of the *Annotated Language Laws of Canada* is the work of the Official Languages Directorate of the Department of Justice Canada ("Department of Justice"). The following, current and former, members of the Directorate have contributed to this second edition of the publication at different times:

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From 1996 to 1998, the following members of the Official Languages Law Group (now the Law Team of the Official Languages Directorate) of the Department of Justice produced on the first edition of the publication (1998):

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III. Foreword

First Edition (1998)

The first edition of this publication was written and published in 1998 as part of the National Symposium on Canada's Official Languages. The event commemorated the tenth anniversary of the coming into force of the second *Official Languages Act* of Canada (1988) – the first federal *Official Languages Act* came into force in 1969 and was repealed in 1988 – and the twentieth anniversary of the enactment of the main linguistic provisions of the *Criminal Code* (section 530 – Language of Accused) in 1978.

The first edition, undertaken by the Department of Justice in co-operation with the Department of Canadian Heritage, contained not only the federal *Official Languages Act* and the *Criminal Code* but also almost all other Canadian language laws – i.e. constitutional, federal, provincial and territorial legislation (398 laws in total) relating, in whole or in part, to the use of language(s) with and within government institutions and in commercial or private activities.

For each of these laws, the publication reproduced relevant case law excerpts and references (331 in total). However, for administrative and financial reasons, the publication did not reproduce regulations and other delegated legislation adopted pursuant to these laws, with the exception of a few texts, nor did it reproduce provincial and territorial laws related to minority language education. However, section 23 of the *Canadian Charter of Rights and Freedoms*, which protects minority language educational rights, was reproduced and annotated with the relevant case law.

The objective of the publication was to enable jurists and non-jurists to achieve a better understanding of the legal principles applicable to language rights in Canada. It was published in a paper version only, and 2,000 copies were distributed free of charge.

Second Edition (2017)

This second edition of the *Annotated Language Laws of Canada* is published in 2017 in commemoration of the 150th anniversary of Canada and the first constitutional language rights in Canada, which were entrenched in section 133 of the *Constitution Act, 1867.*

Since the publication of the first edition in 1998, language rights in Canada have evolved considerably. Legislative and judicial developments, notably the Supreme Court of Canada's landmark decision in *R. v. Beaulac*, [1999] 1 S.C.R. 768 and the 2005 amendments to Part VII (Advancement of English and French) of the federal *Official Languages Act*, continue to shape the ways in which language rights are created, implemented and interpreted. To reflect this changing landscape, the Official Languages Directorate of the Department of Justice decided in 2015 to update and expand its scope.

To keep up with new or modified language laws, regulations and case law in Canada, this second edition is an evergreen reference tool that is available online and free of charge for all Canadians. Its content will be updated regularly based on the frequency of case law and legislative activity.

The objective of the publication remains the same as that of the first edition (1998): to enable jurists and non-jurists to achieve a better understanding of the legal principles applicable to language rights in Canada. Additionally, the authors have endeavoured to provide an exhaustive compilation of relevant

language legislation, regulations, and case law excerpts that encompasses not only official languages rights, but also aboriginal language rights and the rights of those who speak neither French nor English. It is important to mention that legislative texts and case law excerpts relating to official languages law inventoried in the publication have tripled since 1998.

The authors hope therefore that this publication, as a whole, will provide readers with a better understanding of the scope and magnitude of language rights issues. Going well beyond constitutional language rights entrenched in section 133 of the *Constitution Act, 1867*, section 23 of the *Manitoba Act, 1870*, and sections 16 to 23 of the *Canadian Charter of Rights and Freedoms*, this publication illustrates how language issues cut across a panoply of fields regulated by statutes or regulations: criminal law, administrative law, family law, labour and employment law, immigration and citizenship law, aboriginal law, commercial law, aviation law, natural resources, broadcasting, health care, and so on. May our readers enjoy exploring the innovative – and sometimes unexpected – manifestations of language rights issues rooted in everyday life.

IV. Acknowledgments

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Finally, the authors would like to thank WestlawNext©Canada, Thomson Reuters Canada Limited, as well as LexisNexis Canada, Inc. for their support to this project.

V. User Guide

Wherever possible, the authors have incorporated hyperlinks into the titles of judgments, laws and regulations, allowing the reader to consult the full version of a reference in CanLII. Such titles are reproduced in the style and form of the CanLII referencing system.

In terms of legislation, only the *current* version of a provision is featured in the publication. When significant legislative amendments have been made to a provision, annotations may be divided under separate headings. In *Chapter 2: Federal Laws*, for instance, the annotations for subsection 530(3) of the *Criminal Code* feature a separate heading for "Case Law Subsequent to the 2008 Amendments".

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> [34] Where both **UPSs [unsubsidized private schools]** and special authorizations issued by the province are concerned, the children are in fact receiving or have in fact received instruction in English and fall, in principle, within the categories of rights holders under s. 23(2). […]
>
> - ***Nguyen v. Quebec (Education, Recreation and Sports)***, [2009] 3 SCR 208, 2009 SCC 47 (CanLII)

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VII. Questions or Comments

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Chapter 1: Constitutional Laws

Constitution Act, 1982 – Charter Provisions

Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11

Part I – Canadian Charter of Rights and Freedoms

Guarantee of Rights and Freedoms (section 1)

1. Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[LAST UPDATE: APRIL 2017]

ANNOTATIONS FOR SECTION 1 DEALING WITH AN ALLEGED BREACH OF SUBSECTION 2(B) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

Ford v. Québec (Attorney General), [1988] 2 S.C.R. 712, 1988 CanLII 19 (SCC)

[73] The section 1 [of the *Canadian Charter*] and s. 9.1 [of the Quebec *Charter*] materials establish that the aim of the language policy underlying the *Charter of the French Language* was a serious and legitimate one. They indicate the concern about the survival of the French language and the perceived need for an adequate legislative response to the problem. Moreover, they indicate a rational connection between protecting the French language and assuring that the reality of Quebec society is communicated through the "*visage linguistique*". The section 1 and s. 9.1 materials do not, however, demonstrate that the requirement of the use of French only is either necessary for the achievement of the legislative objective or proportionate to it. That specific question is simply not addressed by the materials. Indeed, in his factum and oral argument the Attorney General of Quebec did not attempt to justify the requirement of the exclusive use of French. He concentrated on the reasons for the adoption of the *Charter of the French Language* and the earlier language legislation, which, as was noted above, were conceded by the respondents. The Attorney General of Quebec relied on what he referred to as the general democratic legitimacy of Quebec language policy without referring explicitly to the requirement of the exclusive use of French. In so far as proportionality is concerned, the Attorney General of Quebec referred to the American jurisprudence with respect to commercial speech, presumably as indicating the judicial deference that should be paid to the legislative choice of means to serve an admittedly legitimate legislative purpose, at least in the area of commercial expression. He did, however, refer in justification of the requirement of the exclusive use of French to the attenuation of this requirement reflected in ss. 59 to 62 of the *Charter of the French Language* and the regulations. He submitted that these exceptions to the requirement of the exclusive use of French indicate the concern for carefully designed measures and for interfering as little as possible with commercial expression. The qualifications of the requirement of the exclusive use of French in other provisions of the *Charter of the French Language* and the regulations do not make ss. 58 and 69 any less prohibitions of the use of any language other than French as applied to the respondents. The issue is whether any such prohibition is justified. In the opinion of this Court it has not been demonstrated that the prohibition of the use of any language other than French in ss. 58 and 69 of the *Charter of the French Language* is necessary to the defence and enhancement of the status of the French language in Quebec or that it is proportionate to that legislative purpose. Since the evidence put to us by the government showed that the predominance of the French language was not reflected in the "*visage linguistique*" of Quebec, the governmental response could well have been tailored to meet that

specific problem and to impair freedom of expression minimally. Thus, whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "*visage linguistique*" in Quebec and therefore justified under the Quebec *Charter* and the *Canadian Charter*, requiring the exclusive use of French has not been so justified. French could be required in addition to any other language or it could be required to have greater visibility than that accorded to other languages. Such measures would ensure that the "*visage linguistique*" reflected the demography of Quebec: the predominant language is French. This reality should be communicated to all citizens and non-citizens alike, irrespective of their mother tongue. But exclusivity for the French language has not survived the scrutiny of a proportionality test and does not reflect the reality of Quebec society. Accordingly, we are of the view that the limit imposed on freedom of expression by s. 58 of the *Charter of the French Language* respecting the exclusive use of French on public signs and posters and in commercial advertising is not justified under s. 9.1 of the Quebec *Charter*. In like measure, the limit imposed on freedom of expression by s. 69 of the *Charter of the French Language* respecting the exclusive use of the French version of a firm name is not justified under either s. 9.1 of the Quebec *Charter* or s. 1 of the *Canadian Charter*.

Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790, 1988 CanLII 20 (SCC)

[24] It remains to be considered whether the limit imposed on freedom of expression by the challenged provisions of the *Charter of the French Language*, which require the use of French while at the same time permitting the use of another language, is justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and s. 9.1 of the Quebec *Charter*. The section 1 and s. 9.1 materials submitted by the Attorney General of Quebec in justification of the challenged provisions were considered in Ford. For the reasons there stated, legislation requiring the exclusive as opposed to the predominant use of French is not justified under s. 1 or s. 9.1. Section 58 of the *Charter of the French Language*, as was shown in *Ford*, does require exclusive use of French and therefore does not survive s. 9.1 scrutiny. For the reasons given in that case the requirement of either joint or predominant use is justified under s. 9.1 and s. 1.

[…]

[27] The remaining sections, 52 and 57 [of the *Charter of the French Language*], if they are preserved, neither cause unintended results in the overall legislative scheme, nor conflict with s. 2(b) of the *Canadian Charter* or s. 3 of the Quebec *Charter* as interpreted in *Ford*. Their subsistence does not cause unintended results because they are not dependent on s. 58 for their meaning, as were ss. 59, 60 and 61. Similarly, their continued existence does not infringe either *Charter* because, while ss. 52 and 57 provide for the publication of such items as catalogues, brochures, order forms and invoices in French, they do not require the exclusive use of French. Section 89 makes it clear that where exclusive use of French is not explicitly required by the Act, the official language and another language may be used together. Following the reasons in *Ford*, permitting joint use passes the scrutiny required by s. 1 of the *Canadian Charter* and s. 9.1 of the Quebec *Charter*. The rational connection between protecting the French language and assuring that the reality of Quebec is communicated through the "*visage linguistique*" by requiring signs to be in French was there established. The same logic applies to communication through such items as brochures, catalogues, order forms and invoices, and the rational connection is again demonstrated. Sections 52 and 57 are therefore sustainable under s. 9.1 of the Quebec *Charter*, and s. 57 -- the only one of the two subject to the *Canadian Charter* -- is sustainable thereunder by virtue of s. 1. It now remains to discuss whether ss. 52 and 57 are contrary to s. 10 of the Quebec *Charter*, and whether s. 57 is contrary to ss. 15 and 1 of the *Canadian Charter*.

[…]

[31] This leaves the question as to whether s. 57 is contrary to ss. 15 and 1 of the *Canadian Charter*. Section 15 of the *Canadian Charter* was invoked by the appellant only before this Court, although the Attorney General of Quebec did agree that constitutional questions be stated and that s. 15 should be in issue. Nevertheless, we do not have the benefit of reasons from the Court of Appeal or from the Superior Court interpreting the application of s. 15 to s. 57. Nor has this Court yet rendered any judgment interpreting the meaning of s. 15. It is not necessary in this case to discuss whether s. 57 is *prima facie* in

breach of s. 15. We have already determined that it is *prima facie* in breach of s. 2(b). The only question that remains to be answered is whether the application of s. 1 would be any different if there were a *prima facie* breach of s. 15 in this case. More specifically, the question becomes whether the proportionality test laid down in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, and restated by Dickson C.J. in *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, would yield a different result in this case if the prima facie breach in issue were a breach of the rights guaranteed under s. 15. We have already determined that the requirement of joint use of French is rationally connected to the legislature's pressing and substantial concern to ensure that the "*visage linguistique*" of Quebec reflects the predominance of the French language. Does this requirement impair as little as possible the right to equality before and under the law and the right to equal protection and benefit of the law without discrimination? Is it designed not to trench on that right so severely that the legislative objective is nevertheless outweighed by the abridgment of rights? By ensuring that non-francophones can draw up application forms for employment, order forms, invoices, receipts and quittances in any language of their choice along with French, s. 57, read together with s. 89, creates, at most, a minimal impairment of equality rights. Although, as the appellant contended, the requirement of joint use of French might create an additional burden for non-francophone merchants and shopkeepers, there is nothing which impairs their ability to use another language equally. Thus, the conclusion we have reached with respect to the operation of s. 1 stands even if the prima facie breach of the *Canadian Charter* at issue is a breach of s. 15.

Galganov v. Russell (Township), 2012 ONCA 409 (CanLII)

[2] The by-law in issue, no. 49-2008, (the “By-law”) requires the content of any new exterior commercial signs to be in French and in English, although the actual name of a business may be unilingual.

[…]

[5] The issues on this appeal are: (1) whether Galganov has standing to apply to quash the By-law; (2) whether the By-law is *ultra vires* the Township’s authority; (3) if *intra vires*, (a) whether the By-law infringes freedom of expression as guaranteed by s. 2(b) of the *Charter* and, (b) if there is an infringement, whether the limit on freedom of expression is justified under s. 1 of the *Charter*.

[…]

[7] I would also dismiss Brisson’s appeal. I agree with the application judge’s conclusion that the Township had the authority to pass the By-law. Insofar as the issue of whether Brisson’s right to freedom of expression under s. 2(b) of the *Charter* is infringed, I am of the opinion that the application judge erred in concluding that there was no infringement. However, I conclude that this infringement is justified under s. 1 of the *Charter*.

[…]

[61] Having regard to the Supreme Court’s holdings in *Ford* and *Devine*, by compelling the use of both French and English on new exterior commercial signs, the By-law’s purpose infringes Brisson’s right to freedom of expression as guaranteed by s. 2(b) of the *Charter*. I must now consider whether such infringement is justified under s. 1 of the *Charter*.

[…]

(i) Whether the By-law serves an objective that is sufficiently important

[…]

[67] The evidence before the court, concerning the social well-being of the municipality, discussed under the authority to enact the By-law in (2)(b)(ii) above, establishes the importance of the purpose the By-law addresses – the preservation and enhancement of the equality of the status of the French language in the

Township, a municipality which has chosen to designate itself as bilingual under the *French Language Services Act* and to offer its services to residents in both languages. The objective of the By-law, the promotion of the equality of status of both French and English, the official languages of Canada, is a pressing and substantial one.

[68] Accordingly, the By-law meets the first criterion of s. 1 of the *Charter*.

(ii) Whether the By-law meets the proportionality test in the second criterion

[69] Having found that the By-law meets the first criterion, the next question is whether the means used are reasonable and demonstrably justified by applying the proportionality test in the second criterion.

[…]

[75] The application judge had before her evidence that French was, in 2006, the first language learned of 45.5 per cent of the Township's population, English was the first language learned of 50.3 per cent of that population and 4.2 per cent of the population had another first learned language. Although the total number of Francophones in the Township increased, the evidence of Dr. Castonguay, an expert who is a retired University of Ottawa mathematics professor and has published extensively on linguistic assimilation, is that the proportion of French speakers is decreasing because of linguistic assimilation. Overall, Dr. Breton, a sociologist whose focus is on linguistic and cultural minorities, and Dr. Choquette, an expert on the history of Franco-Ontarians, say that the French population in Ontario and elsewhere in Canada is decreasing. In order to preserve the French language, a linguistic environment is necessary. The material that the application judge did accept indicated a rational connection between protecting the equal status of the French language and assuring that the reality of Quebec society is communicated through the "*visage linguistique*" as discussed by the Supreme Court in *Ford*.

[…]

[77] Similarly, the joint use of French and English is rationally connected to the Township's concern of ensuring that its bilingual nature is reflected on exterior commercial signs.

[78] I also note that deference to the government's choice is also owed at the rational connection stage: see *Lavoie v. Canada*, 2002 SCC 23 (CanLII), [2002] 1 S.C.R. 769, at para. 59. Given the evidence of the symbolic importance of affirming the equal status of the two official languages, there is a rational connection between the By-law and the furtherance of the equal status of French and English as well as the preservation of French more generally.

[…]

[81] The process undertaken by the Township prior to the enactment of the By-law involved consultation with the public and consideration of other alternatives. It resulted in a By-law that applied only to new, exterior and commercial signs. In *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 (CanLII), [2005] 3 S.C.R. 141, at para. 94, the court observed:

> First, in dealing with social issues like this one, where interests and rights conflict, elected officials must be accorded a measure of latitude. The Court will not interfere simply because it can think of a better, less intrusive way to manage the problem. What is required is that the City establish that it has tailored the limit to the exigencies of the problem in a reasonable way.

[82] In tailoring the By-law as it did, the Township has established that it dealt with the problem in a way that minimally impairs freedom of expression.

[83] One must also recall the specific facts of this case. The argument that, Brisson's freedom of expression is more than minimally impaired by requiring the description of his services on his new French

only sign to also be in English, loses much of its force having regard to the following facts: the name of Brisson's business, "Independent Radiator Services", is unilingually English, and is entitled to remain so; for most of the 34 years Brisson has been in business the content of his sign has been in English only; and he continues to hand out business cards and invoices in English. Thus, in the past, Brisson has chosen to express himself only in English; he now chooses to express himself only in French on his exterior sign while continuing to employ English in other aspects of his business. To require him to employ English on his sign in addition to French is a minimal impairment of his right to freedom of expression.

[84] Having passed the minimum impairment stage, the final question asks whether the infringing effects of the By-law outweigh the importance of the objective sought. Brisson has not advanced any arguments on this aspect of the Oakes test. In light of the importance of the protection and promotion of the equal status of the French language, I would hold that the benefits of the By-law are proportional to any deleterious effect on freedom of expression or inconvenience suffered.

[85] For these reasons, although the By-law is a breach of Brisson's rights under s. 2(b) of the *Charter*, it is a breach that is demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

Entreprises W.F.H. Ltée v. Québec (Attorney General), 2001 CanLII 17598 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[45] In 1988, the Supreme Court declared in *obiter*, that is, even though it was not necessary to do so to support its decision, that requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "*visage linguistique*" in Quebec and therefore justified under the Quebec *Charter* and the *Canadian Charter*. The Supreme Court went so far as to specifically say, in *Ford*, that French could be required in addition to any other language or could be required to have greater visibility than that accorded to other languages.

[46] I am of the opinion that s. 58, in its current form, simply repeats the guidelines laid down by the Supreme Court. I am also of the opinion that, in light of the evidence submitted to the Supreme Court in 1988, a provision such as the current s. 58 would have withstood a challenge based on the right to freedom of expression and the right to equality and would not have been declared of no force or effect.

[47] It is readily apparent that, for the same answer to apply today, given that the Attorney General of Quebec has chosen not to adduce evidence to establish that the provision is justified under s. 1 of the *Canadian Charter* and s. 9.1 of the Quebec *Charter of human rights and freedoms*, we must be able to conclude that the *obiter dictum* from *Ford* has the same force as if it were part of the *ratio decidendi* and that the burden of proof is therefore on the appellant to prove the absence of justification.

[...]

[58] I find in this case that the Supreme Court's *obiter dictum* in *Ford* carries the same weight as if it were part of the *ratio decidendi* and is therefore binding on the Court of Appeal. Indeed, it is clear from an analysis of *Ford* and *Devine* that the Supreme Court weighed the impact of its conclusions on the sensitive issue of the language of signage in Quebec and wanted to resolve it. The formulation of the marked predominance rule was certainly not just an isolated phrase whose repercussions would not have been foreseen.

[...]

[61] The burden was therefore on the appellant to establish that the situation revealed by the documents considered by the Supreme Court in 1988 had changed to the point that the measure could no longer be justified in 1999. It did present some evidence, but the judge of the Superior Court did not accept it. It declined the invitation to give full evidence, arguing that the burden of proof remained on the shoulders of

the Attorney General. It wanted to present evidence before the Court of Appeal, but leave was refused for the reason already given. This is the framework in which the appellant's grievances must be considered.

[62] It is appropriate to bear in mind the case that must be met to establish that a limit is reasonable and can be demonstrably justified in a free and democratic society.

[63] To this end, *Oakes*, above, established at pp. 138 and 139 that the objective to be served by the limiting measure must be of sufficient importance to warrant overriding a constitutionally protected right or freedom and that the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves "a form of proportionality test" involving three components:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

[...]

[65] Since the appellant has the burden of proof in this case, it had to establish that the measure is no longer justified within the meaning of s. 1 of the *Canadian Charter* and s. 9.1 of the Quebec *Charter*.

[66] I have already stated that the Supreme Court concluded in *Ford* that the evidence showed that the aim of the language policy underlying the *Charter of the French language* was a serious and legitimate one, and that it indicated a rational connection between protecting the French language and assuring that the reality of Quebec society is communicated through the *visage linguistique*.

[...]

[68] I see no merit in the appellant's argument that the Supreme Court never submitted the general objective of the *Charter of the French language* to the proportionality test set out in *Oakes*. On the contrary, the Supreme Court's *obiter* in *Ford* proposes a clause that meets all the requirements of *Oakes* and *Sharpe*.

[...]

[88] I share the opinion of the Superior Court judge that *stare decisis* applies to *Devine*, and he properly directed himself in law in concluding that, assuming that s. 58 in its current form infringes subsection 15(1) of the *Canadian Charter* and s. 10 of the Quebec *Charter*, the infringement is justified under s. 1 and s. 9.1.

[...]

[117] I am of the opinion that s. 58 of the *Charter of the French language*, enacted by the Quebec government in accordance with the principles set out by the Supreme Court in *Ford* and *Devine*, is a valid provision, and that the appellant has not presented any relevant evidence that would have allowed the Superior Court to revise its conclusions regarding the language of public signage and commercial advertising in Quebec.

156158 Canada inc. v. Québec (Attorney General), 2016 QCCS 1676 (CanLII)

[43] The Appellants then argued that the trial judge erred "when he failed to presumptively follow the entire *obiter dictum* of the Supreme Court in *Ford*", the entire *obiter dictum* being that outside signs in French and another language – markedly predominant or of equal size – would satisfy the *Oakes* test.

[44] Appellants suggested that an “equal size” provision rather than a “markedly predominant size” provision would satisfy the minimum impairment test of Section 1 of the *Canadian Charter*.

[45] The Supreme Court of Canada said in *Ford* and *Devine* that both types of provisions satisfy the *Oakes* test. It is up to the legislator, not the Appellants, to decide between two solutions that are equally constitutional. For commercial advertising, the legislator chose the “markedly predominant” criteria (Section 58 of the *CFL* [*Charter of the French Language*]); for inscriptions on a product, catalogues and other documentation, he chose to allow for the use of two languages, not requiring that one be more important than the other (Sections 51, 52 and 89 of the *CFL*).

[…]

[66] The trial judge first summarized the Supreme Court of Canada’s analysis concerning equality rights in the *Ford* and *Devine* decisions.

[67] In *Ford*, the Supreme Court, having decided the legislation constituted a violation of freedom of expression, did not need to address the equality issue.

[68] In *Devine*, on the contrary, having concluded the legislation constituted a reasonable limit to freedom of expression, the Supreme Court had to address the equality issue. It held that the Section 1 analysis was equally applicable to Section 15 of the *Canadian Charter*, i.e. if the legislation was a reasonable limit to the freedom of expression, it was also a reasonable limit to the equality provisions. As for Section 10 of the Québec *Charter*, the Supreme Court decided that the equality right had to be linked to another right or freedom, in this case, the freedom of expression. Since the Supreme Court had already concluded the limitation of the freedom of expression was justifiable, the same conclusion followed, regarding the right to equality.

[69] In the present case, applying the same principle and after having concluded that the violation of the freedom of expression was justifiable under Section 1 of the *Canadian Charter* and under Sections 3 and 9.1 of the Québec *Charter*, the trial judge dismissed the equality challenge.

[…]

[77] This Court found no error in the trial judge’s extensive analysis of the law and in the application of the principles of law to the facts of the case. There is nothing in the *CFL*, whether one analyses the purpose or the effect of the provisions – that demeans the human dignity of the English speaking population. In any case, even if there was a violation of the equality rights, it would be justified under Section 1 of the *Canadian Charter* as already decided in the freedom of expression discussion.

N.B. – This judgment is currently under appeal before the Quebec Court of Appeal. See also the trial judgment: *Quebec (Attorney General) c. 156158 Canada Inc. (Boulangerie Maxie's)*, 2015 QCCQ 354 (CanLII).

ANNOTATIONS FOR SECTION 1 DEALING WITH AN ALLEGED BREACH OF SECTION 3 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

Reference re the Final Report of the Electoral Boundaries Commission, 2017 NSCA 10 (CanLII)

[1] This is a Reference. The Court is asked (1) whether the abolition, in 2012, of the former provincial electoral ridings of Clare, Argyle and Richmond infringed s. 3 of the *Canadian Charter of Rights and Freedoms* and, if so, (2) whether the infringement is justified under s. 1 of the *Charter*.

[…]

[133] Section 3 requires that electoral boundaries reflect effective representation. The determination involves a balance of voter parity and countervailing criteria. The applicable countervailing criteria vary with the circumstances. For Clare, Argyle and Richmond, criteria that were noted in *Carter* and are reasonably worthy of consideration, include minority representation and cultural identity.

[…]

[135] We do not state that s. 3 of the *Charter* requires that there be protected ridings in Clare, Argyle and Richmond. Rather, under s. 3, the body that is authorized by law to craft the electoral boundaries must be allowed to balance the constitutional criteria as set out by the majority's reasons in *Carter*, and to express its view on the matter.

[136] The Attorney General's intervention on June 14, 2012 prevented the Commission from performing the balance, and from expressing its authentic view of effective representation for electors in Clare, Argyle and Richmond. Hence the Attorney General's intervention violated the precepts of s. 3 of the *Charter*. The violation (1) led directly to the Final Report's recommendation to eliminate the protected ridings which, in turn, (2) led directly to their abolition in (to quote the wording of Reference Question # 1) "Section 1 of Chapter 61 of the Acts of Nova Scotia 2012 … by which provisions the recommendations tendered by the Electoral Boundaries Commission by its Final Report … to the House of Assembly were enacted".

[…]

8. Second Question: Is the Infringement Justified under s. 1?

[138] There were no submissions whether the *Charter* infringement was "prescribed by law" under s. 1. Given our conclusion on proportionality, expressed below, it is unnecessary to comment on that point.

[…]

[145] In the Court's view, the legislative objective was to implement *Carter*'s constitutional principles of effective representation in Nova Scotia's circumstances, with the assistance of an independent commission as contemplated by s. 5 of the *House of Assembly Act*. This synopsizes the view expressed in the 1992 Commission's Report that led to the enactment of s. 5 (above, para. 27). This is a pressing and substantial objective.

[146] Next is *Oakes's* second branch – proportionality. We need only address the first and second tests: rational connection and minimal impairment.

[…]

[152] The point is: under s. 5 of the *House of Assembly Act*, the majority Government always controls the content of the eventual enactment that fixes electoral boundaries. Despite anything in the Commission's reports, by following s. 5 and House legislative procedures, the majority Government could enact the abolition of protected ridings in Clare, Argyle and Richmond (above, paras. 92-99). That is the process which is rationally connected to the legislative objective.

[153] The legislative objective does not, on the other hand, contemplate that the Attorney General may derail the statutory process by prohibiting the Commission from expressing its view of effective representation and by "voiding" a Report that does so.

[154] There is no rational connection between the *Charter* infringement and the legislative objective.

(c) Proportionality – Minimal Impairment

[…]

[159] The Attorney General's "voiding" of the Commission's Interim Report did not minimally impair the *Charter* right.

(d) Summary – Question # 2

[160] For each of those two reasons, the infringement fails *Oakes*'s proportionality test. It is unnecessary to consider the third aspect of proportionality.

[161] Reference Question # 2 asks whether any infringement of s. 3 is justified under s. 1. We answer – No.

Raîche v. Canada (Attorney General), [2005] 1 F.C.R. 93, 2004 FC 679 (CanLII)

[48] The Commission in fact reached the same conclusion. It agreed that there was a community of interest in Acadie-Bathurst, and it was even aware that parity of voting power is not the only consideration in readjusting electoral boundaries. However, it decided that a variance of -21 percent was simply too large, and that despite the existence of a community of interest in Acadie-Bathurst it was necessary to reduce Miramichi's variance from the electoral quota. It therefore transferred the parish of Allardville and part of the parishes of Saumarez and Bathurst to the electoral district of Miramichi.

[49] Because the primary consideration in determining whether a population has effective representation is voter parity, and that a commission does not contravene section 3 of the *Charter* unless "reasonable persons applying the appropriate principles . . . could not have set the electoral boundaries as they exist", the Court finds that the Commission did not contravene section 3 of the *Charter* when it decided to transfer the parishes from Acadie-Bathurst to Miramichi.

[50] That decision is reasonable, and accordingly the Commission did not contravene section 3 of the *Charter*.

Section 1 of the *Charter*

[51] However, if the Court is in error and the Commission did contravene section 3 of the *Charter*, the Court does not believe that the decision can be safeguarded by section 1 of the *Charter*.

[52] The Supreme Court of Canada stated the test for determining whether a *Charter* violation is safeguarded by section 1 as follows:

> The government first must demonstrate that the objective of the legislation is sufficiently pressing and substantial to warrant violating a *Charter* right. The objectives must be neither "trivial" nor "discordant with the principles integral to a free and democratic society": *Oakes*, supra, at p. 138. Once this has been established, the government must then demonstrate that the infringement is proportionate, namely, that the legislation is rationally connected to the objective, that it minimally impairs the *Charter* right in question, and that the salutary benefits of the legislation outweigh the deleterious effects.

[53] Under the test in *Oakes*, the Court must weigh the rights of the individual and the needs of society. Evidence regarding the needs of society is therefore needed. The respondent, who has the burden of proof offered nothing on this point. Accordingly, it is impossible to do a proper section 1 analysis, and the respondent has failed to show that the violation was justified.

ANNOTATIONS FOR SECTION 1 DEALING WITH AN ALLEGED BREACH OF SECTION 15 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, 1997 CanLII 327 (SCC)

[84] I come now to possible justification under s. 1 of the *Charter*, which reads:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In order to justify a limitation of a *Charter* right, the government must establish that the limit is "prescribed by law" and is "reasonable" in a "free and democratic society". In *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, this Court set out the analytical framework for determining whether a law constitutes a reasonable limit on a *Charter* right. A succinct restatement of that framework can be found in the reasons of Iacobucci J. in *Egan*, at para. 182:

> First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the Charter guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

It is not necessary to consider each of these elements in this case. Assuming without deciding that the decision not to fund medical interpretation services for the deaf constitutes a limit "prescribed by law", that the objective of this decision -- controlling health care expenditures -- is "pressing and substantial", and that the decision is rationally connected to the objective, I find that it does not constitute a minimum impairment of s. 15(1).

[85] This Court has recently confirmed that the application of the *Oakes* test requires close attention to the context in which the impugned legislation operates; see *Ross v. New Brunswick School District No. 15*, 1996 CanLII 237 (SCC), [1996] 1 S.C.R. 825, at para. 78. The Court has also held that where the legislation under consideration involves the balancing of competing interests and matters of social policy, the *Oakes* test should be applied flexibly, and not formally or mechanistically; see *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, at p. 737, *McKinney*, supra, *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at pp. 999-1000, *Cotroni*, supra, at p. 1489, *Committee for the Commonwealth of Canada v. Canada,* 1991 CanLII 119 (SCC), [1991] 1 S.C.R. 139, at p. 222 (per L'Heureux-Dubé J.), *Egan*, supra, at para. 29 (per La Forest J.) and at paras. 105-106 (per Sopinka J.), and *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 63 (per La Forest J.) and at paras. 127-138 (per McLachlin J.). It is also clear that while financial considerations alone may not justify *Charter* infringements (*Schachter*, supra, at p. 709), governments must be afforded wide latitude to determine the proper distribution of resources in society; see *McKinney*, at p. 288, and *Egan*, at para. 104 (per Sopinka J.). This is especially true where Parliament, in providing specific social benefits, has to choose between disadvantaged groups; see *Egan*, at paras. 105-110 (per Sopinka J.). On the other hand, members of this Court have suggested that deference should not be accorded to the legislature merely because an issue is a "social" one or because a need for governmental "incrementalism" is shown; see *Egan*, at para. 97 (per L'Heureux-Dubé J.) and at paras. 215-16 (per Iacobucci J.). In the present case, the failure to provide sign language interpreters would fail the minimal impairment branch of the *Oakes* test under a deferential approach. It is, therefore, unnecessary to decide whether in this "social benefits" context, where the choice is between the needs of the general population and those of a disadvantaged group, a deferential approach should be adopted.

[86] At the same time, the leeway to be granted to the state is not infinite. Governments must demonstrate that their actions infringe the rights in question no more than is reasonably necessary to achieve their goals. Thus, I stated the following for the Court in *Tétreault-Gadoury*, *supra*, at p. 44:

> It should go without saying, however, that the deference that will be accorded to the government when legislating in these matters does not give them an unrestricted licence to disregard an individual's Charter rights. Where the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down.

[87] In the present case, the government has manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights. As previously noted, the estimated cost of providing sign language interpretation for the whole of British Columbia was only $150,000, or approximately 0.0025 percent of the provincial health care budget at the time. This figure was based on an extrapolation from the services then being provided by the Western Institute for the Deaf and Hard of Hearing in the Lower Mainland area. Although there was little evidence presented of the precise content of this service, it was not suggested that its extension throughout the province would not have fulfilled the requirements of s. 15(1). In these circumstances, the refusal to expend such a relatively insignificant sum to continue and extend the service cannot possibly constitute a minimum impairment of the appellants' constitutional rights.

[88] The respondents argue, however, that the situation of deaf persons cannot be meaningfully distinguished from that of other non-official language speakers. If they are compelled to provide interpreters for the former, they submit, they will also have to do so for the latter, thereby increasing the expense of the program dramatically and placing severe strain on the fiscal sustainability of the health care system. In this context, they contend, it was reasonable for the government to conclude that they impaired the rights of deaf persons as little as possible.

[89] This argument, in my view, is purely speculative. It is by no means clear that deaf persons and non-official language speakers are in a similar position, either in terms of their constitutional status or their practical access to adequate health care. From the perspective of a patient, there is no real difference between sign language and oral language if there is no ability to communicate with a physician. But from the perspective of the state's obligations, there may very well be. In the present case, the only relevant constitutional provisions are ss. 15(1) and 1 of the *Charter*. In a case involving a claim for medical interpretation for hearing patients, in contrast, the analysis would be more complicated. In such a case, it would be necessary to consider the interaction between s. 15(1) and other provisions of the Constitution, specifically those related to the language obligations of governments. Moreover, the respondents have presented no evidence as to the potential scope or cost of an oral language medical interpretation program. It is possible that the nature and extent of any reasonable accommodation required for hearing persons under s. 1 would differ from that required for deaf persons. Thus, any claim for the provision of such a program, whether based on national origin or language as an analogous ground, would proceed on markedly different constitutional terrain than a claim grounded on disability.

[90] Further, it is apparent that deaf persons stand in a special position in terms of their ability to communicate with the mainstream population. As I have discussed, it is extremely difficult for many deaf persons to acquire a high level of proficiency in oral languages, whether in spoken or written form. Moreover, it is apparent that the deaf have particular difficulties in obtaining the service of persons in the community who understand sign language. There is no evidentiary basis from which to assess whether non-official language speakers stand in a similar position. So, without wishing to minimize the difficulties faced by hearing persons whose native tongues are neither English nor French, it is by no means clear that the communications barriers they face are analogous to those encountered by deaf persons. As a result, the success of a potential s. 15(1) claim by members of the latter group cannot be predicted in advance. The possibility that such a claim might be made, therefore, cannot justify the infringement of the constitutional rights of the deaf.

[…]

[94] In summary, I am of the view that the failure to fund sign language interpretation is not a "minimal impairment" of the s. 15(1) rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a "reasonable accommodation" of the appellants' disability. In the language of this Courts' human rights jurisprudence, it has not accommodated the appellants' needs to the point of "undue hardship"; see *Simpsons-Sears*, *supra*, and *Central Alberta Dairy Pool*, *supra*.

Entreprises W.F.H. Ltée v. Québec (Attorney General), 2001 CanLII 17598 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[45] In 1988, the Supreme Court declared in *obiter*, that is, even though it was not necessary to do so to support its decision, that requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "*visage linguistique*" in Quebec and therefore justified under the Quebec *Charter* and the *Canadian Charter*. The Supreme Court went so far as to specifically say, in *Ford*, that French could be required in addition to any other language or could be required to have greater visibility than that accorded to other languages.

[46] I am of the opinion that s. 58, in its current form, simply repeats the guidelines laid down by the Supreme Court. I am also of the opinion that, in light of the evidence submitted to the Supreme Court in 1988, a provision such as the current s. 58 would have withstood a challenge based on the right to freedom of expression and the right to equality and would not have been declared of no force or effect.

[47] It is readily apparent that, for the same answer to apply today, given that the Attorney General of Quebec has chosen not to adduce evidence to establish that the provision is justified under s. 1 of the *Canadian Charter* and s. 9.1 of the Quebec *Charter of human rights and freedoms*, we must be able to conclude that the *obiter dictum* from *Ford* has the same force as if it were part of the *ratio decidendi* and that the burden of proof is therefore on the appellant to prove the absence of justification.

[. . .]

[58] I find in this case that the Supreme Court's *obiter dictum* in *Ford* carries the same weight as if it were part of the *ratio decidendi* and is therefore binding on the Court of Appeal. Indeed, it is clear from an analysis of *Ford* and *Devine* that the Supreme Court weighed the impact of its conclusions on the sensitive issue of the language of signage in Quebec and wanted to resolve it. The formulation of the marked predominance rule was certainly not just an isolated phrase whose repercussions would not have been foreseen.

[. . .]

[61] The burden was therefore on the appellant to establish that the situation revealed by the documents considered by the Supreme Court in 1988 had changed to the point that the measure could no longer be justified in 1999. It did present some evidence, but the judge of the Superior Court did not accept it. It declined the invitation to give full evidence, arguing that the burden of proof remained on the shoulders of the Attorney General. It wanted to present evidence before the Court of Appeal, but leave was refused for the reason already given. This is the framework in which the appellant's grievances must be considered.

[62] It is appropriate to bear in mind the case that must be met to establish that a limit is reasonable and can be demonstrably justified in a free and democratic society.

[63] To this end, *Oakes*, above, established at pp. 138 and 139 that the objective to be served by the limiting measure must be of sufficient importance to warrant overriding a constitutionally protected right or freedom and that the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves "a form of proportionality test" involving three components:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

[. . .]

[65] Since the appellant has the burden of proof in this case, it had to establish that the measure is no longer justified within the meaning of s. 1 of the *Canadian Charter* and s. 9.1 of the Quebec *Charter*.

[66] I have already stated that the Supreme Court concluded in *Ford* that the evidence showed that the aim of the language policy underlying the *Charter of the French language* was a serious and legitimate one, and that it indicated a rational connection between protecting the French language and assuring that the reality of Quebec society is communicated through the *visage linguistique*.

[. . .]

[68] I see no merit in the appellant's argument that the Supreme Court never submitted the general objective of the *Charter of the French language* to the proportionality test set out in *Oakes*. On the contrary, the Supreme Court's *obiter* in *Ford* proposes a clause that meets all the requirements of *Oakes* and *Sharpe*.

[. . .]

[88] I share the opinion of the Superior Court judge that *stare decisis* applies to *Devine*, and he properly directed himself in law in concluding that, assuming that s. 58 in its current form infringes subsection 15(1) of the *Canadian Charter* and s. 10 of the Quebec *Charter*, the infringement is justified under s. 1 and s. 9.1.

[. . .]

[117] I am of the opinion that s. 58 of the *Charter of the French language*, enacted by the Quebec government in accordance with the principles set out by the Supreme Court in *Ford* and *Devine*, is a valid provision, and that the appellant has not presented any relevant evidence that would have allowed the Superior Court to revise its conclusions regarding the language of public signage and commercial advertising in Quebec.

Paquette v. Canada, 1987 ABCA 228 (CanLII)

[1] The Attorney General of Canada, prosecuting the accused under the *Narcotic Control Act*, and the Attorney General of Alberta who intervened in the proceedings, both appeal a decision holding that the unproclaimed provisions of Part XIV.1 of the *Criminal Code* permitting trials in either official language are in force in Alberta. The issue is whether the failure to proclaim the section in Alberta violates s.15 of the *Charter of Rights and Freedoms*. […]

[33] The main focus of debate surrounds the questions of whether the legislation roust wrongly discriminate, (as distinct from the more neutral term of differentiate), and at what point the defender of the legislation is driven to s.1.

[34] The discrimination here is a geographical one. This accused would enjoy the rights of Pt. XIV.1 in many parts of Canada, he is denied equality because of the province in which he is charged.

[…]

[40] An extensive review of authorities is found in the judgment of McLachlin, J.A. in *Andrews v. The Law Society of British Columbia* 1986 CanLII 1287 (BC CA), [1986] 4 W.W.R. 242 (hoard (sic) by the Supreme Court of Canada in June). She proposes a test at p.253:

> The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals advernely affected and giving due weight to the right of the legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.

Other useful discussions are found in the judgments of Spencer, J. in the *B.C. and Yukon Territory Building and Construction Trades Council et al v. A.G. of B.C. and Expo '86 Corporation et al* (1986), 1985 CanLII 596 (BC SC), 22 D.L.R. (4th) 540 Strayer, J. of the Federal Court, in *Smith, Kline and French Laboratories v. A.G. Canada* (1986), 1985 CanLII 3151 (FC), 24 D.L.R. (4th) 321 and Hugessen, J. in the appeal of that case. At p.369 Strayer, J. says:

> It will be seen that this test is twofold: the ends must be among those broadly legitimate for a government, and the means must be rationally related to the achievement of those ends.

Hugessen. J., for the Federal Court of Appeal rejects that test as not allowing adequate scope for s.1. He does not propose a single test although he says "At the most basic level, the equality rights guaranteed by s.15 can only be the right of those similarly situated to receive similar treatment" (at p.590). He discusses permissible and impermissible grounds for categorization, impermissible requiring resort to s.1 for justification. In *Reference Re French in Criminal Proceedings*, 1987 CanLII 204 (SK CA), [1987] 5 W.W.R. 577, the majority of the Saskatchewan Court of Appeal concludes that any inequality requires justification under s.1. That approach does not square with our conclusion in *Mahe*. I have also considered Gold, *The Principled Approach to Equality Rights: a Preliminary Inquiry* (1982), 4 *Supreme Court L. Rev.* 131, particularly at 147 and Wakeling and Chipeur, *An Analysis of Section 15 of the Charter after the First Two Years*, 1987, 25 *Alta. L. Rev.* 407.

[…]

[49] The Saskatchewan Court of Appeal has also delivered its judgment in Reference Re French in Criminal Proceedings. The majority appears to approve the decision of Halvorson, J. in Re Tremblay in putting the section into effect. The majority concluded that s. 15 applied and that the Crown failed to meet the onus imposed by s.1. It suggests a possible remedy of staying proceedings until the legislation is implemented. The majority observes that equality is essentially comparative, likes are not being treated alike, that those similarly situate are not similarly treated. I not only would not use that test, but could not find that the accused seeking a French trial in Quebec or Ontario is similarly situate i.o the accused seeking it in Alberta. To assume so it to deny the propriety of staged implementation. The majority acknowledges that the inequality arises from the failure to proclaim the section and does not fault staged implementation. It finds French trials can be conducted in the Superior court and that the deficiency in the provincial courts could be appointed from the bars of Saskatchewan or other provinces as permanent or acting judges. I pause to note that I would be hesitant to suggest the appointment of an acting judge as a satisfactory step in Alberta. It then concludes the failure to act, can no longer be justified under s.1. I agree that the executive is under a duty to comply with the *Charier* (sic), but I do not agree that it has a s.1 onus, nor, more importantly, that its failure can be presumed from short term inaction. The remedy there proposed, approving what Halvorson, J. did, simply denied the Lieutenant Governor in Council an opportunity to act and effectively denied the wisdom of Parliament in providing that time. In Alberta such action is legislative because implementation requires an overriding of the *Jury Act*.

Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings, 1987 CanLII 204 (SK CA)

[64] On the whole, therefore, the better view of the matter in our opinion is this: Parliament and the legislatures undoubtedly, by virtue of s. 16(3), possess the power to move official language rights beyond those entrenched in the *Charter*, but neither, when doing so, is relieved by s. 16(3) of having to respect the fundamental rights and freedoms found elsewhere in the *Charter*. Such relief as may be available to them under ss. 1 and 33 is, of course, another matter altogether, although one might add that the existence of these sections serves to remove some of the obstacles to official language advancement which, having regard particularly to s. 15, might otherwise be encountered.

[…]

[93] In our respectful view, this case presents another example of how the construction of companion sections of the *Bill of Rights* and the *Charter* can differ markedly on account of the presence in the *Charter* of s. 1. The difference in this instance is that those considerations, having to do with drawing the line between justified and unjustified inequalities, which in *Burnshine*, *Prata* and *MacKay* bore so heavily upon the interpretation of the equality section of the *Bill of Rights*, now fall for the most part to be addressed in the context of s. 1 of the *Charter*. The *Bill of Rights*, of course, contained no equivalent of s. 1 of the *Charter*.

[…]

[97] However, it is our view that the determination of whether an inequality in the law of the nature contemplated by s. 15(1) is justified or unjustified, having regard for the nature, object and effect of, and perhaps the inspiration for, the act giving rise to it, falls to be made in the context of s. 1 rather than s. 15(1).

[…]

3. The impugned provision: its nature and purpose

[121] The objective of the *Criminal Law Amendment Act* includes providing accused persons whose language is French with the option, exercisable everywhere in Canada, of being tried in their own language.

[…]

[127] Having regard for the nature and purpose of the impugned law, and for the tests of *Oakes*, we have no difficulty in concluding that the law, in both purpose and effect, was reasonable and amply justifiable both at its inception — in the light of s. 1(b) of the *Canadian Bill of Rights* — and on the coming into force of s. 15 of the *Charter*. And we are satisfied that it continues to enjoy the protection of s. 1 of the *Charter*. The objective of the law is sufficiently important in our opinion to warrant the override of s. 15, and the means chosen to achieve that objective — empowering the executive to proclaim on a province by province basis — meet each of the components of the proportionality test of *Oakes*.

[…]

[166] As noted earlier, a transitional provision exists only as a bridge between an old and a new legal order. Once the ground for the new order exists, failure by the executive to make the crossing, so to speak, becomes increasingly inexplicable and difficult to justify — and the longer the failure the greater the difficulty. This is especially so if the criminal law is involved. It is in the light of this, particularly, and the facts of the matter, that the case for justification, in relation to the failure to proclaim in Saskatchewan, encounters difficulty. Indeed, in our respectful opinion, the failure of the executive to act, the effect of which is to continue the limitation on the constitutional right of an accused in Saskatchewan to equality in the law, can no longer be justified under s. 1.

[…]

[168] The failure of the executive to proclaim in Saskatchewan [s. 530 of the *Criminal Code*], having regard for the circumstances which prevail in the Province, is out of tune with the objective--indeed it stands in the way of attaining the objective in the Province--and, in the language of *Oakes* can no longer be regarded as rationally connected to the objective. Nor, it might be added, does the executive action at issue impair "as little as possible" the equality rights of an accused in Saskatchewan whose language is French. Thus the Crown has failed, in our respectful opinion, to meet the onus upon it proof showing that the limitation in question is both reasonable and demonstrably justified.

156158 Canada inc. v. Québec (Attorney General), 2016 QCCS 1676 (CanLII)

[43] The Appellants then argued that the trial judge erred "when he failed to presumptively follow the entire *obiter dictum* of the Supreme Court in *Ford*", the entire *obiter dictum* being that outside signs in French and another language – markedly predominant or of equal size – would satisfy the *Oakes* test.

[44] Appellants suggested that an "equal size" provision rather than a "markedly predominant size" provision would satisfy the minimum impairment test of Section 1 of the *Canadian Charter*.

[45] The Supreme Court of Canada said in *Ford* and *Devine* that both types of provisions satisfy the *Oakes* test. It is up to the legislator, not the Appellants, to decide between two solutions that are equally constitutional. For commercial advertising, the legislator chose the "markedly predominant" criteria (Section 58 of the *CFL* [*Charter of the French Language*]); for inscriptions on a product, catalogues and other documentation, he chose to allow for the use of two languages, not requiring that one be more important than the other (Sections 51, 52 and 89 of the *CFL*).

[…]

[66] The trial judge first summarized the Supreme Court of Canada's analysis concerning equality rights in the *Ford* and *Devine* decisions.

[67] In *Ford*, the Supreme Court, having decided the legislation constituted a violation of freedom of expression, did not need to address the equality issue.

[68] In *Devine*, on the contrary, having concluded the legislation constituted a reasonable limit to freedom of expression, the Supreme Court had to address the equality issue. It held that the Section 1 analysis was equally applicable to Section 15 of the *Canadian Charter*, i.e. if the legislation was a reasonable limit to the freedom of expression, it was also a reasonable limit to the equality provisions. As for Section 10 of the Québec *Charter*, the Supreme Court decided that the equality right had to be linked to another right or freedom, in this case, the freedom of expression. Since the Supreme Court had already concluded the limitation of the freedom of expression was justifiable, the same conclusion followed, regarding the right to equality.

[69] In the present case, applying the same principle and after having concluded that the violation of the freedom of expression was justifiable under Section 1 of the *Canadian Charter* and under Sections 3 and 9.1 of the Québec *Charter*, the trial judge dismissed the equality challenge.

[…]

[77] This Court found no error in the trial judge's extensive analysis of the law and in the application of the principles of law to the facts of the case. There is nothing in the CFL, whether one analyses the purpose or the effect of the provisions – that demeans the human dignity of the English speaking population. In any case, even if there was a violation of the equality rights, it would be justified under Section 1 of the Canadian Charter as already decided in the freedom of expression discussion.

N.B. – This judgment is currently under appeal before the Quebec Court of Appeal. See also the trial judgment: Quebec (Attorney General) c. 156158 Canada Inc. (Boulangerie Maxie's), 2015 QCCQ 354 (CanLII).

ANNOTATIONS FOR SECTION 1 DEALING WITH AN ALLEGED BREACH OF SUBSECTION 18(2) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[118] I have found that subsection 18(2) of the *Charter* imposes on New Brunswick municipalities the obligation to enact, print and publish their by-laws in the two official languages. I have also found that the City of Moncton's failure to enact and publish its by-laws, including by-law Z-4, infringes subsection 18(2) of the *Charter* and the constitutional obligation to which the City is subject.

[119] This failure is an outright denial of a *Charter* right. It cannot be a limit prescribed by law as can be demonstrably justified under section 1 of the *Charter*.

[120] Under subsection 52(1), a law may be adjudged unconstitutional on its face because it infringes a *Charter* right and is not saved by section 1 of the *Charter*. This is not a situation where a law infringes protected rights, rather, it concerns the failure of an institution of the government, *i.e.*, the City of Moncton, to comply with the constitutionally required manner for the enactment of its by-laws.

[…]

[128] In this connection, it should be remembered that section 1 of the *Charter* allows restrictions of *Charter* rights only by such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Under this general limitation, the legislature can strike a balance or achieve a compromise between the exercise of a guaranteed right and the safeguarding of society's best interests. However, while certain limits imposed on the exercise of the right guaranteed under subsection 18(2) may be justifiable, this provision creates a requirement of legislative bilingualism that cannot be reduced to unilingualism or a bilingualism that is left to the discretion of municipal councils. This would amount to a denial of the constitutional language right guaranteed by subsection 18(2). Moreover, by implication, the bilingualism requirement in regard to municipal by-laws extends to the process of enactment.

ANNOTATIONS FOR SECTION 1 DEALING WITH AN ALLEGED BREACH OF SUBSECTION 20(1) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

Doucet v. Canada, [2005] 1 F.C.R. 671, 2004 FC 1444 (CanLII)

[51] It is usual to proceed with the analysis of a *Charter* infringement by applying the tests in *Oakes*. In applying the *Oakes* tests, we go immediately to the government's pressing and urgent objective and then consider the proportionality of the disputed governmental measure. However, it is necessary first to consider whether the measure itself can be regarded as prescribed by law. Pursuant to section 1 of the *Charter*, the rights and freedoms are "subject only to such reasonable limits prescribed by law". There is no doubt that the *Regulations*, adopted pursuant to the *OLA*, are prescribed by law. However, the *Regulations* themselves are not in dispute, but rather a void therein. In my view, the effect is the same. The absence of an appropriate regulatory measure in the present case has the effect of infringing a right guaranteed by the *Charter*.

[…]

[54] In a country as large as Canada, with a relatively small and diverse population, it is reasonable and legitimate to limit the availability of bilingual services in those areas where it is not justified by the demand. In my opinion, this is a valid objective from a constitutional point of view. The rational objective is therefore clearly legitimate. The question then is to decide whether its implementation infringes rights in a proportional manner. First, one must ask if there is a connection between the objective and the

infringement, in other words, whether limiting the availability of services in French can be rationalized. This is undoubtedly true. There is a logical connection; it is at the proportionality stage itself, that is, the stage of minimal impairment and balancing the deleterious effect and benefits conferred, that the measure fails.

[55] Indeed, the impairment is not minimal. The evidence has established a significant demand: the rights of a large number of Francophones are therefore being infringed. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, McLachlin J. (now Chief Justice) reminded us that the government has the burden of establishing minimal impairment […]

[56] In the case at bar, the defendant did not demonstrate how the *Regulations* as drafted minimally impair the rights of the travelling public belonging to the minority official language group. The *Regulations* do not require consideration of motorists as a factor in determining "significant demand". The defendant merely argued that the demographics of the region do not justify bilingual police services; this altogether fails to address the concerns of Francophone travellers.

[…]

[60] The beneficial effects of the disputed *Regulations* are only appreciable in terms of the money saved by Treasury in not being required to supply bilingual officers on Highway 104 in the Amherst service area. This economic benefit must be weighed against the limitation's deleterious effect, as measured by the values underlying the *Charter*. In the case at bar, the evidence has established a "significant demand" and, accordingly, the deleterious effect on the rights of Francophones travelling on Highway 104 near Amherst is clear. In his testimony, Staff Sgt. Hastey described the complications brought about by the need for services in French for unilingual Francophones. However, he did not address the issue of the right of Francophones to speak in French when communicating with a federal institution, regardless of their proficiency in the other official language. I have already addressed the practical problems raised by the defendant, at paragraph 57 and following of these reasons. None of these arguments are any justification for infringing the language rights guaranteed by the *Charter*. In my opinion, the deleterious effect of the omission noted in the *Regulations* largely outweighs any benefit conferred by the policy of denying access to bilingual services on the Amherst Highway 104. The effect of the measure is thus disproportionate to the benefit sought by the rationalization.

[61] Accordingly, I find that the breach of the language rights of Francophones travelling on Highway 104 near Amherst, and more specifically the impairment of the rights guaranteed by subsection 20(1) of the *Charter*, is not justified under section 1 of the *Charter*.

ANNOTATIONS FOR SECTION 1 DEALING WITH AN ALLEGED BREACH OF SECTION 23 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

Association des parents de l'école Rose-des-vents v. British Columbia (Education), [2015] 2 S.C.R. 139, 2015 SCC 21 (CanLII)

[49] It may be that costs and practicalities again become relevant if a responsible party seeks to justify a violation of s. 23 under s. 1 of the *Charter*. As well, costs and practicalities may be relevant where a court seeks to fashion a remedy that is "appropriate and just" in the circumstances, pursuant to s. 24(1) of the *Charter*. Thus, it does not automatically follow from a finding of a s. 23 breach that rights holders will receive a new school. There is a perpetual tension in balancing competing priorities; between the availability of financial resources and the demands on the public purse. In fashioning a remedy, the court will take into account the costs and practicalities that form part of the provision of all educational services — for both majority and minority language schools. However, this issue is not before us on this appeal.

[50] To summarize, issues of costs and practicalities are considered in determining where a minority language community falls on the sliding scale of rights guaranteed under s. 23. Where the community is entitled to the highest level of educational services, on an equal footing with the majority language community, costs and practicalities will not be relevant to a determination of whether the rights holders

are receiving the services to which they are entitled. It may be, however, that costs and practicalities will be relevant in attempts to justify a breach of s. 23, and in attempts to fashion an appropriate and just remedy for a breach.

[…]

[61] In my view, the judge's declaration in this case constitutes a limited, or *prima facie*, declaration of a breach of s. 23. In these circumstances, where the children of s. 23 rights holders are entitled to an educational experience equivalent to that of majority language children, there is no difference between a finding of a lack of equivalence and a finding that the rights holders have not received the services to which they are entitled under s. 23. In effect, unless the absence of equivalence can be justified under s. 1, it is a violation of the claimants' *Charter* rights. Put differently, what else could save a breach, other than justification of the failure to provide equivalent services or to allocate sufficient resources? However, since responsibility for the breach has not yet been assigned — and leaving open the possibility that the responsible party or parties may seek to justify the breach — it cannot be said that the judge's declaration constitutes a complete finding of a *Charter* violation. Indeed, the judge's careful phrasing of his declaration indicates that he was alive to these complexities.

[…]

[73] Responsibility for the breach at issue here cannot be determined until the next phase of proceedings. Division of responsibility will determine where the burden of justifying the s. 23 violation lies, if a s. 1 argument is raised. Similarly, the division of responsibility would most likely precede any substantive remedial orders.

Nguyen v. Quebec (Education, Recreation and Sports), [2009] 3 S.C.R. 208, 2009 SCC 47 (CanLII)

[2] The first of these amendments provides that periods of attendance at unsubsidized English-language private schools are to be disregarded when determining whether a child is eligible to receive instruction in the publicly funded English-language school system. The second amendment establishes the same rule with respect to instruction received pursuant to a special authorization granted by the province under s. 81, 85 or 85.1 *CFL* [*Charter of the French language*] in a case involving a serious learning disability, temporary residence in Quebec, or a serious family or humanitarian situation. For the reasons that follow, I conclude that the amendments in issue limit the rights guaranteed by s. 23 of the *Canadian Charter of Rights and Freedoms*, that these limits have not been justified under s. 1 of the *Charter*, and that paras. 2 and 3 of s. 73 *CFL*, which were added by *Bill 104* [*Act to amend the Charter of the French language*], are therefore unconstitutional. I would therefore dismiss the appeals. I would also dismiss the respondents' cross-appeals, which relate to incidental issues.

[…]

[22] This Court must decide whether the second and third paragraphs of s. 73 of the *CFL* are constitutional. To do so, it must first decide whether the provisions in issue infringe the language rights guaranteed by s. 23 of the *Canadian Charter* and, if so, whether the infringement is reasonable and whether it is justified in a free and democratic society under s. 1 of the *Canadian Charter*. The Court must then decide on the appropriate remedy and on costs.

[…]

E. Justification Under Section 1

[37] According to the respondents, the appellants cannot invoke s. 1 of the *Canadian Charter* to justify a limit on s. 23 rights. But it is now well established that s. 1 applies to language rights, and that the Court did not reach the conclusion the respondents say it did in *Quebec Association of Protestant School Boards* (see, for example, *Ford*, at pp. 771 and 774). Thus, in accordance with the approach established in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, the Court must determine first whether the

objective of the measures adopted by the Quebec legislature is sufficiently important to warrant the infringement of the guaranteed rights, and then whether the means chosen are proportional to the objective.

[38] *Bill 104* had two principal objectives. The first was to resolve the problem of bridging schools and the expansion of the categories of rights holders that resulted from the enrolment of students in those institutions. The second, more general, objective was to protect and promote the French language in Quebec. Although the Quebec legislature is required to perform its constitutional obligations related to minority language educational rights within its territory, the fundamental rule concerning the language of instruction in Quebec remains. According to s. 72 *CFL*, instruction in Quebec must, with some exceptions, be provided in French to all students in kindergarten and in elementary and secondary schools. This rule is the expression of a valid political choice. Quebec's National Assembly may legitimately try to give effect to this choice by permitting no exceptions other than those required by the language rights provided for in s. 23 of the *Canadian Charter*. The legislature's intention in this respect would be compromised if these "springboard" schools could be used to make obtaining access to minority language schools almost automatic. Resolving this problem is a serious and legitimate objective. Moreover, this Court has already held, in *Ford*, that the general objective of protecting the French language is a legitimate one within the meaning of Oakes in view of the unique linguistic and cultural situation of the province of Quebec:

[…]

[40] Since the legislative objective has been found to be valid, the next step is to determine whether the provisions introduced by *Bill 104* constitute a proportionate response to the problems identified above. In my opinion, the appellants have established the existence of a rational causal connection between the objectives of *Bill 104* and the measures taken by the province of Quebec. Moreover, this Court has commented several times on the importance of education and the organization of schools to the preservation and promotion of a language and its culture (*Mahe*, at pp. 362-63; *Reference re Public Schools Act (Man.)*, at p. 849; *Gosselin*, at para. 31). The purpose of *Bill 104* is to protect and promote instruction in French as well as the use of the French language.

[41] The main problem that arises in determining whether the impugned provisions are constitutional relates to the proportionality of the adopted measures. Even if a rational connection is found to exist between the impugned measures and the objective of the legislation, it is necessary to take the analysis further and ask whether the means chosen by the legislature constitute a minimal impairment, as defined in the case law, of the constitutional rights guaranteed by s. 23(2) of the *Canadian Charter*. In my opinion, the measures that are contested in the *Nguyen* and *Bindra* cases are excessive in relation to the objectives being pursued, and do not meet the standard of minimal impairment.

[42] I will begin by discussing the *Nguyen* case, and therefore the case of unsubsidized private schools contemplated in the second paragraph of s. 73 *CFL*. As I mentioned above, *Bill 104* rules out any consideration of a child's educational pathway in an unsubsidized English-language private school. No account whatsoever is to be taken of the duration and circumstances of that pathway or of the nature and history of the educational institution in which the child was enrolled. The prohibition against taking this into account is total and absolute. In light of the evidence presented in the *Nguyen* case, this legislative response seems excessive in relation to the seriousness of the identified problem and its impact on school clientele and, potentially, on the situation of the French language in Quebec. The evidence shows that the number of children who become eligible for admission to the English-language public school system after attending a UPS remains relatively low, although it does seem to be gradually increasing. For example, in the 2001-2 school year, according to statistics provided by the Ministère de l'Éducation for the entire province of Quebec, just over 2,100 students enrolled in English-language UPSs [unsubsidized private schools] at the pre-school, elementary and secondary levels throughout Quebec did not have certificates of eligibility for instruction in English (A.R., at p. 1605). Thus, before *Bill 104* came into force, the time they spent in these institutions could have qualified them for a transfer to the publicly funded English-language system. This represents just over 1.5 percent of the total number of students eligible for instruction in English that year (*Rapport sur l'évolution de la situation linguistique au Québec*,

2002-2007, at p. 82). This number has since increased. The number of students attending English-language UPSs who did not have certificates of eligibility exceeded 4,000 in the 2007-8 school year (A.R., at p. 1605). Despite this increase, however, the number of students in question remains relatively low in relation to the numbers of students in the English- and French-language school systems. In view of this situation, although I do not deny the importance of the purpose of para. 2 of s. 73 *CFL*, the absolute prohibition on considering an educational pathway in a UPS seems overly drastic. What is happening is not a de facto return to freedom of choice with disruptive changes to the categories of rights holders. The legislature could have adopted different solutions that would involve a more limited impairment of the guaranteed rights and could more readily be reconciled with the concrete contextual approach recommended in *Solski*.

[43] However, I do not wish to deny the dangers that the unlimited expansion of UPSs could represent for the objectives of preserving and promoting the French language in Quebec. If no action were taken to control this expansion, the bridging schools could become a mechanism for almost automatically circumventing the *CFL's* provisions on minority language educational rights, creating new categories of rights holders under the Canadian *Charter* and, indirectly, restoring the freedom to choose the language of instruction in Quebec.

[44] Some of the evidence on the use of bridging schools raises doubts regarding the genuineness of many educational pathways, and regarding the objectives underlying the establishment of certain institutions. In their advertising, some institutions suggested that after a brief period there, their students would be eligible for admission to publicly funded English-language schools (A.R., at pp. 1200-1202). An approach to reviewing files closer to the one established in *Solski* would make it possible to conduct a concrete review of each student's case and of the institutions in question. This review would relate to the duration of the relevant pathway, the nature and history of the institution and the type of instruction given there. For example, it might be thought that an educational pathway of six months or one year spent at the start of elementary school in an institution established to serve as a bridge to the public education system would not be consistent with the purposes of s. 23(2) of the *Canadian Charter* and the interpretation given to that provision in *Solski*. Moreover, as I mentioned above, this Court expressed reservations in *Solski* about attempts to create language rights for expanded categories of rights holders by means of short periods of attendance at minority language schools (*Solski*, at para. 39).

[45] The situations in issue in the *Bindra* case also concern a relatively small number of children. According to the statistics provided by the appellants, it appears that between 1990 and 2002, an average of 7.1 percent of students eligible for English instruction were eligible owing to a special authorization issued by the province under ss. 81, 85 and 85.1 *CFL* (*Rapport sur l'évolution de la situation linguistique au Québec*, 2002-2007, at p. 90). Although it is impossible to determine with any accuracy what proportion of those students subsequently obtained certificates of eligibility under s. 73, para. 1(2) *CFL*, I note that a large majority of them were eligible because they were staying temporarily in Quebec and had obtained special authorizations on that basis under s. 85 *CFL*. Moreover, it must not be forgotten that the special authorizations mechanism remains wholly within the authority of the Quebec government, which can therefore grant authorizations that exceed what it is constitutionally obligated to grant, but cannot, after doing so, deny any rights flowing from the authorizations in question that are guaranteed by the *Canadian Charter*. The provisions added to the *CFL* by *Bill 104* that apply to Mr. Bindra's case are not consistent with the principle of preserving family unity provided for in s. 23(2) of the *Canadian Charter*. In fact, they are likely to make it impossible for children of a family to receive instruction in the same school system.

F. Remedies

[46] I must therefore find that the limit on the respondents' constitutional rights was not justified under s. 1 of the *Canadian Charter*. I would therefore uphold the Quebec Court of Appeal's declaration that paras. 2 and 3 of s. 73 *CFL* are invalid. Because of the difficulties this declaration of invalidity may entail, I would suspend its effects for one year to enable Quebec's National Assembly to review the legislation. However, it is also necessary to consider the situations of the claimants concerned in the two appeals.

Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14 (CanLII)

[21] The minority language education rights entrenched in s. 23 are national in scope and remedial in nature. At the time the section was adopted, the framers were aware of the various regimes governing the Anglophone and Francophone linguistic minorities throughout Canada and perceived these regimes as inadequate. Section 23 was intended to provide a uniform solution to remedy these inadequacies. As the Court explained in *Quebec Association of Protestant School Boards*, at pp. 79-80, where the constitutionality of the *CFL*'s education provisions was under review:

> The framers of the Constitution unquestionably intended by s. 23 to establish a general regime for the language of instruction, not a special regime for Quebec; but in view of the period when the *Charter* was enacted, and especially in light of the wording of s. 23 of the *Charter* as compared with that of ss. 72 and 73 of *Bill 101*, it is apparent that the combined effect of the latter two sections seemed to the framers like an archetype of the regimes needing reform, or which at least had to be affected, and the remedy prescribed for all of Canada by s. 23 of the *Charter* was in large part a response to these sections.

Given the national character of s. 23, the Court has interpreted the rights provided by this provision in a uniform manner from province to province: *Quebec Association of Protestant School Boards*; *Mahe* ; *Reference re Public Schools Act (Man.)*; *Arsenault-Cameron*; *Doucet-Boudreau*. This is not to say however that the unique historical and social context of each province is irrelevant; rather, it must be taken into account when provincial approaches to implementation are considered, and in situations where there is need for justification under s. 1 of the *Canadian Charter*: *Ford*, at pp. 777-81.

[…]

[52] While the current quantitative approach to s. 73 of the *CFL* [*Charter of the French language*] is not the standard required by s. 23(2) of the *Canadian Charter*, the Attorney General of Quebec argues, in the alternative, that it is justifiable under s. 1. It is his view that the unique linguistic position of Quebec in Canada — the provincial majority language community is also the national minority language community — can serve as a justification for the "major part" requirement as interpreted by him. We do not consider it necessary to examine that possibility. Reading down s. 73 permits Quebec to meet its legislative objectives while ensuring that no persons eligible under s. 23 of the *Canadian Charter* are excluded from minority-language schools if they choose to attend them. […]

A.G. (Que.) v. Quebec Protestant School Boards, [1984] 2 S.C.R. 66, 1984 CanLII 32 (SCC)

[p. 84] If, as is apparent, Chapter VIII of *Bill 101* [*Charter of the French language*] is the prototype of regime which the framers of the Constitution wished to remedy by adopting s. 23 of the *Charter*, the limits which this regime imposes on rights involving the language of instruction, so far as they are inconsistent with s. 23 of the *Charter*, cannot possibly have been regarded by the framers of the Constitution as coming within "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Accordingly, the limits imposed by Chapter VIII of *Bill 101* are not legitimate limits within the meaning of s. 1 of the *Charter* to the extent that the latter applies to s. 23.

[…]

[pp. 85-86] Let us assume that Chapter VIII of *Bill 101* had been enacted after the *Charter*, or that a province other than Quebec were now to adopt an Act drafted like Chapter VIII of *Bill 101*, but designed to limit the right to instruction in French. Could it be said that s. 1 of the *Charter* is capable of legitimizing such legislation, to the extent that s. 1 applies to s. 23?

We do not think so.

Whatever their scope, the limits which s. 1 of the *Charter* allows to be placed on the rights and freedoms set out in it cannot be equated with exceptions such as those authorized by s. 33(1) and (2) of the *Charter*, which in any event do not authorize any exception to s. 23:

[…]

Nor can those limits be tantamount to amendments to the Constitution of Canada, the procedure for which is prescribed in ss. 38 *et seq.* of the *Constitution Act, 1982*.

[…]

[p. 87] The following arguments made by the Attorney General of New Brunswick in his submission seem to us to be conclusive:

> …Section 59 modifies the classes of parents entitled to have their children instructed in English by suspending the operation of paragraph 23(1)(a) in Quebec. By implication, the other classes of beneficiaries entitled to enjoy section 23 rights cannot be redefined by ordinary legislative enactment.
>
> The detailed definition of classes of parents is at the heart of Section 23. Any effort to redefine the classes of parents entitled to educational rights effectively represents an attempt to amend the Constitution without resort to the amending formula and is accordingly not comprehended by section 1.

The Attorney General of Canada expresses the same idea in his memorandum, where he writes, after referring to s. 1 of the *Charter*.

> [TRANSLATION] …it does not allow the categories of individuals who enjoy the right conferred by s. 23 to be altered by imposing different rules which run directly counter to those expressly stated in that section. The exception clause provided for in s. 33 does not cover s. 23, and the *Canadian Charter of Rights and Freedoms* can only be amended in accordance with the terms of the procedure for amending the Constitution contained in Part V of the *Constitution Act, 1982*.

[…]

[p. 88] […] The provisions of s. 73 of *Bill 101* collide directly with those of s. 23 of the *Charter*, and are not limits which can be legitimized by s. 1 of the *Charter*. Such limits cannot be exceptions to the rights and freedoms guaranteed by the *Charter* nor amount to amendments of the *Charter*. An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the *Charter*, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1. The same applies to Chapter VIII of *Bill 101* in respect of s. 23 of the *Charter*.

Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764 (CanLII)

[864] I take from these comments a number of principles: Once considerations of cost and pedagogy or decisions in prior litigation establish entitlement to the highest level of services -- equivalence-- costs and practicalities are irrelevant to the equivalence analysis. Costs and practicalities are relevant to determining what services a given number of students is entitled to; in other words, they are relevant when the Court is situating the number on the sliding scale. They may also be relevant if a party seeks to justify a violation of s. 23 under s. 1 of the *Charter*. They may prove relevant again when a court seeks to fashion an "appropriate and just" remedy, as "it does not automatically follow from a finding of a s. 23 breach that rights holders will receive a new school."

[…]

[989] Further, although the right to minority language education is limited by the numbers warrant criterion, those limits do not engage the same philosophical concerns as the elements of the *Oakes* test. The s. 1 test examines competing moral claims and broad societal benefits (*Carter* at para. 79). The limits imposed by the numbers warrant criterion are designed to limit government expenditures to what is

practical in light of pedagogy and cost. The numbers warrant criterion is even less rooted in the same concerns as s. 1 than are the principles against arbitrary, overbroad and grossly disproportionate laws. The limits in s. 23 simply do not allow the Court to consider the broader public goals that might justify a limit to language rights.

[990] Less has been said about the reasons why s. 15 claims are so rarely justified. It appears that the dearth of cases where the right to equality has been justified pursuant to s. 1 does not occur because there is any higher standard placed on governments. Rather, these cases have proven exceptionally challenging to justify on the facts of the cases due to the fundamental human interests that are engaged and the competing interests at play.

[…]

D. Justification

[1518] I conclude that the Province breached s. 23 by continuing its policy of not applying the AFG [Annual Facility Grant] Rural Factor to the CSF [Conseil scolaire francophone] in 2008/09, 2009/10 and 2010/11. The Ministry treated the CSF differently from majority boards despite recognizing the rationale for doing so was dissipating. The remaining question is whether the breach is justified pursuant to s. 1.

[1519] I set out the framework for s. 1 justification in Chapter IX, Justification. There, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. The purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the "fair and rational allocation of public funds". Here, the particular infringing measure-- the policy of not applying the AFG Rural Factor to the CSF-- was also intended to fairly and rationally allocate public funds.

[1520] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective. When examining the rational connection, I will have regard to the objective and the scheme for achieving that objective.

[1521] I find that there is a rational connection between fairly and rationally expending public funds and a measure that did not apply the AFG Rural Factor to the CSF. The policy refrained from providing the CSF with increased funding when it was operating out of many leased, heterogeneous schools and was not paying for the maintenance work on those facilities. By doing so, more funds were available for the majority school boards responsible for the maintenance work, which was a fair and rational allocation of funds. Further, after about 2008, the continued application of the policy to the CSF reduced the harm to the (sic) in a period where the Ministry was providing only half of districts' overall AFG funding in each year. The Ministry chose to wait until there were more funds to distribute before it made the AFG Rural Factor applicable to the CSF.

[1522] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[1523] In my view, the failure to make the change in 2008 was minimally impairing. The CSF continued to receive about 60% of the AFG funding that it would ultimately be entitled to. The CSF's new programmes where it moved from leased to owned space opened in 2008 and then 2011, so the CSF's need for the additional funds were not urgent in 2009. Moreover, since the CSF was not spending its AFG funds on leased space, including leased homogeneous space, it was in practice operating at an advantage with respect to AFG funds.

[1524] The final stage considers the proportionality of the effects of the infringing measure. This goes beyond the purpose or objective of the measure, and examines its salutary and deleterious effects.

[1525] At the local level, the salutary effects of the policy of not applying the AFG Rural Factor to the CSF are straightforward: the Ministry did not have to deal with the political consequences of taking from the majority to give to the minority in a period when it had just done so. It also had the effect of protecting majority boards from small additional AFG losses in years when they were already only receiving half of what they were used to receiving. The Ministry did not save any funds it could have reallocated from the majority to the minority.

[1526] The deleterious effects are more challenging to quantify. The Ministry has always maintained that school boards ought to be spending part of their operating funds on facility maintenance. The CSF had operating surpluses of more than $5,793,403 in 2008/09, $4,242,349 in 2009/10 and $1,853,493 in 2010/11. The CSF did not point to any projects that it was unable to complete due to a deficiency of AFG funds in this period. I note that in more recent years, starting in 2013/14, the CSF deferred a Heating, Ventilation and Air Conditioning ("HVAC") system replacement at École Élémentaire Anne-Hébert (Vancouver (East)) due to insufficient AFG funds. It is possible that the CSF may have been able to proceed with a project like that sooner if the Ministry had begun applying the AFG Rural Factor to the CSF in 2008/09. However, that is unlikely because the CSF was coping with the reduced AFG funding being provided to all districts in those years. At most, I find that if the Ministry had applied the AFG Rural Factor to the CSF sooner, it would have reduced the financial burden on the CSF.

[1527] Weighing those effects together, I find that the salutary effects outweigh the deleterious effects. All school boards were undergoing challenging economic times in 2008/09 and 2009/10, particularly regarding their AFG. The CSF's need for the AFG Rural Factor was only just beginning to materialize in those years, and was not fully realized until 2011, after its programmes had moved from leased heterogeneous to owned homogeneous space. The CSF was also operating from a position of relative advantage at that time because of its decision not to spend its AFG funds on leased space even though it was receiving funds for students enrolled in those schools. The CSF also had considerable operating surpluses. As soon as the Ministry was able to secure more funds for its AFG funding envelope, it allocated all of those funds to the CSF. In light of those factors, and the deference owed to the Ministry's assessment of the best ways of balancing the needs of the majority and the minority, I conclude that the deleterious and salutary effects are balanced, and the breach passes the proportionality test.

N.B. – For further examples of justifications of s. 23 breaches pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms* in this judgment, please refer to paragraphs 4247 to 4259 and 4991 to 5003. This decision is currently under appeal before the British Columbia Court of Appeal.

Dauphinee v. Conseil Scolaire Acadien Provincial, 2007 NSSC 238 (CanLII)

[46] I find that the Department, by not making, or even attempting to make, any provisions in its Tuition Support program which would accommodate special needs students of the CSAP [*Conseil scolaire acadien provincial*] infringes those parents' equality or equivalency rights which the Supreme Court of Canada has stated are part and parcel of the guarantees provided in Section 23 of the *Charter*. The defendants have not advanced any compelling reason why students of the CSAP should not be provided for in the Tuition Support program. The plaintiffs are not asking that new schools or facilities be built, but simply that the Department approve a plan for access by students of the CSAP who qualify for Tuition Support. They request access to a plan which caters to French students with special needs, as is now the case for the English majority. Surely this is not too much to ask. I find that failure on the part of the Department to use its best efforts to make such provisions is a violation of the *Charter* rights of qualified Section 23 families. If the Department refuses to use its best efforts to make such provisions, in view of the fact it appears relatively cost neutral, or even if there is some reasonable additional cost, it is difficult to envisage how it could be saved by Section 1 of the *Charter*. There can be no justification for not providing for students and families of the CSAP in the Tuition Support program in the circumstances, and, (sic) considering some of the provisions I have referred to above. The Department must act to see what, if any, French-first-language schools which cater to students with special needs in other jurisdictions can

be designated for inclusion under the present Tuition Support program, or put a different plan in place which will adequately meet the needs of CSAP students with special needs. If this requires changes to the present regulations and guidelines, then surely this can be done in consultation with the CSAP and its parent groups. It is simply a matter of "accommodation".

[…]

[53] The Department did violate or breach the plaintiffs Section 23 *Charter* rights by failing to consider and provide any accommodation for CSAP families in its Tuition Support program for students with special needs. Such a breach is not justified in the circumstances and it cannot be saved by Section 1. The Department must use its best efforts to incorporate and accommodate CSAP students with special needs in its Tuition Support in a manner that meets their linguistic needs and rights. The best way to achieve this should be worked out between the Department, the CSAP and its parent groups. This does not in the circumstances extend to the creation or establishment of new facilities comparable to the existing English private schools because the numbers do not warrant such measures.

SEE ALSO:

Canadians for Language Fairness v. Ottawa (City), 2006 CanLII 33668 (ON SC)

Fundamental Freedoms (section 2)

2. Fundamental freedoms

2. Everyone has the following fundamental freedoms:

> **[…]**
>
> **(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;**
>
> **[…]**

[LAST UPDATE: APRIL 2017]

ANNOTATIONS

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, 1988 CanLII 19 (SCC)

[40] […] Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality. That the concept of "expression" in s. 2(b) of the *Canadian Charter* and s. 3 of the Quebec *Charter* goes beyond mere content is indicated by the specific protection accorded to "freedom of thought, belief [and] opinion" in s. 2 and to "freedom of conscience" and "freedom of opinion" in s. 3. That suggests that "freedom of expression" is intended to extend to more than the content of expression in its narrow sense.

[…]

[43] The second and third of the submissions of the Attorney General of Quebec which have been summarized above, with reference to the implications for this issue of the express or specific guarantees of language rights in s. 133 of the *Constitution Act, 1867*, and ss. 16 to 23 of the *Canadian Charter of Rights and Freedoms*, are closely related and may be addressed together. These special guarantees of language rights do not, by implication, preclude a construction of freedom of expression that includes the freedom to express oneself in the language of one's choice. A general freedom to express oneself in the language of one's choice and the special guarantees of language rights in certain areas of governmental activity or jurisdiction -- the legislature and administration, the courts and education -- are quite different things. The latter have, as this Court has indicated in *MacDonald*, *supra*, and *Société des Acadiens*, *supra*, their own special historical, political and constitutional basis. The central unifying feature of all of the language rights given explicit recognition in the Constitution of Canada is that they pertain to governmental institutions and for the most part they oblige the government to provide for, or at least tolerate, the use of both official languages. In this sense they are more akin to rights, properly understood, than freedoms. They grant entitlement to a specific benefit from the government or in relation to one's dealing with the government. Correspondingly, the government is obliged to provide certain services or benefits in both languages or at least permit use of either language by persons conducting certain affairs with the government. They do not ensure, as does a guaranteed freedom, that within a given broad range of private conduct, an individual will be free to choose his or her own course of activity. The language rights in the Constitution impose obligations on government and governmental institutions that are in the words of Beetz J. in *MacDonald*, a "precise scheme", providing specific opportunities to use English or French, or to receive services in English or French, in concrete, readily ascertainable and limited circumstances. In contrast, what the respondents seek in this case is a freedom as that term was explained by Dickson J. (as he then was) in *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 336: "Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint." The respondents seek to be free of the state imposed requirement that their commercial signs and advertising be in French only, and seek the freedom, in the entirely private or non-governmental realm of commercial activity, to display signs and advertising in the language of their choice as well as that of French. Manifestly the respondents are not seeking to use the language of their choice in any form of direct relations with any branch of government and are not seeking to oblige government to provide them any services or other benefits in the language of their choice. In this sense the respondents are asserting a freedom, the freedom to express oneself in the language of one's choice in an area of non-governmental activity, as opposed to a language right of the kind guaranteed in the Constitution. The recognition that freedom of expression includes the freedom to express oneself in the language of one's choice does not undermine or run counter to the special guarantees of official language rights in areas of governmental jurisdiction or responsibility. The legal structure, function and obligations of government institutions with respect to the English and French languages are in no way affected by the recognition that freedom of expression includes the freedom to express oneself in the language of one's choice in areas outside of those for which the special guarantees of language have been provided.

[…]

[54] It is apparent to this Court that the guarantee of freedom of expression in s. 2(b) of the *Canadian Charter* and s. 3 of the Quebec *Charter* cannot be confined to political expression, important as that form of expression is in a free and democratic society. The pre-*Charter* jurisprudence emphasized the importance of political expression because it was a challenge to that form of expression that most often arose under the division of powers and the "implied bill of rights", where freedom of political expression could be related to the maintenance and operation of the institutions of democratic government. But political expression is only one form of the great range of expression that is deserving of constitutional protection because it serves individual and societal values in a free and democratic society.

[…]

[58] In order to address the issues presented by this case it is not necessary for the Court to delineate the boundaries of the broad range of expression deserving of protection under s. 2(b) of the *Canadian Charter* or s. 3 of the Quebec *Charter*. It is necessary only to decide if the respondents have a constitutionally protected right to use the English language in the signs they display, or more precisely, whether the fact that such signs have a commercial purpose removes the expression contained therein from the scope of protected freedom.

[59] In our view, the commercial element does not have this effect. Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the *Canadian Charter* should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the *Charter*. It is worth noting that the courts below applied a similar generous and broad interpretation to include commercial expression within the protection of freedom of expression contained in s. 3 of the Quebec *Charter*. Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. The Court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection.

[60] Rather, the expression contemplated by ss. 58 and 69 of the *Charter of the French Language* is expression within the meaning of both s. 2(b) of the *Canadian Charter* and s. 3 of the Quebec *Charter*. This leads to the conclusion that s. 58 infringes the freedom of expression guaranteed by s. 3 of the Quebec *Charter* and s. 69 infringes the guaranteed freedom of expression under both s. 2(b) of the *Canadian Charter* and s. 3 of the Quebec *Charter*. Although the expression in this case has a commercial element, it should be noted that the focus here is on choice of language and on a law which prohibits the use of a language. […]

Patanguli v. Canada (Citizenship and Immigration), 2015 FCA 291 (CanLII)

[32] Second, the appellant contends that the employer's refusal to conduct disciplinary hearings in French as he had requested twice (August 27 and 31, 2009), had violated his right to freedom of expression as guaranteed by subsection 2(*b*) of the *Canadian Charter of Rights and Freedoms* and language rights protected under section 16 of the Charter and by the *Official Languages Act* (the *Act*). Even though the appellant insists that this issue should not be treated as simply a breach of procedural fairness, his grievance did not raise the violation of his language rights as a separate issue to be settled by the adjudicator. Therefore I will address them.

[…]

[46] It is far from clear to me that the appellant actually had the language rights he alleges to have had under the *Charter* and the *Act*, which enforces sections 16 to 20 of the *Charter* (*Lavigne v. Canada (Office of the Commissioner of Official Languages*), 2002 SCC 53 (CanLII), [2002] 2 S.C.R. 773). The appellant cites section 16 of the *Charter* and the purpose of the *Act* (section 2), without demonstrating that these provisions imposed an obligation on his employer to ensure that the interviews on August 31 and September 1, 2009, took place in French. […]

Galganov v. Russell (Township), 2012 ONCA 409 (CanLII)

[7] I would also dismiss Brisson's appeal. I agree with the application judge's conclusion that the Township had the authority to pass the By-law. Insofar as the issue of whether Brisson's right to freedom of expression under s. 2(b) of the *Charter* is infringed, I am of the opinion that the application judge erred in concluding that there was no infringement. However, I conclude that this infringement is justified under s. 1 of the *Charter*.

[…]

(a) Whether the By-law infringes freedom of expression as guaranteed by s. 2(b) of the *Charter*

[50] Brisson, supported by the intervener, submits that the By-law infringes his right to freedom of expression as guaranteed by s. 2(b) of the *Charter*.

[51] In deciding whether the By-law infringes freedom of expression, I must undertake the two-step analysis mandated by *Irwin Toy Ltd. v. Quebec (A.G.)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927. The first step is to determine whether the conduct falls within the sphere of activity protected by freedom of expression. If so, the second step is to determine whether the purpose or effect of the government action restricts freedom of expression.

[52] The fact that Brisson's sign is a commercial sign does not remove it from the scope of the protected freedom in s. 2(b): see *Ford v. Quebec (A.G.)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at pp. 766-767. Commercial expression is included within the protection of freedom of expression if it conveys meaning.

[53] One has only to read Brisson's sign to appreciate that it conveys meaning respecting the nature of his business. Below his business name, "Independent Radiator Services", the sign reads:

> *Radiateurs réparés et neufs*
>
> *Air climatisé rempli et réparé*
>
> *Réparation mécanique mineure*

[54] The sign indicates that the nature of Brisson's business is repairing and installing new radiators, filling air conditioners [with fluid] and repairing them, and doing minor mechanical repairs. Thus, Brisson's sign conveys meaning and cannot be excluded from the protection of s. 2(b).

[55] I must therefore determine whether the purpose or effect of the By-law violates Brisson's right to freedom of expression. Brisson and the intervener submit that compelled bilingualism on new exterior commercial signs forces commercial entities into a course of action they would not have chosen for themselves and that this compulsion violates the guarantee of freedom of expression under s. 2(b). Accordingly, they contend that the application judge erred in holding there was no infringement of Brisson's right to freedom of expression.

[56] Choice of language is an important aspect of expression. In *Ford*, at p. 748, the Supreme Court of Canada observed that "[l]anguage is not merely a means or medium of expression; it colours the content and meaning of expression." The court held that s. 58 of the Quebec *Charter of the French Language*, R.S.Q., c. C-11, which stated that "[p]ublic signs and posters and commercial advertising shall be solely in the official language [French]" was inoperative because it violated the guarantee of freedom of expression in s. 3 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, (the "Quebec *Charter*"), which is the equivalent of s. 2(b) of the *Canadian Charter*. The court concluded that s. 3 is infringed when one is compelled to use a particular language and is thereby prohibited from using one's language of choice. Nor was s. 58 justified under s. 9.1 of the Quebec *Charter*. Section 9.1 is a provision corresponding to s. 1 of the *Canadian Charter* subject, in its application, to a similar test of rational connection and proportionality.

[…]

[61] Having regard to the Supreme Court's holdings in *Ford* and *Devine*, by compelling the use of both French and English on new exterior commercial signs, the By-law's purpose infringes Brisson's right to freedom of expression as guaranteed by s. 2(b) of the *Charter*. I must now consider whether such infringement is justified under s. 1 of the *Charter*.

Entreprises W.F.H. Ltée v. Québec (Attorney General), 2001 CanLII 17598 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[4] The appellant was found guilty of violating s. 58 of the *Charter of the French language*, R.S.Q., c. C-11, which requires that French be markedly predominant in bilingual commercial signs, and sentenced it to pay the minimum fine provided under s. 205 of the same act. It asks the Court to declare these sections invalid and of no force or effect, on the basis that s. 58 infringes its right to freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* and s. 3 of Quebec's *Charter of human rights and freedoms*, R.S.Q., c. C-12, as well as its right to equality guaranteed by s. 15 of the *Canadian Charter* and s. 10 of the Quebec *Charter*.

Was the right to freedom of expression violated by the requirement that French be markedly predominant?

[44] The provision that prescribed that public signs and commercial advertising had to be in French only was declared to be of no force or effect in 1988. Clearly, such a provision would still be so today.

[45] In 1988, the Supreme Court declared in *obiter*, that is, even though it was not necessary to do so to support its decision, that requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "*visage linguistique*" in Quebec and therefore justified under the Quebec *Charter* and the *Canadian Charter*. The Supreme Court went so far as to specifically say, in *Ford*, that French could be required in addition to any other language or could be required to have greater visibility than that accorded to other languages.

[46] I am of the opinion that s. 58, in its current form, simply repeats the guidelines laid down by the Supreme Court. I am also of the opinion that, in light of the evidence submitted to the Supreme Court in 1988, a provision such as the current s. 58 would have withstood a challenge based on the right to freedom of expression and the right to equality and would not have been declared of no force or effect.

[. . .]

[60] Assuming that s. 58 limits freedom of expression, the Superior Court judge concluded that it was up to the appellant to show, through its own evidence, that the principles in *Ford* no longer applied. I am of the opinion that he is right. *Ford* established guidelines, and the legislature effectively codified them in 1993, thereby meeting the burden of proof imposed by s. 1 of the *Canadian Charter* and s. 9 of the Quebec *Charter*.

156158 Canada inc. v. Québec (Attorney General), 2016 QCCS 1676 (CanLII)

2. Freedom of Expression

[20] At trial, the Appellants argued that Sections 51, 52 and 58 of the *CFL* [*Charter of the French language*] infringed on their freedom of expression, as guaranteed by Section 2 b) of the *Canadian Charter of Rights and Freedoms* (*Canadian Charter*) and Section 3 of the *Charter of Human Rights and Freedoms* (Québec *Charter*).

[…]

[33] The trial judge decided that the protection of the French language was still an important objective and that the measures adopted met the *Oakes* test. He concluded Appellants had not met their burden of proving that the situation of the French language had changed significantly since the decisions in the *Ford* and *Devine* cases.

2.2 Grounds of Appeal

[34] The Appellants argued that the trial judge incorrectly interpreted:

- the obiter dictum of the Supreme Court in the *Ford* case;
- the judgments in *Entreprises W.F.H.*;
- the principle of *stare decisis* and applied it incorrectly;
- the notion of the *visage linguistique* of Québec referred to in the *Ford* case;
- the phrase “the vulnerability of the French language”.

2.3 The *obiter dictum* of the Supreme Court in the *Ford* case

[…]

[37] The trial judge did not err in law and did not consider the obiter of the Supreme Court of Canada to mean that only a “markedly predominant” requirement would satisfy the minimum impairment test.

2.4 The judgment in *Entreprises W.F.H.*

[40] Appellants may disagree with the Court of Appeal judgment in *Entreprises W.F.H.*, but the Court of Québec, in the present case, was bound by the precedents of higher courts, including the Court of Appeal judgment.

[…]

[42] The trial judge did not err in his use of the *Entreprises W.F.H.* precedent.

[…]

2.5 The principle of *stare decisis* and its application

[…]

[45] The Supreme Court of Canada said in *Ford* and *Devine* that both types of provisions satisfy the *Oakes* test. It is up to the legislator, not the Appellants, to decide between two solutions that are equally constitutional. For commercial advertising, the legislator chose the “markedly predominant” criteria (Section 58 of the *CFL*); for inscriptions on a product, catalogues and other documentation, he chose to allow for the use of two languages, not requiring that one be more important than the other (Sections 51, 52 and 89 of the *CFL*).

[…]

[49] The trial judge correctly applied the principle of *stare decisis*. The real question at issue here was whether the evidence presented at trial was sufficient to depart from the precedents. It was not.

[…]

[64] The Court cannot find a mistake in the trial judge’s analysis. The protection of the French language is still an important objective and the measures adopted still meet the *Oakes* test. Appellants have not shown that the situation of the French language changed significantly since the decisions in *Ford* and *Devine*.

N.B. – This judgment is currently under appeal at the Quebec Court of Appeal. See also Quebec (Attorney General) c. 156158 Canada Inc. (Boulangerie Maxie's), 2015 QCCQ 354 (CanLII)

Canadians for Language Fairness v. Ottawa (City), 2006 CanLII 33668 (ON SC)

[115] The Applicant submits that the unilingual Anglophones' rights to freedom of expression are abrogated by the By-Law [No. 2001-170] and the [Bilingualism] Policy. Unilingual English employees are required to take additional measures to be bilingual. The Policy is invasive and discriminatory and thus a contravention of the *Charter* and various United Nations International Covenants.

[…]

[119] The Supreme Court of Canada set out a two-step test to determine whether an individual's freedom has been infringed (see *Irwin Toy Ltd. v. Québec (A.G.)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927).

[120] The first step is to determine whether an activity falls within the freedom of expression. The *Charter* does not protect activity that either does not convey or attempt to convey a meaning.

[121] The activity of being required to learn a second language in order to obtain a certain employment is not one that has a meaning or any content.

[122] But, if the activity did have meaning, the second step is to determine whether the purpose or effect of the action was to restrict freedom of expression.

[123] The evidence in the case at bar is that the purpose and effect of the Policy is to ensure that both English speaking and French speaking citizens can obtain services in the official language of their choice. The evidence is persuasive that for City employees, working in one's language of choice facilitates the provision of services to the public in both English and French. Therefore there is no attempt to prevent any expression of thoughts, opinion or beliefs in a policy designed to promote the use of both languages. The right to express oneself in the language of one's choice is specifically guaranteed in the Policy.

Lavigne v. Quebec (Attorney General), 2000 CanLII 30033 (QC SC)

[22] Petitioner also raises the issue of freedom of expression. The Supreme Court in *Ford* distinguished between linguistic rights and freedom of expression:

> "A general freedom to express oneself in the language of one's choice and the special guarantees of language rights in certain areas of governmental activities or jurisdiction - the legislature and administration, the Courts and education - are quite different things."

[23] To illustrate this observation, we note that freedom of expression is guaranteed to all Canadians regardless of their language. Before the Courts, however, proceedings and pleadings can only be in one of the official languages.

[24] The very nature of an individual's freedom of expression is that he can exercise it in his own language. In the present case, therefore, Mr. Lavigne can express himself in his own language, English, as he did when pleading his motion. He may also benefit from the services of an interpreter. It would be difficult therefore to believe that his freedom of expression might be hindered in any manner. The conclusion sought by the Petitioner in effect, seeks to oblige the government of Quebec to adopt a legislative policy.

[25] The Supreme Court has decided that the nature of this liberty implies that there is neither constraint nor coercion: s. 2 of the *Canadian Charter* generally imposes a negative obligation on the government rather than a positive obligation of support or protection. As far as freedom of expression is concerned, this principle is well illustrated in the *Haig* decision:

> The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(b) prohibits gags but does not compel the distribution of megaphones.

[26] The Court cannot read sections 2b) and 3 of the Canadian and Quebec Charters as imposing the obligation on the government to legislative [sic] compel itself to assign as its counsel those who speak the language of the other party. The remedy sought by Mr. Lavigne is in fact more of the nature of a legislative policy.

N.B. – The appeal of this judgment was dismissed on motion at the Quebec Court of Appeal and the application for leave to appeal at the Supreme Court of Canada was dismissed.

R. v. Rodrigue, 1994 CanLII 5249 (YK SC)

[p. 11] There can be no doubt that under sections 530 and 530.1 of the *Criminal Code*, the accused and his counsel effectively enjoy the right and the freedom to express themselves in their own official language. In fact, subsection 530.1(a) specifies [in French] that "the accused and his counsel have the right to use either official language ... during the preliminary inquiry and trial of the accused" (the English version specifies that this right can be exercised "for all purposes during the preliminary inquiry and trial of the accused").

[pp. 11-12] This being said, in view of the fact that the Supreme Court of Canada has indicated that there is a clear distinction between freedom of expression when exercised during private activity and linguistic rights which are exercised during the course of dealings with the State, it would be inappropriate, in my view, to transpose the analysis adopted by the Supreme Court concerning freedom of expression to the provisions regarding linguistic rights. […]

N.B. – The appeal of this judgment was dismissed on other grounds by the Yukon Court of Appeal and the application for leave to appeal to the Supreme Court of Canada was dismissed.

SEE ALSO:

Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790, 1988 CanLII 20 (SCC)

Immeubles Claude Dupont inc. v. Québec (Procureur général), 1994 CarswellQue 2109, [1994] R.J.Q. 1968, J.E. 94-1233, EYB 1994-73412 (QC SC) [hyperlink not available] [judgment available in French only]

Democratic Rights (section 3)

3. Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[LAST UPDATE: APRIL 2017]

ANNOTATIONS

Figueroa v. Canada (Attorney General), [2003] 1 S.C.R. 912, 2003 SCC 37 (CanLII)

I. Regional Representation

[…]

[167] These features of Canada's history and political institutions indicate that fair democratic representation in this country includes representation of the distinctive interests of regional groups. I find support for this conclusion in some of this Court's statements on the relationship between federalism and democracy, particularly in the *Secession Reference*, *supra*. The Court portrayed the underlying principles of the Constitution, including federalism and democracy, as existing in symbiosis: "[n]o single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other" (para. 49). This suggests that federalism, with its concern for preserving the distinctive interests of regional groups, helps to define Canadian democracy.

[…]

[169] These observations suggest that one of the components of the right to meaningful participation is the right to have one's voice heard as a member of the regional community to which one belongs. The constitutional guarantee of effective representation includes a right to a certain degree of recognition of the individual voter's interests as a Manitoban, or a Maritimer, or a Quebecker, and it suggests a floor of relative equality between the different provinces and regions of the country which cannot be completely cancelled out by a nationwide numerical majority. This aspect of effective representation is far from being an absolute right, and its weight should not be overstated at the risk of trumping core concerns such as fairness as between individual voters. But it is one of the values to be taken into account in defining meaningful representation and determining whether government action offends s. 3.

Reference re the Final Report of the Electoral Boundaries Commission, 2017 NSCA 10 (CanLII)

[1] This is a Reference. The Court is asked (1) whether the abolition, in 2012, of the former provincial electoral ridings of Clare, Argyle and Richmond infringed s. 3 of the *Canadian Charter of Rights and Freedoms* and, if so, (2) whether the infringement is justified under s. 1 of the *Charter*.

[2] Electoral boundaries should achieve "effective representation". This is a constitutional right of citizens in s. 3 of the *Charter*. It is not a policy option for the Government. On this Reference, the analysis turns on the standards that govern the implementation of the constitutional principle of effective representation.

[3] Effective representation derives from a balance of criteria, broadly described by the Supreme Court of Canada, that are deduced from s. 3. The equilibrium is applied to the circumstances on the electoral map. It is a normative and contextual inquiry whose outcome may be in the eye of the beholder. Reasonable observers may disagree. So it is crucial to identify who is assigned the inquiry.

[…]

[19] Section 3's "democratic" reach extends beyond the polling booth. Early on, the courts' purposive interpretation of s. 3 impacted electoral boundaries. First was the decision of Chief Justice McLachlin, then of the British Columbia Supreme Court, in *Dixon v. British Columbia (Attorney General)* (1989), 1989 CanLII 248 (BC SC), 59 D.L.R. (4th) 247. Next was *Reference Re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158 (commonly called "*Carter*"), that overturned (1991), 1991 CanLII 8030 (SK CA), 78 D.L.R. (4th) 449 (Sask. C.A.), on the Government of Saskatchewan's electoral boundaries reference.

[…]

[49] The Interim Report's Appendix G explained the [Electoral Boundaries] Commission's reasoning for recommending the maintenance of protected ridings in Argyle, Clare and Richmond (to encourage Acadian representation) and Preston (to encourage African-Nova Scotian representation). The Commission applied its view of *Carter*'s effective representation to the circumstances that had become apparent during the Commission's hearings:

> Appendix G: Maintaining "Protected Constituencies"
>
> Canada is known throughout the world for the recognition and accommodation of minority rights within its democratic and parliamentary institutions. Indeed, the Supreme Court identified this as one of the defining features of the Canadian constitutional order (see *Reference re Secession of Quebec*, 1998). Nova Scotia has its own relatively recent history of recognizing and accommodating its distinctive Acadian and African Nova Scotian communities. Since 1991, the province of Nova Scotia has done this by extending special "protection" to four electoral districts. … The creation and maintenance of such electoral districts represents a choice – acknowledged or not – about how well to represent a minority group. Ensuring "effective representation" in the House of Assembly for all Nova Scotians (which is their constitutional right and the primary purpose of the electoral redistribution exercise) requires that relative parity of voting power be balanced against other considerations, and the balance struck will vary depending upon a range of factors and circumstances. In the judgment of the Commission, retaining the four protected constituencies for Acadians and African Nova Scotians continues to be the appropriate balance between relative voter parity and other considerations in order to best ensure that these groups receive effective representation in the Nova Scotia legislature.
>
> The protected districts in Nova Scotia were designated as such because they have a special historical significance for the province, as well as major significance for the Acadian and African Nova Scotian minorities whose political representation within the legislature they are intended to protect. Three of the four are ridings where the Acadian population is either dominant or numerically important: Clare, Argyle, and Richmond. The fourth is the riding of Preston, where African Nova Scotians comprise a key component of the voting population. The special protection was conferred as a means of avoiding the inevitable political dilution of these minority communities within the surrounding majority (even though their overall provincial numbers would otherwise justify proportionate representation in the legislature). While this particular mode of accommodating these specific minority groups is not without its problems (see below), it remains both a politically important and culturally significant gesture, recognizing as it does the unique place and role of these minority groups in the province's history, and within its present cultural diversity.
>
> Like the Mi'kmaq people, the Acadian and African Nova Scotian communities have a particular cultural uniqueness and territorial basis in Nova Scotia that supports the argument for retaining a form of 'special status' in the electoral redistribution process. This status follows from the fact that they constitute minority cultural communities that are indigenous to Nova Scotia, and further can be said to have fairly well-defined territorial 'homelands' in this province that have been continuously occupied for hundreds of years. Their distinctiveness derives from their long evolution as ethno-linguistic (Acadian) or racial (African Nova Scotian) minorities within an English-speaking majority of predominantly British heritage, but also, just as importantly, from their unique indigenous cultures that have developed over centuries of relative isolation as coherent communities (due to remote rural locale and/or social exclusion). In short, these minority cultures are both distinctively Nova Scotian and deeply rooted in specific, territorially-based communities within the province.
>
> …
>
> In effect, the elected representatives from the protected ridings in Nova Scotia have a mandate and a responsibility to perform a dual role both within and outside the legislature: they have a duty to be constituency representatives like other members of the legislature, but they also act as political representatives for the extended cultural community they represent. Thus, Acadians across the province, whether they live in the three protected ridings or not, depend on these protected political districts and the elected representatives they send to the legislature to play an important role in

> safeguarding the interests and identities associated with the Acadian language, culture and tradition. The same can be said for the riding of Preston, which, whether it elects an African Nova Scotian to the legislature or not (an outcome dependent in large part upon decisions made by political parties through their candidate selection processes), still expects its elected MLA [Members of the Legislative Assembly] to play this dual role – a mandate which they are able to impart through the strong African Nova Scotian voter presence within the boundaries of the protected constituency of Preston. (It should be noted that this fits the classic political definition of an influence district, where political candidates need to court support from a minority group to ensure their election, though the extent of minority influence will vary depending on local circumstances, and even from election to election). This is an additional consideration to take into account. This is the importance of symbolic recognition to minority communities. Such recognition constitutes a positive message of affirmation to minorities regarding acknowledgement by the majority of their existence, their historical significance and their continued distinctiveness. Revoking the protected status of the four designated constituencies would revoke this recognition; it would send a strong negative message about their place and status within the larger provincial community.
>
> … The protection offered to the three Acadian constituencies should be seen as a further measure taken to recognize and protect the French-speaking minority in the province, but beyond this the unique and indigenous Acadian communities from whence the vast majority of Nova Scotia's French-speaking population derives. The Constitution also explicitly acknowledges – in section 15(2) protecting the constitutionality of affirmative action programs – that equality for minorities needs to be understood as something other than 'sameness' of treatment; different treatment is sometimes necessary to achieve a form of equality that equates more closely with fairness for minorities, especially those that have been subject to historical discrimination. Finally, and directly pertinent to the elected redistribution process, is the Supreme Court decision in *Reference re Provincial Electoral Boundaries* (1991), where the Court held that the right to vote guaranteed by section 3 of the *Charter of Rights and Freedoms* does not include the right to votes of equal 'weight' in the sense that constituencies must be of equal population size.

[…]

[52] On June 14, 2012, the Attorney General, Mr. Landry, wrote to the Chair of the Commission. Mr. Landry's letter stated that the Interim Report was "null and void", for failure to follow the Terms of Reference, and directed the Commission to replace it with another Interim Report:

[…]

[65] There is no straight road to effective representation. Justice McLachlin framed the question as "comprising many factors":

[…]

[66] The body which determines or recommends the boundaries is expected to balance those factors. Effective representation weighs the principle of voter parity against countervailing criteria. The countervailing criteria include minority representation, cultural and group identity. Justice McLachlin put it this way:

[…]

[79] From the text in the Commission's first Interim Report, it appears likely that, without the Attorney General's letter of June 14, 2012, the Commission would have concluded that *Carter*'s criteria of minority representation, cultural and group identity, supported a higher variance for the Acadian ridings (above, paras. 47-49). The Attorney General's intervention forced the Commission to sign a Final Report with electoral boundaries that, in this respect, did not represent the Commission's authentic view of effective representation according to the constitutional criteria.

[…]

[89] The Commission is not just a Crown agent following orders from its principal. It also entertains authority directly from s. 3 of the *Charter* to implement the constitutional principles of effective representation. Effective representation is not a favour of the Government's beneficence. Section 3 expresses the citizens' entrenched "democratic right" that is untouchable even by a legislative override under s. 33.

[…]

[133] Section 3 requires that electoral boundaries reflect effective representation. The determination involves a balance of voter parity and countervailing criteria. The applicable countervailing criteria vary with the circumstances. For Clare, Argyle and Richmond, criteria that were noted in *Carter* and are reasonably worthy of consideration, include minority representation and cultural identity.

[…]

[135] We do not state that s. 3 of the *Charter* requires that there be protected ridings in Clare, Argyle and Richmond. Rather, under s. 3, the body that is authorized by law to craft the electoral boundaries must be allowed to balance the constitutional criteria as set out by the majority's reasons in *Carter*, and to express its view on the matter.

[136] The Attorney General's intervention on June 14, 2012 prevented the Commission from performing the balance, and from expressing its authentic view of effective representation for electors in Clare, Argyle and Richmond. Hence the Attorney General's intervention violated the precepts of s. 3 of the *Charter*. The violation (1) led directly to the Final Report's recommendation to eliminate the protected ridings which, in turn, (2) led directly to their abolition in (to quote the wording of Reference Question # 1) "Section 1 of Chapter 61 of the Acts of Nova Scotia 2012 … by which provisions the recommendations tendered by the Electoral Boundaries Commission by its Final Report … to the House of Assembly were enacted".

Daoust v. Québec (Directeur general des élections), 2011 QCCA 1634 (CanLII)

[37] The trial judge concluded that the [Quebec] *Election Act* does not contravene either s. 3 of the *Canadian Charter* or s. 22 of the Quebec *Charter*, and that the evidence had not established any violation of the right to equality that is enshrined in s. 15 of the *Canadian Charter* and s. 10 of the Québec *Charter* either. I am of the same opinion. Here is why.

[…]

[39] Without entering into all of the details, today's electoral map of Quebec, pursuant to the *Election Act*, is divided into electoral divisions that are delimited not only by taking into account the principle that the vote of each elector is of equal weight, but also on the basis of demographical, geographical and sociological considerations. Subject to exceptions, Section 16 of the *Election Act* stipulates that there cannot be a deviation between the number of electors in each division that exceeds by 25% the quotient obtained by dividing the total number of electors by the number of electoral divisions. The candidate of a division who has received the greatest number of votes is elected.

[…]

[44] Therefore, in order to be valid, every electoral system must confer on the electorate or assure it of a minimal, albeit significant, degree of representation. The appellants maintain that the voting system in force does not satisfy this requirement. They noted the deviations that may sometimes exist between the percentage of votes obtained and the number of members elected. Like the interveners, they consider that the current voting system creates large distortions that affect the representative character of the electorate. According to the appellants, minorities, including the English-speaking population of the West

Island, are under-represented in the National Assembly. The current system favours the election of majority governments, and works against minority parties.

[…]

[50] The evidence, especially the testimony by expert Leslie Seidle accepted by the trial judge, supported the conclusion that the one-round single-member majority system that is currently in effect in Quebec respects the right to effective representation of electors, including the minorities identified by the appellants.

[…]

[56] Once there is effective representation of citizens, which implies the possibility that each elector can exercise his right to vote periodically, freely, and secretly, be a candidate for office, vote for the party of his choice, and express himself in public, the right to vote enshrined in s 3 of the *Canadian Charter* and s 22 of the Quebec *Charter* is respected. That is the case here.

City of Yellowknife et al v Commissioner of NWT et al, 2015 NWTSC 51 (CanLII)

[47] The [Electoral Boundaries Commission's] Final Report is quite blunt about the challenges the Commission faced in attempting to achieve relative parity while also addressing other legitimate considerations, and the concerns that had been expressed:

> It is apparent that absolute voter parity between electoral districts is impossible to achieve. Moreover, it is extremely difficult to make any recommendation which would result in all electoral districts being within the plus or minus 25% variance. To do so would result in drastic changes to electoral districts that would not sufficiently take into account the historic configuration of electoral districts, language, culture, geography, land claims or self-government agreements.
>
> We are also of the view that the status quo is not acceptable and changes need to be considered. Some inequities between electoral districts are significant and have increased over time. The concept of effective representation requires that we attempt to reduce those inequities as much as possible.
>
> It seems clear that the issue of the number of electoral districts within Yellowknife versus elsewhere in the Northwest Territories cannot be resolved in a way that accommodates everyone's concerns. We do not think that effective representation requires that the number of electoral districts in Yellowknife be in perfect accord with Yellowknife's proportion of the territorial population. At the same time, the situation in Yellowknife cannot be ignored and if additional electoral districts are to be considered, one should be allocated to Yellowknife.
>
> *Ibid.,* page 15.

[48] The Applicants argue that although the issue of under-representation of the Yellowknife districts was acknowledged, nothing in the Final Report explains why this problem could not be mitigated. I disagree. The Report refers to the other considerations that were factored into the analysis. In the excerpt quoted above at Paragraph 47, the Commission refers directly to the challenges it faced, and to the need to take into account factors such as the historic configuration of electoral districts, language, culture, geography, land claims and self-government agreements.

[49] These concerns are very much in line with the realities cited by the Supreme Court of Canada in *Reference Re Prov. Electoral Boundaries (Sask.)* when it alluded to situations where a focus on voter parity may detract from the goal of effective representation:

> (...) effective representation and good government in this country compel those charged with setting electoral boundaries sometimes to take into account factors other than voter parity, such as geography

> and community interests. The problem of representing vast, sparsely populated territories, for example, may dictate somewhat lower voter population in these districts; to insist on voter parity might deprive citizens with distinct interests of an effective vote in the legislative process as well as of effective assistance from their representatives in their "ombudsman" role. This is only one of a number of factors which may necessitate deviation from the "one person - one vote" rule in the interests of effective representation.
>
> *Reference Re Prov. Electoral Boundaries (Sask.)*, *supra*, p. 188.

[50] It is difficult to imagine a jurisdiction where these considerations would resonate more than they do in the Northwest Territories. This jurisdiction spans over a widespread geographic area. Many of its communities do not have year-round road access. Air travel is very expensive. The Territory has eleven official languages, including nine aboriginal languages. *Official Languages Act*, R.S.N.W.T. 1988, c. O-1. Some aboriginal groups have settled land claims with beneficiaries who are spread out in several communities. Others do not have settled land claims, but have a community of interests. These are all factors that have a bearing on how the citizens of this territory can have effective representation in the Legislative Assembly.

[…]

[54] Drawing electoral boundaries is always a complex exercise but in the context of this jurisdiction, it is especially challenging. The districts here are not divided along the lines of "urban districts" and "rural districts". As noted above, there are a myriad of variables that must be taken into account in order to achieve effective representation.

[…]

[58] As noted above, the Northwest Territories has unique features, and this makes the drawing of electoral boundaries particularly challenging. Reasonable people may disagree as to how those challenges should be resolved. Weighing the many factors that had to be considered, including numbers, the Legislative Assembly could well have made a different decision about how best to address these difficult issues, and drawn the electoral boundaries in a different way. But saying that a different decision could have been made is a far cry from saying that the decision that was made could not have been made by reasonable persons, having regard to all the circumstances.

Judicial Recount Arising out of the 41st General Election in the Electoral District of Etobicoke-Centre (Re), 2011 CanLII 36068 (ON SC)

[36] Certain ballots must be rejected because of statutory provisions. These ballots may be categorized as follows:

[…]

2. Where ‘X’ is not in the circle provided

Section 284(1)(b) of the [*Canada Elections*] *Act* provides that the marking shall be made in the circle at the right of the candidate’s name to be valid. Therefore, If the ‘X’ is not in the circle provided the ballot is not valid.

Counsel for Borys Wrzesnewskyj submitted that the word ‘shall’ in s. 248(1)(b) of the *Act* should not be interpreted as determinative but as permissive, meaning that ballots with a mark outside of the circle to the right of the candidate’s name may still be valid as long as the voter’s intention is clear.

Counsel took the position that the interpretation of ‘shall’ as determinative is based on pre-*Charter* case law and that the jurisprudence did not take into account s.3 of the *Charter of Rights and Freedoms, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 (the “*Charter*”). In order for s.248(1)(b) to

be consistent with s.3 of the *Charter*, 'shall' should be interpreted as being permissive. Otherwise, voters who place their mark outside of the circle will be disenfranchised, and such a result is not consistent with their s. 3 rights.

Counsel for Mr. Wrzesnewskyj argued that a number of residents in the Etobicoke-Centre electoral district who (sic) do not speak English as a first language. Counsel submitted that persons who may not understand English well may have difficulty understanding the instructions as to where to vote on the ballot, and therefore may place their vote outside of the circle. Interpreting 'shall' in s.248(1)(b) as imperative would disenfranchise these persons. Counsel also referred to Manitoba legislation which allows marks outside of the circle to be counted as valid votes and the cases of *Chrol v. Winnipeg (City)*, 2007 MBQB 16 (CanLII), [2007] M.J. No. 22 to support the argument.

[…]

Counsel for Ted Opitz submitted that 'shall' in s.248(1)(b) should be interpreted consistently with Canada's *Interpretation Act*, RSC 1985, c. I-21, s. 11 (the "*Interpretation Act*") which states the following:

> The expression "shall" is to be construed as imperative and the expression "may" as permissive.

Counsel submitted that the court should interpret s. 248(1)(b) consistently with Ontario courts in recent years, which have applied 'shall' determinatively, and that the Manitoba case law presented by the applicant is not relevant in this case as Manitoba's legislation on this issue differs from the provisions in the *Canada Elections Act*. He contends that the *Charter* does not repeal the clear wording of legislation, and that the court must apply s.248(1)(b) as written.

I find that 'shall' in s.248(1)(b) is to be interpreted as being imperative. Case law in Ontario and other provinces has consistently found s.248(1)(b) as requiring a ballot with a mark outside of the circle to be invalid. The Supreme Court of Canada stated in *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, at p. 1078:

> Although this Court must not add to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect.

Section 248(1)(b) is not open to more than one interpretation. The section clearly states that ballots with marks outside of the circle 'shall' be rejected. Parliament has unambiguously determined that 'shall' is to be interpreted imperatively in the *Interpretation Act*. Therefore, s.248(1)(b) must be interpreted as being determinative. It is not for the court to add or delete anything from legislation when provisions are not ambiguous. Furthermore, s.248(1)(b) may not be inconsistent with the rights in s.3 of the *Charter*. In order to determine whether the language of s.248(1)(b) infringes s.3, a full *Charter* analysis would need to be undertaken. An application to challenge the constitutionality of s.248(1)(b) has not been put before the court in this case, and notice must be given to the Attorney General before such an application is heard. I am therefore of the view that the argument must fail and I find those ballots with marks outside the circle are invalid.

Raîche v. Canada (Attorney General), [2005] 1 F.C.R. 93, 2004 FC 679 (CanLII)

[28] In *Reference Re Prov. Electoral Boundaries (Sask.)*, the Supreme Court of Canada examined the principles set out in section 3 of the *Charter*. McLachlin J. (as she then was), writing for the majority, concluded that the purpose of the right to vote enshrined in section 3 of the *Charter* was the right to effective representation, and not merely parity of voting power.

[…]

[30] Accordingly, relative parity of voting power is the first condition of effective representation; but other factors, for example geographic features, history, the interests of the community and representation of minority groups, had to be considered, and could justify deviations from absolute voter parity.

[…]

[33] In this case, the applicants introduced evidence to show that there is a community of interest in Acadie-Bathurst. They filed seven affidavits by residents of the former electoral district of Acadie-Bathurst. All seven attested to the strong linguistic, historic, social and administrative ties that exist in Acadie-Bathurst, and the relative absence of ties between the communities in the former electoral district of Acadie-Bathurst and those in Miramichi. For example, Carmel Raîche, a resident of Allardville, and Ian Oliver, a resident of South Tetagouche, stated in their affidavits that they themselves, like the populations of Allardville and South Tetagouche, go to school, do their shopping, use the hospital and go to recreational centres in the Bathurst region, and not in Miramichi.

[…]

[46] The Court also believes that the testimony given by the applicants' witnesses is very important. The region spoke with a united voice. Representatives of associations, mayors from the different towns and the member of Parliament for Acadie-Bathurst filed affidavits and made submissions to the Commission. A petition signed by over 2,000 people was presented to the Commission.

[47] The people explained that the region is unique. According to one presenter, it has the highest concentration of Acadians in Canada. In the course of the hearings, a number of presenters talked about the importance of having a strong Acadian voice, and reminded the members of the Commission of the historical wrongs done to the Acadians. Having regard to the evidence as a whole, the Court finds that there is a community of interest in Acadie-Bathurst.

[48] The Commission in fact reached the same conclusion. It agreed that there was a community of interest in Acadie-Bathurst, and it was even aware that parity of voting power is not the only consideration in readjusting electoral boundaries. However, it decided that a variance of -21 percent was simply too large, and that despite the existence of a community of interest in Acadie-Bathurst it was necessary to reduce Miramichi's variance from the electoral quota. It therefore transferred the parish of Allardville and part of the parishes of Saumarez and Bathurst to the electoral district of Miramichi.

[49] Because the primary consideration in determining whether a population has effective representation is voter parity, and that a commission does not contravene section 3 of the Charter unless "reasonable persons applying the appropriate principles . . . could not have set the electoral boundaries as they exist", the Court finds that the Commission did not contravene section 3 of the *Charter* when it decided to transfer the parishes from Acadie-Bathurst to Miramichi.

[50] That decision is reasonable, and accordingly the Commission did not contravene section 3 of the *Charter*.

Friends of Democracy v. Northwest Territories (Commissioner), 1999 CanLII 4256 (NWT SC)

[10] It follows that the right to vote guaranteed by section 3 of the *Charter* is more than merely the right to be registered as a voter and to cast a ballot on election day. In times past, there were residents of the Northwest Territories who were denied all right to vote in elections to the House of Commons and in elections to the legislature of the Northwest Territories. These denials of right have long since been corrected by legislation. Canadians through Parliament and their provincial and territorial legislatures, have chosen to tolerate a measure of over-representation from thinly populated and relatively remote regions in preference to any such complete denial of legislative representation from those regions. Nor is the present application directed at the removal or reduction of such over-representation within the Northwest Territories.

[11] Instead, the question before the court in the present application is whether the under-representation of voters at Yellowknife, in elections to the Legislative Assembly, is in violation of section 3 of the *Charter*. Should additional electoral districts there be created so as to correct this under-representation and meet the standard set by that important and over-riding requirement of the Constitution of Canada?

[…]

[18] Considering the factors of geography, community history and interests, language differences, difficulties in communication with remote communities and minority representation, not to mention the normal difficulties and expenses of travel between the seat of government at Yellowknife and the various communities outside Yellowknife, I am satisfied that there probably is justification within the ambit of section 3 of the *Charter* for the present over-representation of the electoral districts whose percentage variations in population are below the average. On the other hand, I am unable to find similar justification for the gross under-representation of those other districts where the variations are markedly (25% or more) above the average. This gross under-representation must constitute a clear violation of section 3 of the *Charter* in the absence of due justification.

[…]

[24] Given that the *Charter* section 3 right to vote is a right of citizenship exercisable by all duly qualified individuals, it is clear that neither the existence nor the due exercise of that right should depend upon the leave, licence or say-so of any government or other executive authority, be it in relation to the negotiation or enjoyment of any aboriginal land claim or other aboriginal or treaty right. And to the extent that voting rights are dependent upon or are exercisable only subject to legislation, that legislation must not violate the supreme law known as the Constitution of Canada, as defined by section 52 of the *Constitution Act, 1982*:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> (2) The Constitution of Canada includes:
>
> (a) the *Canada Act, 1982*, including this Act;
>
> (b) the Acts and orders referred to in the Schedule; and
>
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).
>
> (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

[25] As the foregoing is intended to show, I remain unpersuaded that section 3 of the Charter is in any sense to be understood as qualified by section 25 of the *Charter* or section 35 of the *Constitution Act, 1982*, at least in the present instance, given the evidence before the court in this application. It is entirely unacceptable that such a fundamental right of citizenship as that recognized and guaranteed in section 3 of the *Charter* (and thus in the Constitution of Canada) should be held in suspense, and thus be withheld, during government negotiations over the future self-government of aboriginal or other groups which might yet take decades to bring to a conclusion.

[…]

[38] As counsel for the Respondent has reminded me, this court in *Morin v. Northwest Territories (Conflict of Interest Commissioner)* (1999) N.W.T.J. No. 5 (Docket CV 07975) has held that the Legislative Assembly of the Northwest Territories is a legislature in the full sense of the word though not competent as yet to amend its own constitution except as permitted by the *Northwest Territories Act*. That being so,

it is plain that the *Charter* section 3 voting right extends to voting in elections to that legislature equally with the provincial legislatures across Canada. Conditions in the Northwest Territories are different in certain respects from those in the provinces but the same constitutional principles apply. Canadian citizens in these Territories have the same *Charter* section 3 rights as do Canadian citizens in the various provinces.

Legal Rights (sections 7-14)

7. Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[LAST UPDATE: APRIL 2017]

ANNOTATIONS

R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

[41] Another important consideration with regard to the interpretation of the "best interests of justice" is the complete distinctiveness of language rights and trial fairness. […]

The right to full answer and defence is linked with linguistic abilities only in the sense that the accused must be able to understand and must be understood at his trial. But this is already guaranteed by s. 14 of the *Charter*, a section providing for the right to an interpreter. The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English. This Court has already tried to dissipate this confusion on several occasions. Thus, in *MacDonald v. City of Montreal, supra*, Beetz J., at pp. 500-501, states that:

> It would constitute an error either to import the requirements of natural justice into . . . language rights . . . or vice versa, or to relate one type of right to the other. . . . Both types of rights are conceptually different. . . . To link these two types of rights is to risk distorting both rather than reenforcing either.

I re-affirm this conclusion here in the hope that these rights will no longer be confused. Fairness of the trial is not to be considered at this stage and is certainly not a threshold that, if satisfied, can be used to deny the accused his language rights under s. 530.

R. v. Tran, [1994] 2 S.C.R. 951, 1994 CanLII 56 (SCC)

[37] Support for an expansive interpretation of s. 14 may also be found within the *Charter* itself. This Court has already indicated that provisions of the *Charter* are not to be read in isolation, but rather interpreted in light of one another: e.g., *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588, per Wilson and La Forest JJ., *Dubois v. The Queen*, 1985 CanLII 10 (SCC), [1985] 2 S.C.R. 350, per Lamer J. (as he then was), and *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357. It has already been noted by this Court that s. 7 of the *Charter* is a general expression of the legal rights contained in ss. 8 to 14 of the *Charter*: *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, per Lamer J. (as he then was), at p. 502. Not surprisingly, therefore, s. 14 bears a close relationship to s. 7 and the other "legal rights" guaranteed under the *Charter*. Indeed, I would argue that the right to interpreter assistance under s. 14 is a means of ensuring that criminal proceedings comply with the constitutional guarantee of a fair and public hearing found in s. 11(d) of the *Charter*. At the same time, the force of s. 14 can be understood in part by reference not only to the right to make full

answer and defence, but also to the right to have full disclosure of the case which has to be answered prior to making one's defence, both rights which are protected under ss. 7 and 11 of the *Charter*. Indeed, the close connection between s. 14 and these other *Charter* guarantees suggests that the right to interpreter assistance in the criminal context should be considered a "principle of fundamental justice" within the meaning of s. 7 of the *Charter*.

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 1986 CanLII 65 (SCC)

[114] It is axiomatic that everyone has a common law right to a fair hearing, including the right to be informed of the case one has to meet and the right to make full answer and defence. Where the defendant cannot understand the proceedings because he is unable to understand the language in which they are being conducted, or because he is deaf, the effective exercise of these rights may well impose a consequential duty upon the court to provide adequate translation. But the right of the defendant to understand what is going on in court and to be understood is not a separate right, nor a language right, but an aspect of the right to a fair hearing.

[115] It should be absolutely clear however that this common law right to a fair hearing, including the right of the defendant to understand what is going on in court and to be understood is a fundamental right deeply and firmly embedded in the very fabric of the Canadian legal system. That is why certain aspects of this right are entrenched in general as well as specific provisions of the *Charter* such as s. 7, relating to life, liberty and security of the person and s. 14, relating to the assistance of an interpreter. While Parliament or the legislature of a province may, pursuant to s. 33 of the *Charter*, expressly declare that an Act or a provision thereof shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the *Charter*, it is almost inconceivable that they would do away altogether with the fundamental common law right itself, assuming that they could do so.

[116] This is not to put the English and the French languages on the same footing as other languages. Not only are the English and the French languages placed in a position of equality, they are also given a preferential position over all other languages. And this equality as well as this preferential position are both constitutionally protected by s. 133 of the *Constitution Act, 1867*. Without the protection of this provision, one of the two official languages could, by simple legislative enactment, be given a degree of preference over the other as was attempted in Chapter III of Title 1 of the *Charter of the French Language*, invalidated in *Blaikie No. 1*. English unilingualism, French unilingualism and, for that matter, unilingualism in any other language could also be imposed by simple legislative enactment. Thus it can be seen that, if s. 133 guarantees but a minimum, this minimum is far from being insubstantial.

[117] It would constitute an error either to import the requirements of natural justice into the language rights of s. 133 of the *Constitution Act, 1867*, or vice versa, or to relate one type of right to the other under the pretext of re-enforcing both or either of them. Both types of rights are conceptually different. Also, language rights such as those protected by s. 133, while constitutionally protected, remain peculiar to Canada. They are based on a political compromise rather than on principle and lack the universality, generality and fluidity of basic rights resulting from the rules of natural justice. They are expressed in more precise and less flexible language. To link these two types of rights is to risk distorting both rather than re-enforcing either.

Yamba v. Canada (Minister of Justice), 2016 BCCA 219 (CanLII)

[22] Mr. Yamba's concern that his limited proficiency in English will prevent him from receiving a fair trial in the United States raises his right to make full answer and defence and engages the principles of fundamental justice under s. 7 of the *Charter*. In the extradition context, those principles recognize the reality that it is not unjust to surrender a person to a state that has criminal procedures that do not meet Canada's constitutional requirements. In such circumstances, the Supreme Court of Canada has stated that the correct question is "whether or not, in the particular circumstances of the case, surrender of a fugitive for a trial offends against the basic demands of justice" (*Schmidt* at 523).

[23] The basic demands of justice clearly include the right to a fair trial. In order to have a fair hearing an accused must understand what is transpiring in court. In *R. v. Tran*, 1994 CanLII 56 (SCC), [1994] 2

S.C.R. 951 at 967, a case dealing s. 14 of the *Charter*, which guarantees the right to the assistance of an interpreter in any proceedings, Chief Justice Lamer stated:

> The right to interpreter assistance is a means of ensuring that proceedings are fair and comply with the basic principles of natural justice.

[24] Chief Justice Lamer went on to note that interpreter assistance is an internationally-accepted standard for facilitating an accused's right to a fair trial. After referring to the right to the free assistance of an interpreter guaranteed to an accused in both the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (art. 14(3)(f)), and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 (art. 6(3)(e)), the Chief Justice said this about the United States (at 969):

> While the United States' Constitution lacks a provision which expressly guarantees the right to interpreter assistance, American courts have found such a right to exist inferentially under the Fifth Amendment (right not to be deprived of liberty without due process of law), the Sixth Amendment (right of accused to confront witness against him and to have the assistance of counsel) and the Fourteenth Amendment (right not to be deprived by any State of liberty without due process of law), as well as in the counterparts to these provisions found in state constitutions: J. F. Rydstrom, "Right of Accused to Have Evidence or Court Proceedings Interpreted" (1971), 36 A.L.R. 3d 276, *Negron v. New York*, 434 F.2d 386 (2nd Cir. 1970), and Valladares v. United States, 871 F.2d 1564 (11th Cir. 1989).

See also: *R. v. Sidhu* (2005), 2005 CanLII 42491 (ON SC), 203 C.C.C. (3d) 17 at para. 276 (Ont. S.C.J.).

[25] In my view, it was reasonable for the Minister to conclude that the assistance of a certified translator will address Mr. Yamba's concerns regarding trial fairness in the United States. The use of a translator will ensure the integrity of the fact-finding process. With the assistance of a translator Mr. Yamba will be able to understand what is transpiring in court, consult with and instruct counsel and, if Mr. Yamba elects to do so, testify in a responsive manner.

R. v. Lapointe, 1983 CarswellOnt 1212, [1983] O.J. No. 183, 1 O.A.C. 1, 9 C.C.C. (3d) 366 (ON CA) [hyperlink not available]

[47] Nothing which has been said in this judgment should be taken as an encouragement for the practice followed by the Metropolitan Toronto Police in the present case. On the contrary, the taking of the respondents' statements in the English language without requiring the presence of an interpreter seriously jeopardized the admissibility of statements deemed to be important for the administration of criminal justice. In every case where police officers deal with a suspect whose mother tongue is different, every effort should be made to obtain a qualified interpreter. Ideally, officers taking the statements should be familiar with the language of the suspect. This is, of course, not always possible even in a multi-cultural society. Where no such officer is present, an interpreter should be made available.

N.B. – This decision was confirmed by the Supreme Court in R. v. Lapointe and Sicotte, [1987] 1 SCR 1253, 1987 CanLII 69 (SCC).

Cabral v. Canada (Citizenship and Immigration), 2016 FC 1040 (CanLII)

[2] The essentials of the Plaintiffs' claim, as reflected in the Amended Statement of Claim is as follows:

> (a) Each of the Plaintiffs applied for permanent resident status pursuant to subsection 12(2) of the Immigration and *Refugee Protection Act*, SC 2001, c 27 and section 87.2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as part of the Federal Skilled Trade Class [FSTC];
>
> (b) Despite meeting all of the other requirements for permanent residence required by the FSTC, each was refused because he failed to meet the language requirement by failing the International English Language Testing System [IELTS], adopted by the Minister of Citizenship and Immigration;

(c) The Plaintiffs allege that the IELTS is culturally biased towards “British English” rather than “Canadian English” and unfairly requires a high proficiency in English;

(d) The Plaintiffs further allege that the Minister administers the FSTC in a manner that favours persons from English-speaking countries and discriminates against those, like the Plaintiffs, who are from non-English speaking countries;

(e) Each Plaintiff, having failed to meet the threshold requirements under the IELTS, requested that the officer perform a substitute evaluation of his ability to become economically established in Canada, as provided by subsection 87.2(4) of the Regulations;

(f) The Plaintiffs allege that the officer refused to consider their applications on the merits because of a Ministerial Instruction stipulating that no FTSC application was to be examined by an officer unless the language requirement was met;

(g) The Plaintiffs allege that the Ministerial Instruction is contrary to the Regulations and is ultra vires;

(h) The Plaintiffs allege that the conduct of the Defendants amounts to breach of statute, public misfeasance and abuse, excess of jurisdiction and authority, abuse of process, bad faith, and breach of section 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11; and

(i) The Plaintiffs suffered damages as a result of the Defendants’ wrongful conduct.

[…]

[89] In my view, the Plaintiffs have not shown that the IETLS is in any manner “unfair” to them based on their background. In particular, given the high test results of persons from Italy, Poland, and Portugal, it cannot be said that the test discriminates against persons from non-English speaking countries. While it is true that a greater percentage of English-speaking candidates pass the benchmarks than non-English-speaking applicants, this can hardly be surprising and more importantly does not in itself establish that there is a bias against non-English speaking applicants.

R. v. Ibrahem, 2016 ONSC 3196 (CanLII)

[36] Mr. Ibrahem is a person with a first language other than English but with an ability to communicate and understand English. When he had the assistance of an interpreter of his first language, he was not deprived of his legal rights to remain silent or to give a voluntary statement.

[…]

[38] There has been no deprivation of Mr. Ibrahem’s right to silence within section 7 of the *Charter of Rights and Freedoms*. He had an operating mind as he communicated with police officers. He was not subjected to pressure or trickery by police officers.

156158 Canada inc. v. Québec (Attorney General), 2016 QCCS 1676 (CanLII)

[80] Appellants argued that the *CFL* [*Charter of the French Language*] provisions also infringed on their right to liberty, as guaranteed by Section 7 of the *Canadian Charter* and Section 1 of the Québec *Charter*:

Canadian Charter

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Québec Charter

1. Every human being has a right to life, and to personal security, inviolability and freedom.

[…]

[81] The trial judge did not err in deciding that the decision to conduct business in the language of one's choice could not be qualified as inherently or fundamentally personal and, therefore, was protected by the right to liberty.

[82] As stated by the trial judge, the right to liberty protected by the Québec and Canadian *Charters* is not synonymous with the absence of restraint; it is limited to protecting the irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference.

[83] The trial judge made no mistake when he asserted that the constraints imposed by the *CFL* on the manner in which Appellants conduct their business cannot be classified as inherently or fundamentally personal. Furthermore, this right protects human beings, not corporations.

N.B. – This judgment is currently under appeal before the Quebec Court of Appeal. See also the trial judgment: *Quebec (Attorney General) c. 156158 Canada Inc. (Boulangerie Maxie's)*, 2015 QCCQ 354 (CanLII).

H.M.T.Q. v. Blackduck, 2014 NWTSC 58 (CanLII)

[4] Mr. Blackduck's first language is Tłı̨chǫ (which was also referred to as "Dogrib" during the evidence at the voir dire). His position that the statement should not be admitted is largely based on the fact that when it was taken, Mr. Blackduck did not have the assistance of an interpreter. He argues that his limited comprehension of the English language and his limited ability to express himself in that language makes the statement inadmissible.

[…]

[83] I accept that Sgt. Landry, for the reasons he explained in his evidence, believed that Mr. Blackduck understood him. But that belief does not establish that in fact, Mr. Blackduck did understand everything he was being told that day, and in particular, that he understood the caution. Having an understanding of language to function in certain types of interactions is not the same thing as understanding rights, legal concepts and the potential ramifications of certain decisions.

[…]

[88] The assessment of voluntariness is a contextual exercise, and is highly fact-specific. Here, the issue boils down to whether Mr. Blackduck understood his right to remain silent. Bearing in mind that voluntariness implies an awareness of what is at stake, and of the implications of speaking, or not speaking, to the authorities about the alleged events, I am not satisfied that it has been established to the required standard of proof. I am not satisfied beyond a reasonable doubt that Mr. Blackduck understood his right to remain silent and gave that right up with a full understanding of what was at stake in speaking to Sgt. Landry that day. I am also not satisfied he fully appreciated that what he was telling Sgt. Landry could be used in a prosecution against him.

[89] I accept that the officers involved in this matter did not believe that there was any issue with Mr. Blackduck's level of understanding of what they were telling him. But when dealing with someone whose first language is not English, it may be prudent for police officers to err on the side of caution and seek the assistance of an interpreter to ensure that detainees have a clear understanding of their rights, before attempting to take a statement from them.

R. v. J. K., 2011 ONSC 800 (CanLII)

[57] In this case, the legal test is whether the accused's understanding and ability to communicate in the English language was so deficient that it was impossible for him to have understood the police or to have made any statements in English (para 44 *Lapoint* (sic), para. 33 *L.B.*). At the *voir dire*, the court must determine "the accused's ability to comprehend and communicate in the language of the statement" (para 44 *Lapoint* (sic)).

[58] Given the evidence in this voir dire, as I have said above, I have no hesitation in concluding that J.K. had sufficient communicative ability in English that he could understand the type of questions asked and understand the type of responses he gave during the course of the videotaped interview.

[59] The Defence counsel submitted J.K. could have better communicated through an interpreter. I don't disagree that his answers *might* have been more eloquent or thorough. However, that is not the test. If the possibility the accused might communicate better through an interpreter were the test, the police would be faced with the task of having an interpreter at interviews in all cases where English was the accused's second language or any number of other occasions such as where the accused's English language skills are deficient even if English is the accused's first language. What about statements when an accused is arrested at the scene or in the police cruiser or to third persons etc.? The list would be endless.

[60] To be clear, I am not suggesting that police do not have to provide an interpreter where it is clear or there is good reason to believe that the person being interviewed has genuine difficulty understanding the questions or has genuine difficulty in expressing their (sic) answers because of language comprehension or proficiency. Failure to do so puts the admissibility of the statement at risk.

HMTQ v. Pelletier, 2002 BCSC 561 (CanLII)

Fair Hearing

[46] Mr. Pelletier contends that if he is not accorded a [parole eligibility] hearing in the French language, he will be deprived of his right to a fair hearing as guaranteed by s. 7 of the *Charter*. Section 7 reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[47] Mr. Pelletier makes the point that most of the witnesses to be called, including himself, speak French, and thus a hearing conducted in English will not be fair because something will inevitably be lost in the translation from the French language to the English language.

[48] I cannot accept this submission. While there is no doubt that Mr. Pelletier is entitled to a fair hearing, whether it be by virtue of s. 7 of the *Charter* or at common law, I cannot agree that the use of interpreters will result in an unfair hearing. While for all practical purposes it would be more convenient for Mr. Pelletier to have his hearing in French, the fact that it will be in English does not inevitably result in an unfair hearing. Translators can and will be provided as needed; hearings involving translators are common place in all courts. Special care is needed when a hearing requires a translator, but the courts regularly operate in such situations with the assistance of translators.

[49] To accept Mr. Pelletier's submission on this point would be to accept the proposition that all persons who require the assistance of translators in the Province of British Columbia cannot have fair hearings. Given the number of different ethnic origins of people in British Columbia and the languages they speak, it would be impossible to provide judges and juries fluent in all these languages.

[50] It is significant that s. 14 of the *Charter* provides for the use of interpreters. The purpose of s. 14 is to protect the right to a fair hearing. In the *Société Des Acadiens* case, *supra*, Beetz J. said, at p. 577:

> The common law right of the parties to be heard and understood by a court and the right to understand what is going on in court is not a language right but an aspect of the right to a fair hearing. It is a broader and more universal right than language rights. It extends to everyone including those who speak or understand neither official language. It belongs to the category of rights which in the *Charter* are designated as legal rights and indeed it is protected at least in part by provisions such as those of ss. 7 and 14 of the *Charter*:
>
> > 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
> >
> > 14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.
>
> The fundamental nature of this common law right to a fair hearing was stressed in MacDonald, in the reasons of the majority, at pp. 499-500:
>
> > It should be absolutely clear however that this common law right to a fair hearing, including the right of the defendant to understand what is going on in court and to be understood is a fundamental right deeply and firmly embedded in the very fabric of the Canadian legal system. That is why certain aspects of this right are entrenched in general as well as specific provisions of the Charter, such as s. 7, relating to life, liberty and security of the person and s. 14 relating to the assistance of an interpreter.

[51] In *R. v. Watts, Ex Parte Poulin*, *supra*, Verchere J. said at p. 224:

> In holding, as I do, that the law of this Province requires that trials in provincial Courts be conducted in English, I am not overlooking the asserted unfairness of this court to a Canadian who speaks only French. But, in my opinion, when the rights of an accused person ignorant of the English language are observed and the evidence given at the trial translated to him, as it must be (see *R. v. Lee Kim* (1915), 11 Cr.App.R. 293), it cannot be assumed that any fairness to him will then arise.

[52] For the foregoing reasons, I do not accept Mr. Pelletier's submission that a proceeding conducted in English will result in an unfair hearing.

R. v. Butler, 2002 NBQB 325 (CanLII)

[15] Fundamental differences exist between the concept of legal rights and language rights. […]

[25] Although I have decided that Mr. Butler's language rights pursuant to section 20(2) have not been violated, I, nevertheless, am of the opinion that language can be and is, in this case, an important factor to be considered in determining whether Mr. Butler's ability to make full answer and defence has been impaired due to his failure to obtain disclosure in English.

[…]

[28] Disclosure is not a process which is extrinsic to the advancement of the prosecution's case. Although it occurs prior to the commencement of the trial proper, it is so inextricably linked with the ability of the accused to make full answer and defence, that is it (sic), in my opinion, co-extensive with the right to a fair hearing.

[…]

[35] These cases are supportive of my opinion that cases may arise in which the accused could successfully establish that the failure to provide translated disclosure in the official language of his choice effectively prejudices his right to make full answer and defence.

[…]

[38] The facts of this case can be readily distinguished from that of *Rodrigue*. Firstly, *Rodrigue* was tried in the Yukon Territory, as opposed to New Brunswick which is the only officially bilingual province in Canada. The *Charter* demonstrates a constitutional objective of linguistic duality for this province. Due to the province's uniqueness, a more exacting standard of disclosure may be warranted. […]

[51] The accused has affirmed that he has been prejudiced owing to his inability to understand the disclosure provided in the French language. This assertion, without more evidence as to the actual effect on his ability to exercise his constitutional rights is, in my opinion, insufficient to prove on a balance of probabilities that he has suffered actual prejudice. The onus is on Mr. Butler to show at the very least that the nature of the disclosure in this case, realistically denied him the opportunity to assess the evidence and make informed decisions about his defence.

[52] Having considered all of the facts of this case, I have concluded that denying a request for translation may, in some cases, amount to a breach of *Charter* rights. Nevertheless, in this particular case, Mr. Butler has failed to discharge the evidential burden. Accordingly, I find that he has not established a violation of section 7 and section 11(d) of the *Canadian Charter of Rights and Freedoms*.

R. v. Ansary, 2001 BCSC 1333 (CanLII)

[64] Notwithstanding that he voluntarily participated in the interview process and notwithstanding that there was no breach of his right to counsel, Mr. Ansary's difficulties with the English language bring into question the fairness of the interrogation process used by the police in this case.

[65] Although Mr. Ansary never asserted a right to silence so as to engage a breach of s. 7 of the *Charter* in the usual sense of the desire to remain mute being overridden by police conduct, he did continually assert his desire to explain all that had happened. He did so in conjunction with the assertion of his need for an interpreter.

[66] Section 14 of the *Charter* provides that a party who does not understand or speak the language in which proceedings are conducted has the right to the assistance of an interpreter. The section does not, however, specifically extend that right to the pre-trial stage of criminal proceedings. In my view, however, the fundamental right to a fair trial protected by s. 7 of the *Charter* requires that the impact of any language difficulties faced by an accused must be considered if the state seeks to adduce evidence at trial of incriminatory statements made by an accused in the investigative stage.

[…]

[76] In my view, when the police questioned Mr. Ansary in the face of his immediate and continued requests for an interpreter prior to the first interview without obtaining the services of an interpreter or without having the questioning performed by an officer that could speak Pushto, they took a chance that any statements he made later might be determined to be inadmissible. Although the police were not bound to provide an interpreter, their determination to proceed without one brought to the fore the issue of the fairness of their conduct in relation to the fairness of the trial process and the risk that the evidence they obtained would be tainted by unfairness.

[77] I am satisfied, notwithstanding the evidence of the police officers to the contrary, that Mr. Ansary did not fully understand all of the questions asked. The transcripts of the two interviews also lead me to conclude that the police may have misunderstood or misinterpreted some responses. More importantly, the police never gave Mr. Ansary the opportunity to correct any lack of understanding or misunderstandings or provide a full explanation by convening a subsequent interview with the aid of an interpreter so that he could explain all that had occurred as he had always said he wanted to do.

[78] I am satisfied that Mr. Ansary's request for an interpreter to assist him in a full explanation was genuine. It was not oblique and did not arise from any improper motivation. I am also satisfied that Mr.

Ansary's willingness to talk to the police and thus forfeit his right to silence must be interpreted as having been conditional upon his being given the opportunity to provide a full explanation with the benefit of an interpreter.

[79] I find that in those circumstances the failure of the police to allow an opportunity for a full explanation with the benefit of an interpreter was a breach of Mr. Ansary's s. 7 right to silence. Accordingly, the statements made both prior to and during the first and second taped interviews are inadmissible. Similarly, the derivative interview relating to the calendar is inadmissible. Since trial fairness would be affected by the admission of what is conscriptive evidence, these statements cannot be saved under s. 24(2) of the *Charter*.

R. v. Rodrigue, 1994 CanLII 5249 (YK SC)

[p. 28] The right is a right to the disclosure of the evidence as it exists, not the right to have the assistance of the prosecution in the sense of enhancing the ability of counsel for the defence, or of the accused himself, to assess and evaluate the significance or the weight that could be attached to a certain item of evidence.

[…]

[pp. 30-31] There may be circumstances where the court would, before the trial, make a ruling that without the translation of a document from a language other than an official language to an official language, or from one official language to the official language in which the accused has chosen to be tried, the right of the accused to "make full answer and defence" or to a fair hearing would be compromised. We will have to wait for another case to determine under what circumstances the court would come to such a conclusion. In the present circumstances, the accused and his counsel admit that they are both able to understand English and they do not allege that the accused would suffer any prejudice if the statements and documents disclosed by the prosecution before the trial were not accompanied by a French translation. The claim of the accused is founded exclusively on the principle that since French has been chosen as the official language of the trial, he has a right to obtain disclosure of the evidence accompanied by a French translation. I have rejected this argument.

N.B. – The appeal of this judgment was dismissed on other grounds by the Yukon Court of Appeal and the application for leave to appeal to the Supreme Court of Canada was dismissed.

R. v. Fiddler, 1994 CanLII 7396 (ON SC)

[13] Of the evidence before me, only the affidavit of Albert Fiddler required the assistance of an interpreter. From that fact, I infer that the applicant's first language is Oji-Cree and not English, and that his present grasp of the English language and his ability to speak it is otherwise unknown. In his affidavit, Albert Fiddler says:

> (1) that he is unfamiliar with Kenora and does not travel there often;
>
> (2) that if his trial is held there, he and witnesses from Sandy Lake would be required to travel 400 kilometres;
>
> (3) that if the relief he seeks is not granted, his Ojibway-Cree culture and language may constitute a barrier to understanding for non-aboriginal jurors;
>
> (4) that the meaning of his testimony, and that of other witnesses he might choose to call, would be lost even if an interpreter is used.

[14] In essence, Albert Fiddler asserts that the factors of culture, language and geography impact negatively on his ability to have a fair trial unless by a jury of his cultural peers, in the community of Sandy Lake.

[…]

[45] There can be no doubt that the right to trial by jury is one of the principles of fundamental justice referred to in s. 7 of the *Charter*. In criminal and penal matters the right to the benefit of trial by jury is specifically guaranteed by s. 11(f) of the *Charter*. History confirms the place of trial by jury as an essential part of our criminal justice system and as a fundamental constitutional guarantee of the rights of the individual in a democratic society: *R. v. Bryant*, *supra*, at p. 233 C.R.R., p. 423 C.C.C.

[...]

[49] The main thrust of the applicant's argument is directed to ss. 7 and 11(d) of the *Charter*; it posits:

(1) that the application of s. 6(2) of the *Juries Act* results in a predominantly non-aboriginal jury;

(2) that a jury so composed cannot grasp the cultural issues that are essential to an understanding of the applicant's case;

(3) that because the meaning of words and gestures is culture-specific, a direct translation cannot capture the underlying meaning of what is spoken;

(4) that the aboriginal community of Sandy Lake has a *Charter*-recognized interest in addition to that of the applicant, and that a jury array gathered pursuant to s. 6(2) of the Juries Act results in a tribunal which cannot be considered impartial by the Sandy Lake community;

(5) that the terms "peers" and "community" require narrower definition in the circumstances to ensure the legitimacy of the hearing and to foster the goals of the jury process as an educative institution thereby encouraging greater aboriginal participation in the administration of justice.

[...]

(i) Language and issues of comprehension

[63] In a criminal trial, full understanding of the evidence is manifestly essential not only for the accused but also for the trier of fact. It is the court's responsibility to facilitate communication and to ensure that appropriate means of communication are provided: *R. v. Lee Kun*, [1916] 1 K.B. 337 at 342, [1914-15] All E.R. Rep. 603 (C.C.A.), per Lord Reading. (We are not concerned here with a French language trial or a bilingual trial. It is assumed that the trial will ultimately take place in the English language.) Where relevant and probative evidence can better be given in a language other than the official language of the trial, the use of interpreters has, to this point, been the accepted means of ensuring full understanding. In criminal proceedings, the provision of a qualified interpreter at the expense of the state is clearly one of the principles of fundamental justice: Graham J. Steele, *Court Interpreters in Canadian Criminal Law* (1992), 34 *Criminal Law Quarterly* 218 at p. 234; *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, *supra*, per Lamer J. (as he then was) at pp. 44-45 C.R.R., p. 301 C.C.C.; *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education* (1986), 1986 CanLII 66 (SCC), 23 C.R.R. 119 at p. 172, [1986] 1 S.C.R. 549 at p. 622, per Wilson J. Indeed, the right to an interpreter is specifically guaranteed by s. 14 of the *Charter*.

[...]

[72] In the present case, the complainant was shunned by the community of Sandy Lake and had to be removed from the community for her own emotional safety. In balancing the rights protected under s. 7 of the *Charter*, I have considered the context of this case, particularly the prominence and the position of the accused and his family in the Sandy Lake community and the evidence that the complainant was shunned by that same community. I find that it would sacrifice the rights of the complainant to direct that a trial take place with a jury composed substantially of persons from that community or its environs.

[...]

[87] For the preceding reasons, I hold the view that the applicant has not made out a case under s. 7 of the *Charter* [...].

R. v. R.T., 2016 QCCQ 689 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[2] Since the accused, the alleged victim and three prosecution witnesses are hard of hearing, all the proceedings were interpreted from French to Quebec Sign Language (QSL) and from QSL to French, from the outset of the case. The interpretation was carried out by certified interpreters who took turns interpreting throughout the proceedings. Their work essentially consisted of interpreting everything that was said during the trial for the benefit of both the accused and justice system representatives, witnesses and the alleged victim.

[3] On the 10th day of the hearing, the defence first raised the fact that the accused seemed to have some trouble comprehending. These problems apparently followed the accused's testimony as part of a *voir dire* held on the ninth day of the hearing. With the parties' consent, the Court held a hearing to clearly identify the nature of these difficulties. At the end of this hearing, given the evidence showing that the accused was able to read, the Court ordered that all the hearings held up to then be transcribed, and postponed the rest of the trial so that the accused would have time to read the transcription. The Court also indicated to the defence that it would take into consideration any request to cross-examine some witnesses again following this reading.

[…]

[26] In this case, after performing a detailed analysis of the evidence and the applicable principles, the Court finds that it is not necessary to declare a mistrial. In the specific context of this case, the comprehension problems raised by the accused do not suggest that either s. 14 of the *Charter* or the accused's right to be present at his trial were violated.

[27] After considering all of the evidence filed, the Court finds that the accused knows basic QSL and understands the meaning of colloquial speech. Despite the fact that his level is rather low, he is nonetheless clearly functional in this language. On a day-to-day basis, QSL is the language he masters best to communicate at all levels. Based on the evidence, it is the language in which he communicated with the complainant and her son for many years. And it is also in this language that he testified during the legal proceedings instituted against him and that he answered questions in a simple, understandable and consistent manner.

[28] Of course, each individual has his or her own vocabulary. It is also understood that a number of factors may affect the extent of each person's vocabulary. For example, an individual's education level and intellectual and cognitive abilities may have an impact on the extent of his or her vocabulary and ability to understand very slight subtleties.

[29] In this case, although the accused seems to have problems understanding more complex vocabulary, this does not make him unable to use either QSL or written French. In the opinion of the Court, the fact that an accused has trouble understanding certain words, concepts or notions does not *ipso facto* constitute a violation of the accused's right to be assisted by an interpreter and/or right to be present at his or her trial. Neither does this automatically make the trial unfair. Whether one of these rights has been violated always depends on the particular circumstances of each case.

[30] In the case at bar, the Court reiterates that the accused's level of understanding is functional and that the quality of the interpretation is not at issue. The Court finds that the comprehension difficulties raised by the accused for the first time on the 10th day of the hearings were related to specific elements and concepts. Since the complainant and three other prosecution witnesses testified using QSL, the accused

was able to understand their respective testimonies without an interpreter while watching them in person. Taking into account the fact that the terms they used were simple and familiar, it is clear that the accused was able to fully understand their remarks.

[…]

[33] In this case, taking into account all of the applicable circumstances and principles, the Court finds that the rights of the accused were not violated and that there was no need to declare a mistrial.

R. v. Maurice Frenette, 2007 NBPC 33 (CanLII)

[15] I therefore proceed on the basis that the failure to provide a translated version of a disclosure package may in certain cases constitute a violation of sections 7 and 11(d) of the *Charter*, but that the failure to do so does not automatically constitute a breach. The issue then becomes under what circumstances does the failure or refusal to translate become a *Charter* violation?

[…]

[25] In order to place this matter in its proper context, we must first identify what exactly is being requested here by the accused. He is requesting that the Court order, on the basis of his constitutionally protected right to make full answer and defence, that the prosecution have translated from the French language to the English language all documentary evidence and recorded interviews for the benefit of his chosen lawyer. The translation is not for his personal benefit. Mr. Frenette understands fully the French language. He can easily read and fully understand all the documents in the disclosure package. He participated in two interviews with a French-speaking police officer and conversed completely in French. So the benefit of translation is not for him. It is for his lawyer.

[26] Section 7 has been held to hold out important procedural and substantive guarantees to individuals who are alleged to have committed a criminal offence. But the individual claiming the right must not only demonstrate a violation of his right to life, liberty or security of his person, he must also demonstrate that the denial of a right protected by section 7 is contrary to the principles of fundamental justice. The principles of fundamental justice guaranteed by section 7 are not a "free-standing guarantee", but rather can only be invoked where the law in question violates the "right to life, liberty or security of the person": see the judgment of Lamer, J. in *Reference re s 94(2) of the Motor Vehicle Act (B.C.)* 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486 (S.C.C.). The right to disclosure of evidence is one of basic tenets of the right to fundamental justice: see *R. v. Stinchcombe* 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326. The courts have vehemently protected an individual's right to fundamental justice in the criminal process in all matters, including police investigative techniques, pre-trial proceedings, procedural guarantees, defences and of course the trial itself.

[27] Mr. Frenette has chosen to be represented by a unilingual Anglophone. That is his right. He certainly cannot be obliged to be represented by a francophone lawyer simply because to do so would be more convenient to the state who must disclose its case to the accused. But by the same token, why should the state be obliged to incur the costs of translating the evidence purely for the benefit of the lawyer chosen by the accused?

[28] The situation here must be distinguished from the one in *Butler*. The situation there was entirely different from the one here. In that case Mr. Butler did not understand the language of the majority of the evidence against him. He personally was at a disadvantage. He could not comprehend the evidence the state intended to use against him as he did not speak the language of the evidence accumulated against him. Yet even under these circumstances the learned justice did not order translation of the evidence, for lack of an evidentiary basis to sustain the motion.

[29] In this case, only the defence lawyer does not understand the evidence against the accused. In such a case, other options are available to the accused. He can hire another lawyer, one who speaks the French language, to assist Ms Mahoney. There is no paucity of bilingual lawyers in this area of the

province. He can assist his lawyer by translating the documents himself, or summarizing the evidence for her benefit. He can pay to have the essential documents translated. He could hire a translator, or any other person who has a fluent knowledge of both languages, to assist his counsel, both prior to or at trial. Or he can hire a lawyer who speaks both the French and English language to conduct his defence. All of these options are available to him.

[30] The accused, having chosen trial in the English language, knows that the documentary evidence to be presented against him at the trial on the absolute jurisdiction offences will have to be translated for his benefit and in accordance with his right to a trial in the language of his choice. He also knows that an interpreter will translate all oral evidence at the trial from the French language to the English language. His lawyer will therefore understand the evidence presented against him at court hearings. He also has the benefit of a preliminary inquiry should he so choose for those offences for which he has an election as to his mode of trial.

Pien v. R., 2006 QCCQ 13382 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[1] The applicants have filed a motion for a stay of proceedings upon the failure to disclose evidence, pursuant to section 7 and paragraph 24(1) of the *Canadian Charter of Rights and Freedoms*. First of all, it is argued that the Crown did not disclose all the evidence relating to the charge. Second, in the case of the accused represented by Mr. Louis Bigué, the Crown is criticized for not having obtained a copy of the disclosed evidence in English. Finally, despite repeated demands, the prosecution refused to give each of the accused a copy of the disclosed evidence and instead merely sent a copy to counsel present. In light of each of these alleged violations, the applicants ask for a stay of proceedings.

[. . .]

Language of the disclosure

[42] This part of the motion only affects the accused from the Long Point First Nation. The evidence consists solely of the testimony of Chief Steeve Mathias. He admits that he is not as comfortable in French as in English. However, he testifies that he was able to read the documents even though he had to take more time to do so. His lack of understanding has more to do with the phrasing of the charges than with the content of the evidence disclosed.

[43] No other evidence was adduced concerning the degree to which the other accused understood the evidence. The Court cannot make any assumptions in this regard. As the right to disclosure of the evidence is a personal right, the Court also cannot apply the appropriate constitutional remedy for one of the accused to all of them.

[44] As Mr. Mathias was able to read and understand the documents disclosed, at least for the most part, the Court does not see how any prejudice was suffered. The Court agrees with the position of the Ontario Court of Appeal [in *Simard*] and Quebec courts [in *Cameron* and *Stadnick*] according to which it is sufficient to disclose the information in the state in which it is received. In the absence of proof of total incomprehension, it must be concluded that the right to make full answer and defence and the right to a fair trial were not infringed.

SEE ALSO:

Stockford v. R., 2009 QCCA 1573 (CanLII)

R. v. Singh, 2015 ONSC 7376 (CanLII)

R. v. Arjun, 2013 BCSC 2076 (CanLII)

R. v. Liew and Yu, 2012 ONSC 1826 (CanLII)

R. v. Alayadi, 2010 ABPC 79 (CanLII)

R. v. Cody, 2006 QCCS 3656 (CanLII)

R. v. Larcher (19 September 2002) (ON SC), J. Lalonde [hyperlink not available]

R. v. Rose, 2002 CanLII 45358 (QC SC)

Stadnick v. La Reine, 2001 CanLII 39664 (QC SC)

Lavigne v. Quebec (Attorney General), 2000 CanLII 30033 (QC SC)

R. v. Cameron, [1999] Q.J. No. 6204 (QC CQ) [hyperlink not available]

R. v. Hunt, 2007 QCCQ 1405 (CanLII)

R. v. Farooq, 1998 CarswellOnt 1563, [1998] O.J. No. 1209, 38 W.C.B. (2d) 21 (ON CJ) [hyperlink not available]

R. v. Breton (1995), 28 W.C.B (2nd) 525 (YK TC) [hyperlink not available]

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10. Arrest or detention

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

[LAST UPDATE: APRIL 2017]

ANNOTATIONS

R. v. Bartle, [1994] 3 S.C.R. 173, 1994 CanLII 64 (SCC)

[19] Under these circumstances, it is critical that the information component of the right to counsel be comprehensive in scope and that it be presented by police authorities in a "timely and comprehensible" manner: *R. v. Dubois*, [1990] R.J.Q. 681 (C.A.), (1990), 54 C.C.C. (3d) 166, at pp. 697 and 196 respectively. Unless they are clearly and fully informed of their rights at the outset, detainees cannot be expected to make informed choices and decisions about whether or not to contact counsel and, in turn, whether to exercise other rights, such as their right to silence: *Hebert*. Moreover, in light of the rule that, absent special circumstances indicating that a detainee may not understand the s. 10(b) caution, such as language difficulties or a known or obvious mental disability, police are not required to assure themselves that a detainee fully understands the s. 10(b) caution, it is important that the standard caution given to detainees be as instructive and clear as possible: *R. v. Baig*, [1987] 2 S.C.R. 537, at p. 540, and *Evans*, at p. 891.

[…]

[40] As this court held in *Evans* (at p. 892), state authorities have a duty under s. 10(b) "to make a reasonable effort to explain to the accused his right to counsel". In most cases, reading the accused a caution that meets the criteria I have outlined above will satisfy this duty. If the circumstances reveal, however, that a particular detainee does not understand the standard caution, the authorities must take additional steps to ensure that the detainee comprehends the rights guaranteed by s. 10(b), and the means by which they can be exercised: *Evans*, at p. 892; *Baig*, at p. 540. […]

[42] […] As I noted earlier, this court has recognized the pivotal function the informational component of s. 10(b) plays. In light of the component's importance in ensuring that the purposes of s. 10(b) are fully realized, the validity of waivers of the informational component should only be recognized in cases where it is clear that the detainee already fully understands his or her s. 10(b) rights, fully understands the means by which they can be exercised, and adverts to those rights. Requiring that these conditions be met ensures that any subsequent waiver of the right to counsel made following a waiver of the informational component will be a fully informed one. Since the informational obligations s. 10(b) imposes on state authorities are not onerous, it is not unreasonable, in my view, to insist that these authorities resolve any uncertainty that might exist regarding the detainee's knowledge of his or her rights, something they can do by simply reading the standard caution, as they are required to do in cases where the detainee does not clearly and unequivocally indicate the desire to waive the informational component.

R. v. Kooktook et al, 2006 NUCA 3 (CanLII)

[126] The trial judge made a number of comments expressing his concerns over the fact that all communications between the fishery officers and the respondents were conducted in English. He was uneasy as to whether the respondents fully understood what was said to them. He made the following general comment (at para. 42):

> "In the jurisdiction of Nunavut, English is a second language to many Inuit. Approximately 80% of its citizens are of Inuit descent. Levels of fluency and comprehension in English vary widely. Basic literacy in English cannot be assumed. This Court is aware that many legal concepts do not directly translate from English into Inuktitut or Innuinaqtun."

The trial judge has many years of experience in the Nunavut courts so as to enable him to make this statement.

[127] Language was a particular concern with respect to Mr. Tucktoo. Wildlife Officer Ashevak testified that Mr. Tucktoo occasionally needs help with English. The fact that Officer McCotter resorted to a "lay" explanation of his legal rights suggests that he too may have been unsure of the level of Mr. Tucktoo's comprehension.

[128] Here again the lack of a complete and accurate record is problematic. The Crown need not prove that a person giving a statement fully comprehends the English language (or whatever language the cautions are given in and the statement taken). But, where there is evidence suggesting that comprehension may be suspect, the authorities cannot expect a ruling on voluntariness without providing evidence that enables the judge to examine all of the circumstances. And language ability is one of those circumstances. If there is an incomplete or unreliable record, then the Crown runs the risk of failing to meet the burden of proof. And, in this case, the interviews were neither audio or video-recorded.

[129] The trial judge commented further on this aspect of the case in his reasons (at para. 44):

> "Prudence would suggest that an investigator proposing to solicit a statement from an Inuk accused in English make some enquiry to establish the citizen's level of comprehension in English, their ability to communicate effectively in English and their overall literacy level as determined by their formal education. A bare recital of the police caution and *Charter* rights will not necessarily be sufficient to establish comprehension in English particularly given the convoluted wording of the standard primary and secondary police caution. Where an accused's level of fluency or comprehension in English is low, every effort should be made to accommodate the citizen's obvious language needs. Where

requested, interpretation should be provided. Even where not requested, if difficulties are obvious, interpretive services should be offered."

[130] In my opinion, these comments are well-founded. They echo concerns that have been expressed by judges of the northern courts for decades. An example can be taken from *R. v. Haniliak*, [1985] N.W.T.R. 352, where Marshall J. of the Supreme Court of the Northwest Territories, said (at p. 354):

> "I might make some general statements at the outset on the taking of statements in the North, because I think that it is very difficult for the police to satisfy the traditional rule as to voluntariness and for them to satisfy the requirements now of the *Charter*. The reasons for the difficulty are several, and some, I think, are more subtle than others. First of all, some of the people in the North are untrained in matters of Canadian criminal justice, police matters and legal matters. Many of the people in northern communities, for reasons of culture, a lack of exposure to the law, education, geographic separation and many other reasons, it seems to me, require a fuller explanation of their rights when taking a statement, an explanation of their rights and a clearer warning on arrest and detention.
>
> If the *Charter of Rights and Freedoms* is to be meaningful to people who have had little exposure to courts and police, then the explanations given in these cases to people who lack experience will have to be more thorough and more carefully done. I note here that the officer not only read the warning and the appropriate script, but, as well, gave an explanation, which, in my view, is often required."

R. v. Vanstaceghem, 1987 CarswellOnt 100, [1987] O.J. No. 509, 21 O.A.C. 210, 2 W.C.B. (2d) 308 (ON SC CA) [hyperlink not available]

[18] I am not persuaded, however, that the only question before the Summary Conviction Appeal Court was one of credibility. The crucial question, which was a question of law, was whether the accused had been advised of his rights pursuant to s. 10(b) of the *Charter* in a meaningful and comprehensible manner. The circumstances were unusual. Having regard to the officer's knowledge that the respondent was French, that the respondent certainly was not at ease with the English language in that he did not understand the breathalyzer demand, I am of the opinion that special circumstances existed which required the officer to reasonably ascertain that the respondent's constitutional rights were understood by him. *R. v. Anderson* (1984), 45 O.R. (2d) 225; 10 C.C.C. (3d) 417 (Ont. C.A.); *R. v. Baig*, [1985] O.J. No. 150; 9 O.A.C. 266.

[19] We were informed by counsel that the Canadian Forces Base at Trenton is a bilingual military base where military police officers who speak the two official languages of Canada are available. It can be inferred from the evidence that legal advice is available to servicemen. Where the arresting officer was compelled to produce a breathalyzer demand card in French before the respondent understood a simple request, the only reasonable conclusion was that the respondent should have been informed of his constitutional rights in his own language, either by means of a card or through an interpreter or by calling for the assistance of a bilingual officer. In the special circumstances of this case the use of the word "counsel" clearly did not bring home to the respondent the fact that he had the right to a lawyer, that is, le droit "d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit."

[…]

[21] In my opinion, the arresting officer's belief that the respondent understood his constitutional rights and made an informed choice to waive them was not reasonable in the special circumstances of his detention. The finding made by the provincial judge was based on the officer's belief about the respondent's ability to understand him and cannot be supported on the basis of credibility alone, which, in any event, is tenuous in this case. The question of whether the respondent was properly informed of his constitutional rights was not properly addressed by the provincial judge. In my opinion, the learned Appeal Court Judge was correct in his conclusion that the respondent's rights under s. 10(b) of the *Charter* were violated.

R. v. Au Yeung, 2016 ABQB 313 (CanLII)

[47] What was important, was that Cpl. Frost was trying to explain the *Charter* s. 10 rights to the Applicant. Within 3 minutes, he was told that a Cantonese-speaking RCMP member was going to assist, then there were discussions between Cpl. Frost and RCMP dispatch regarding the Cantonese-speaking RCMP member. All the while, Cpl. Frost was trying to keep the Applicant advised of these goings-on.

[…]

[49] This Court does not find that Cpl. Frost breached this aspect of the Applicant's *Charter* s. 10 rights. Surely, neither the *Charter* nor the Supreme Court of Canada expects all police officers to speak all languages that are spoken in Canada. Cpl. Frost, in addition to trying to explain the Applicant's *Charter* rights to the Applicant as best he could, immediately tried to elicit the services of Cst. He as soon as was practicable in the circumstances. In carrying out these steps, this Court finds that Cpl. Frost fulfilled his duty (sic) advise the Applicant of the reasons for his arrest, and to inform the Applicant of his right to retain and instruct counsel without delay. In any event, Cpl. Frost was able to engage the services of Cst. He to interpret for him. Cst. He spoke with the Applicant 12 minutes after Cpl. Frost had arrested the Applicant, and Cst. He reiterated the Applicant's *Charter* rights and caution.

[50] The Applicant argues that Cpl. Frost did not fulfill his responsibility to fully articulate to the Applicant the Applicant's *Charter* s. 10(b) right, as Cpl. Frost did not provide the full right from his "*Charter* card." Again, this comes down to a question of whether Cpl. Frost's paraphrasing of the content of his "*Charter* card" serves to "undermine [the Applicant's] right to counsel." Remembering that Cpl. Frost does not speak Cantonese, the complexity of the wording of his "*Charter* card" would undermine the right that he was attempting to articulate to the Applicant. Cpl. Frost explained to this Court that he felt the better way to approach the Applicant was to provide him with the *Charter* right in simpler layperson's language. He recognized that this was not a "best practices" approach, but given the circumstances, he felt this was the best approach.

[51] This Court finds that what Cpl. Frost did was the best he could do in the circumstances, and would perhaps give the Applicant some idea of his rights "without delay." This attempt did not undermine the Applicant's right to counsel, but, in fact, advised him of it. Cst. He then gave the Applicant a full explanation of that right.

[52] In the case at bar, the first reasonable opportunity for the Applicant to exercise his *Charter* s. 10(b) right arose once Cst. DeBow took him to the RCMP detachment. Cst. DeBow then placed the Applicant in a private telephone room and was provided the opportunity to contact counsel, and in fact did speak with counsel through the assistance of a Cantonese interpreter that Legal Aid provided.

[53] There has been no breach of the Applicant's *Charter* s. 10(b) rights.

R. v. Singh, 2015 ONSC 7376 (CanLII)

[3] Counsel for the defense submits that the utterances and statement must be excluded because were (sic) not voluntary, and the Defendant was not properly advised of his right to counsel under s. 10(b) of the *Charter*. The Defendant contends that he was pressured into making a statement, and that his command of the English language was insufficient to understand his rights or to have comprehended the caution that he was given by the police.

[…]

[5] In *R v Bartle*, 1994 CanLII 64 (SCC), [1994] 3 SCR 173, Chief Justice Lamer stated that "absent special circumstances indicating that a detainee may not understand the s. 10(b) caution, such as language difficulties or a known or obvious mental disability, police are not required to assure themselves that a detainee fully understands the s. 10(b) caution". Counsel for the defense submits that special circumstances do exist here, in that Defendant was not able to adequately understand or communicate in English.

[6] Having viewed and listened to the full videotape of Defendant's police statement, and having reviewed the transcript of that statement produced by a court reporter, I am compelled to agree. Much of what the Defendant said was incomprehensible. To be clear, the Defendant is not entirely without knowledge of the English language, and, as one of the officers conducting the interview with him pointed out in his testimony, some of the Defendant's ostensible confusion may be a result of his being evasive in his responses to questions to which he had no good answer. However, as the Court of Appeal noted in *R v Lapointe*, [1983] OJ No 183, mastery of a language is not an all-or-nothing proposition.

[7] The Defendant has lived in Canada for nearly two decades, and has been a taxi driver and a truck driver. Counsel for the Crown submits that these occupations require some knowledge of the language. I concur that a rudimentary command of English is probably required for obtaining a license and driving safely in Ontario. Moreover, the Defendant swore an affidavit in support of this application to exclude evidence, and that affidavit was in English and was not accompanied by a translation or by an affidavit of an interpreter indicating that it was explained to the Defendant in his mother tongue, Punjabi.

[…]

[12] However, a review of the videotape and the transcript reveals a crucial gap in his comprehension. It is obvious in watching and listening to the Defendant that he began speaking without having absorbed the meaning of the s. 10(b) caution, and that he never did comprehend this during the entire duration of his statement.

[…]

[16] In the result, the Defendant never confirmed that he been (sic) given the appropriate s. 10(b) caution and, one can tell from his level of incomprehension, never understood the caution at all. The right words may have been stated by the police officers, but they landed on uncomprehending ears. The Defendant's videotaped police statement was therefore involuntary and is inadmissible.

[17] The same holds true for the statements made by the Defendant upon his arrest and prior to being taken to the police station. At that stage, he had either not yet been cautioned, or had not had the s. 10(b) caution explained to him in full. Officer Andrew Pak testified that he had given the Defendant a paraphrased version of the standard caution, having left the formal version in his notebook in his scout car; Officer Gregory Manuel testified that he gave the Defendant an informal caution but did not provide him with the entire formal version. Either way, there is no indication that the officers took the time to slowly and carefully explain the meaning of the caution to the Defendant.

R. v. Mathieu, 2014 ONCS 6124 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[101] Language limitations are closely linked to the communication and understanding of this right to remain silent. The accused answered "Mhmm" three times during this exchange. It is unclear to what extent this caution was understood, particularly when 16 hours earlier, it had been determined that these rights had to be communicated to the accused in French.

[102] The right to remain silent under s. 7 dovetails closely with the right to retain and instruct counsel under s. 10(b).

[103] Whether or not the words used to inform the accused of his right to remain silent were sufficient, the problem was made worse by the fact that the words used to communicate this right and the confusion surrounding whether the accused wanted to speak with his lawyer at that time compounded the fact that this right had been communicated to the accused in English and that this same police department had concluded, 16 hours earlier, that the accused's limited English required that his right be read to him in French. Detective Laver knew that this conclusion had been reached but ignored it.

[104] Detective Laver made no special effort to explain the nature of the right to remain silent or to retain and instruct counsel and did not obtain a true waiver of that right, even though she was aware of the accused's language limitations and knew that he had twice stated that he was waiting for his counsel to arrive.

[105] These two detectives spent one day on the investigation, spoke with the complainant and the eyewitness, obtained information from two officers and were ready to begin the questioning. They wanted to proceed immediately with the questioning and not delay it, which would have been the case if they had to arrange for an interpreter or notify a French-speaking police officer to take over the questioning. Their interest in this case, or their desire to press ahead without further delay, prevented the accused from receiving a valid explanation of his right to counsel and from understanding that he had the right to remain silent.

R. v. Soares, 2013 ONSC 126 (CanLII)

[26] The recorded statement demonstrates that Mr. Soares seemed to understand a good deal of what was said to him by Ms. Peters. However, as noted above, when colloquialisms or metaphors were used by the officer, Mr. Soares faltered. More fundamentally, in the context of a police interrogation, there is more to communication than just comprehension; an accused person must be able to participate in a meaningful way, expressing him or herself effectively. That was lacking in this case. It ought to have triggered a concern that Mr. Soares might not have understood his rights when consulting with duty counsel. As evidence of this, I refer back to Mr. Soares's description of duty counsel's advice to him – to be very careful when speaking with the police. While duty counsel was not called as a witness, this aspect of Mr. Soares's evidence leads me to conclude that either Mr. Soares did not understand the advice he was given, or that he received terrible advice from the lawyer with whom he spoke. I suspect (and hope) that it was the former.

[27] In all of the circumstances, the interview of Mr. Soares was unfair and required that the language issue be addressed directly in the context of the right to counsel. For this reason, I found s. 10(b) was infringed.

R. v. Arjun, 2013 BCSC 2076 (CanLII)

[86] The overarching inquiry appears to be whether the accused was able to secure meaningful, comprehensible legal advice based on an objective assessment of the accused's ability to understand English at a level where legal advice would be understood.

[…]

[90] The question then is whether there were special circumstances relating to Ms. Arjun's ability to understand English such that, in order to exercise her right to counsel, the police were required to take extra steps to ensure she understood her rights and had the opportunity to meaningfully exercise them by using an interpreter to speak to counsel or by consulting a Hindi-speaking lawyer. I find that the police were required to take those steps.

[…]

[98] In this case, I find that it should have been evident to the police that Ms. Arjun did not understand her rights. I have concluded that because of her limited comprehension of the English language, the accused required an interpreter to sufficiently comprehend her *Charter* right to counsel. There are objective indicia that the police should have been aware that Ms. Arjun's English skills were not sufficient to allow her to understand either her right to counsel or the advice she would have received in her consultation with counsel. These indicia include her strong accent; her requests for an interpreter, both through counsel and of her own accord; her assertions at various times that she did not understand her rights; and the confusion on her part as to whether and when she had spoken to a lawyer. I find that Ms. Arjun was not able to secure meaningful, comprehensive legal advice in the absence of an interpreter to speak to

counsel or without consulting a Hindi-speaking lawyer. Accordingly I find that a breach of the s. 10(b) rights of the accused occurred.

R. v. Barros-DaSilva, [2011] O.J. No. 3794, 2011 ONSC 4342 [hyperlink not available]

[23] The issue here is whether or not Mr. Barros-DaSilva was advised of his rights to counsel in a language that was comprehensible to him and permitted him an opportunity to exercise that right in a meaningful way.

[24] It is settled law that where "special circumstances" exist, a police officer is required to take further steps to reasonably ascertain that an accused person understands his or her constitutional right to counsel: *R. v. Shmoel*, [1998] O.J. No. 2233 at para. 8; *R. v. Colak*, [2006] O.J. No. 4953.

[…]

[28] "Special Circumstances" arise when there are some objective indicia that an accused person's comprehension of the English language may be limited for various reasons, for example, because he or she is a relatively recent immigrant to Canada from a non-English speaking country and there is difficulty in comprehending their rights to counsel. In such circumstances, there is an added onus on the police to take some meaningful steps to ensure that the accused actually understands his or her rights in a meaningful and comprehensible way. Relevant circumstances include factors such as: age, education, sophistication, language, and mental condition. […]

[29] While there is not a comprehensive list of situations in which "Special Circumstances" can arise, Justice Gage outlined situations which should alert an officer as to the existence of Special Circumstances. These may include:

1. A failure to respond to questions dealing with the right to counsel coupled with a statement to the effect "I don't speak the best English.": *R. v. Lukavecki*, [1992] O.J. No. 2123;

2. the necessity of speaking slowly to an accused who speaks English "a little bit.": *R. v. Ly* [1993] O.J. No. 268;

3. a negative response by an accused when asked if the right to counsel is understood and thereafter, the failure to provide verbal or written instruction about that right in the first language of the accused: *R. v. Lim*, [1993] O.J. No. 3241, per Bigelow J. (O.C.J.);

4. the failure to honour the accused's request for an interpreter or an officer or a lawyer who speaks his or her first language: *R. v. Ferreira*, per Wren J. (S.C.J.) dated Dec. 6, 1993;

5. knowledge that the language of the accused is not English coupled with an indication that the breath demand was not understood and repeated statements by the accused that he did not understand his right to counsel or understand the meaning or function of duty counsel: *R. v. Shmoel*, [1998] O.J. No. 2233.

[30] The subjective belief of the officers that the accused fully understood their rights is not determinative of the issue of "special circumstances". Even where a court accepts the police testimony that the officers believed the accused had fully understood their rights as explained in the English language, the factual findings may still raise "special circumstances". It is a reversible error of law to conclude there are no special circumstances on basis (sic) of the officer's subjective belief about the accused's ability to understand his legal rights. *R. v. Vanstaceghem*, *supra*, at pg. 6; *R. v. Shmoel*, [1998] O.J. No. 2233 (Ont. Ct. Jus.) at para. 9; *R. v. Lukavecki*, [1992] O.J. No. 2123 (Ont. Gen. Div.); *R. v. Olivia Baca*, [2009] O.J. No. 1926 (Ont. Ct. Jus) at para. 2; *R. v. Peralta-Brito*, [2008] O.J. No. 81 (Ont. Ct. Jus.).

[31] A failure by the accused to assert a difficulty in communication (i.e. the accused did not specifically ask for an interpreter or duty counsel with a specific language) is not determinative of the issue of "special

circumstances". *R. v. Oliva Baca*, *supra*, at para. 25; *R. v. Silva*, *supra*, at paras. 26-27; *R. v. Peralta-Brito*, *supra*.

[…]

[33] I find that while the learned trial judge recited a significant portion of the evidence, he did not engage in the necessary legal analysis of the issue which was before the court on the motion, which was whether or not the evidence established the existence of "special circumstances" which would require the police officers to take further steps to ensure that Mr. Barros-DaSilva was advised of his rights to counsel pursuant to s. 10(b) of the *Charter* in a meaningful and comprehensible manner. Instead, he based his decision on the officers' subjective belief of the appellant's knowledge and comprehension of the English language in the face of objective evidence that special circumstances existed which should alert the officers to take further steps to ensure meaningful comprehension of the appellant's rights. This in my view is an error in law.

[34] It is clear from the evidence that upon speaking with Mr. Barros-DaSilva, it was readily apparent to both Cst. Skleryk and Cst. Shillington that Mr. Barros-DaSilva spoke with an accent and that English was not his first language.

[…]

[46] With respect to the impact of the Breach on the *Charter*-Protected interests of the Accused, I find that the state's decision to not provide the appellant with a Portuguese speaking translator, lawyer, or police officer effectively deprived him of his entire section 10(b) rights, and further, his right against self incrimination and right to silence. Accordingly, the impact on the appellant's *Charter* protected interest was serious and thus, favours exclusion.

R. v. Therrien, 2006 BCSC 1739 (CanLII)

[36] Both the English and French versions of what Cpl. Gobeil told Mr. Therrien complied with the constitutional requirements of s. 10(b) of the *Charter*. The French version provided even more information than the English one; that being that the police could or would give him a list of lawyers both in British Columbia and elsewhere that he could call free of charge for free legal advice. Mr. Therrien made it very clear he understood both versions. Indeed, he testified that “elsewhere” meant or included Quebec. The fact that he later did not remember that Cpl. Gobeil had offered him a French speaking legal aid lawyer does not mean the police breached his s.10(b) rights.

[37] In any event, the police were not required to inform him of his rights in French because it is clear from Cpl. Gobeil’s evidence and the tape recording of the exchange between them that Mr. Therrien understood and spoke English. Mr. Therrien attempted to run when Cpl. Gobeil informed him that there was a warrant for his arrest on two counts of first degree murder, so Mr. Therrien did understand Cpl. Gobeil. I reject Mr. Therrien’s evidence that he was only reacting to tight handcuffs. That explanation was not put to Cpl. Gobeil in cross-examination and the audio recording of the arrest shows that only one handcuff had been applied when Mr. Therrien tried to run.

[…]

[40] Mr. Therrien confirmed that he understood all of the information he had been given in both languages. Cpl. Gobeil also repeatedly asked Mr. Therrien whether he had any questions about his rights, to which he replied “no” each time. I detected impatience in his voice when he was asked over and over again whether he understood. The police exercised extra caution in also giving Mr. Therrien his rights in French, but they were not constitutionally required to do so.

R. v. Michaud, 1986 CarswellOnt 67, [1986] O.J. No. 1631, 1 W.C.B. (2d) 22, 45 M.V.R. 243 (Ont. Dist. Ct.) [hyperlink not available]

[27] The police may not be required to go to the extreme means in order to respect an accused's rights under s. 10 of the *Charter*. It is necessary, however, in order to comply with the section that an accused be meaningfully informed of the rights. The accused must understand what is being said to him or her and understand what the options are in order that he or she may make a choice in the exercise of the rights guaranteed by the *Charter*.

[28] It is not sufficient for a police officer upon the arrest or detention of a person to merely recite the rights guaranteed by s. 10 of the *Charter*. As s. 10(b) stipulates, the accused or detainee must be informed. This means that the accused or detainee must understand what is being said to him or her by the police officer. Otherwise, he or she is not able to make an informed choice with respect to the exercise or waiver of the guaranteed rights.

[29] If the rights are read in English only, and the accused's or detainee's knowledge of the English language does not allow sufficient comprehension of the matter, those are "special circumstances" which alert the officer and oblige him to act reasonably in the circumstances.

N.B. – These paragraphs were adopted by the Ontario Court of Appeal in *R. v. Vanstaceghem*, [1987] O.J. No. 509, 36 C.C.C. (3d) 142 (ON CA).

R. v. Irving, 2016 QCCQ 2697 (CanLII)

[29] Section 10(b) of the *Charter* provides that a person who has been detained or arrested has the right to be informed of his or her right to consult a lawyer. This right has been raised, in this section, to a constitutional obligation of law enforcement officers who interact with people who are arrested or detained.

[30] The obligation to inform cannot be so intense that it is necessary to prove that the person to whom the information was addressed has understood it well. It is impossible to know with certainty what another person understands despite the clearest explanations. It is also conceivable that the person concerned may obstruct the receipt of the information, by shouting or plugging his or her ears for example, or by experiencing psychosis, making him or her lose contact with reality.

[31] However, it is just as unacceptable to claim that the constitutional obligations can be met simply by mechanically reading out a formula, with no attention paid to the person to whom it is addressed. In my view, it is essential that the right, for it to be meaningful, be conveyed in such a way that the person who does so has reasonable assurance that the message was received.

[32] It appears to me that one practice, which is not essential but very useful, consists in asking the person concerned to repeat what was said in his or her own words.

[33] It is essentially the matter of language that is in question here. On this topic, it seems to me to be minimally reasonable to read an accused’s rights in his or her language, especially if the language is one of the country’s two official languages and the police officers can easily express themselves in the language of the person under arrest.

Ashevak v. R., 2015 QCCQ 9636 (CanLII)

[9] Analyzing accused’s assertion that he has limited abilities to comprehend English, the Court acknowledges the fact that Mr. Ashevak is a 47 years (sic) old Inuk, whose mother tongue is Inuktitut, who speaks Inuktitut at home, whose work, when he was working, did not require him to speak English and that in a community like Salluit, from day to day, an Inuk is generally not required to speak English, unless his job so demands.

[…]

[12] The Court is satisfied that accused's grasp of English did not allow him to understand correctly his rights and to fully appreciate what a waiver meant.

[13] Therefore, there was a duty on the police officer to offer some translation assistance - that was available according to the officer's version - or to make thorough inquiries to make sure accused understood clearly his rights and the consequences of waiving them, especially considering the Inuk he was dealing with had never dealt with the police before.

R. v. Bassi, 2015 ONCJ 340

[42] Crown counsel argued that I should find that special circumstances were not present, because in his submission, viewed as a whole, Mr. Bassi's exchanges with the officers showed that he did understand his communications with them. I accept that Mr. Bassi had a reasonably fluent level of speech in English. But the case law recognizes that an individual under arrest and detained is in a vulnerable situation, and often, as in this case, in an unfamiliar situation. The case law also recognizes that there are complexities to understanding the circumstances facing an individual under arrest, and understanding legal advice, that have the effect that an individual who can manage in English day to day may not have a level of English sufficient for the complexities of legal issues. Based on all of the circumstances, and in particular Mr. Bassi's express comments about lack of understanding and English not being his first language in the breath room, I accept that he was having difficulty understanding duty counsel in English, and that special circumstances existed.

[43] Crown counsel also argued that I should find that special circumstances have not been proven because both Constable Drexler and Constable Simmonds testified to their opinion that Mr. Bassi spoke "perfect" English. I reject this argument. It is inconsistent with the analysis established in the case law. The case law recognizes that it is not for the police to determine their view of the level of the defendant's English or the bona fides of his claims not to understand certain things. The law is clear and has been for many years on this issue. The test I must apply is an objective one, based on all the circumstances.

[…]

[49] Constable Drexler and Constable Simmonds both noted in their evidence that Mr. Bassi never asked for Punjabi speaking duty counsel or for the use of an interpreter for the call with counsel. They said they would have provided that had Mr. Bassi requested it. This evidence shows a misunderstanding by the officers of their Charter duties with respect to language issues. The case law recognizes that an individual under arrest, particularly someone like Mr. Bassi who had never been arrested before, may not be aware of the existence of duty counsel in a language other than English, or of the existence of simultaneous interpretation over the phone for use with counsel. If there is objective evidence of special circumstances in relation to language, the police have a duty to take steps such as offer duty counsel in the detainee's first language or offer an interpreter for counsel. It is not the detainee's duty to know about these services and ask for them. And as noted above at paragraph 48, Constable Simmonds' comments that the only options for a second consultation with counsel were either a private lawyer if Mr. Bassi knew one (which he did not), or a second consultation with (English) duty counsel left the misleading the (sic) impression that there were no other options.

[50] After the language concerns were expressed by Mr. Bassi, rather than offer Mr. Bassi either Punjabi speaking duty counsel or the use of a Punjabi interpreter, Constable Simmonds engaged in the exchange with Mr. Bassi of whether he had any questions he should be asking duty counsel rather than Constable Simmonds. This exchange is troubling from a s. 10(b) perspective on two levels.

[51] First, in relation to language, it is not responsive to the issues Mr. Bassi had clearly raised in relation to understanding of English. Constable Simmonds was not going to answer Mr. Bassi's questions in Punjabi.

[52] Second, and more fundamentally, the exchange undermines the role of counsel in that the officer is seeking to ask what the detained individual wants to ask counsel about, and then to decide whether that

is an appropriate question for counsel or for the police. Rather than offer Mr. Bassi Punjabi speaking duty counsel or an interpreter to speak to counsel, Constable Simmonds took on the role of acting as a gatekeeper for what questions it was appropriate for Mr. Bassi to discuss with counsel.

[53] I acknowledge that in some sense there may be partial overlap between legal advice that counsel provides, and an officer's obligations to advise of the reasons for arrest or detention under s. 10(a) of the *Charter*. They are functionally different, but both may cover elements of the offence charged. But it strikes me as perilous and improper territory for an officer to engage in an exchange with a detainee about the substance of what detainee wants to speak to counsel about. What an individual wants to discuss with counsel is at the heart of solicitor-client privilege and the broader concept of solicitor-client confidentiality: *Solosky v. The Queen*, [1980] 1 S.C.R. 21 at pp. 833-37; *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860 at pp. 870-75; *R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 S.C.R. 445 at paras. 17-37.

[54] I find additional support for my conclusion that the police did not comply with Mr. Bassi's s. 10(b) rights in relation to language in the decision of the Supreme Court of Canada in *R. v. Sinclair*, 2010 SCC 35 (CanLII), [2010] 2 S.C.R. 310. *Sinclair* does not deal expressly with language rights. However, it addresses the right to a further contact with counsel when there is objective evidence that the detainee may not have understood the initial 10(b) advice. Chief Justice McLachlin and Justice Charron, writing for the majority, held at pp. 338-39 of *Sinclair* that a duty to give further access to counsel exists where there are objective circumstances indicating that the detainee may not have understood his or her initial s. 10(b) advice. Although Constable Simmonds was aware that Mr. Bassi had already spoken to counsel, he was also aware that that consultation took place in English. When Mr. Bassi clearly stated to Constable Simmonds that English was not his first language, that he sometimes missed things in English, and that he only understood about 90 percent of what duty counsel said to him, those were objective circumstances which imposed a duty to permit a second contact with counsel. And in this case that duty included the duty to either offer Punjabi speaking duty counsel, or offer a Punjabi interpreter for the consultation with counsel.

[…]

[72] In all the circumstances of this case, I find that the long term impact on the repute of the administration of justice favours excluding the evidence in this case. As I have outlined above, I have found a number of aggravating factors which render the breach particularly serious. Although breath sample evidence is reliable and minimally intrusive on bodily integrity, the impact of a violation of the s. 10(b) duties in relation to language is significant to the defendant. Individuals who are arrested and detained are vulnerable, and denying them the right to speak to counsel in their first language has a serious impact on them. The law in this area is well-established, and has been for many years. The police need to respect that it is not their job to assess the bona fides of a detainee's language claim. In a diverse jurisdiction like Peel Region, it brings the administration of justice into disrepute when the police are not familiar with their well-established duties in relation to s. 10(b) and language, particularly where the resources to implement these rights are readily available in the jurisdiction. The Court cannot be seen to condone this conduct: *R. v. Au-Yeung*, 2010 ONSC 2292 (CanLII) at paras. 67-69. I find that the long term repute of the administration of justice requires that the evidence of the breath sample results in this case be excluded.

R. v. Stabile, 2010 QCCQ 10118 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[46] Giving arrested or detained persons a bilingual card so that they can read it for themselves is not an acceptable means of ensuring that they are able to understand the scope of their right.

[47] The appropriate procedure would have been to seek the assistance of another peacekeeper, reasonably competent in French, to inform him of his rights. At this stage, if no one could respond

effectively, they had to request the services of an on-call interpreter in case of the arrest or detention of a person speaking a foreign language.

[48] It should be noted that this is not a question of requiring all Kahnawake peacekeepers to be bilingual. When needed, however, they must use appropriate measures, such as asking a colleague with sufficient knowledge of French to do the reading of the constitutional rights and verify the detained person's understanding of them, or calling the interpreter's office, to ensure that the detained person is properly informed of the reasons for his or her arrest or detention and of the right to retain and instruct counsel without delay and that the detained person understands the scope of his or her *Charter* rights.

R. v. Kwitkowski, 2009 QCCQ 1221 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[9] According to the case law, peace officers have two duties: the first is to inform the accused of his or her rights and to caution him or her (informational duty), and the second is a positive duty (implementational duties) to implement conditions allowing the legal rights to be exercised (*R. c. Dubois*, 1990 CanLII 3298 (QC CA), [1990] R.J.Q. 681).

[10] The first, informational duty, is validly discharged through the peace officers' efforts and patience in ensuring that the accused understands his or her rights. The accused will have perfectly understood his or her right to counsel.

[11] The second, positive duty by which the police force implements the rights (implementational duties), rests with the peace officers. For an accused to understand the nature and scope of his or her rights when language proficiency is clearly or apparently an issue and when scepticism is raised as to the accused's ability to communicate effectively with counsel in one of the official languages of Canada, peace officers have an obligation to implement means allowing an accused to communicate effectively with counsel so that he or she understands the nature and scope of his or her rights.

[…]

[18] In addition, when concerns about understanding the language of the consultation are central to the circumstances disclosed by the evidence, peace officers' informational duties should be interpreted rigorously. The validity of a waiver is compromised by the failure to communicate the availability of legal advisory services concurrently with these related and indispensable interpretation services available to those who are not proficient in one official language or who fear that they are for this reason unable to effectively take advice from counsel [(*Regina v. Lim* (No. 3) (1990), 1 C.R.R. (2d) 148 (Ont. C.A.) failure to provide services of an interpreter in the case of an accused with obvious difficulty speaking one of the official languages].

[…]

[42] Even a party well versed in his or her rights would nonetheless be entitled to the same information and full implementation of his or her rights as an accused so poorly skilled in the only official language of Canada that he or she speaks. The accused's level of comprehension of French, amply illustrated by the testimony of numerous witnesses, required that the accused be offered the services of an interpreter so that he could communicate effectively with his counsel. It is not that he did not want a lawyer, plain and simple. He did not want a [translation] "French lawyer".

[43] The rights of accused persons arising from the legal guarantees conferred under s. 10(b) of the *Canadian Charter of Rights and Freedoms* come with correlative duties on peace officers regarding the scope of the conditions made available to accused persons so that they can effectively exercise the right to consult counsel.

[44] Accordingly, a waiver of this legal guarantee will be adequate and constitutionally sufficient when the detainee is aware of the means that are and must be available to him or her to make an informed decision, such that a waiver may be set up against him or her (*Regina v. Parks* (1988), 33 C.C.R. 1 (Ont. H.C.), Watt J.).

[45] It is true that the prejudice to the accused would have had no impact on the accused's duty to provide a breath sample. Here, there is no statement that was allegedly made in violation of his right to remain silent.

[46] However, the right to the services of legal counsel and to those of an interpreter, which are crucial to the meaningful exercise of this fundamental right, is sacrosanct, particularly where a citizen is accused of impaired driving and blood alcohol levels above the legal limit, which can be complex matters. There was an obligation to delay submitting the accused to a breathalyzer test so long as the means to consult counsel with the aid of an interpreter had not been offered or, if they had been, exercised and the breathalyzer tests delayed accordingly (*R. v. Prosper*, 1994 CanLII 65 (CSC), [1994] 3 S.C.R. 236).

[47] Failure to act in accordance with the spirit of the *Charter* entitles the victim to the usual remedy, that is, the exclusion of the evidence obtained as a result of the violation of that right and any derivative evidence related to it.

[48] Objectively, this right to access counsel whose advice can be understood is crucial to our legal system. When making an arrest, peace officers are subject to this obligation to ensure that the accused has full benefit of a right of which he or she cannot be deprived arbitrarily or in error of law or fact.

R. v. Mario Régis Mazerolle, 2008 NBPC 31 (CanLII)

[28] Regarding section 10(b) of the *Charter*, it must be noted that in cases where the driver of a motor vehicle is detained by a peace officer who suspects the presence of alcohol in his body and intends to read him the order under section 254(2) of the *Criminal Code* chooses a language which is not the language used by the peace officer, the officer cannot read him his right to consult a lawyer. He does not speak the language chosen by the detainee and cannot expect to be understood. Consequently, Officer Arbeau could not advise Mr. Mazerolle of his right to consult a lawyer while they were waiting for Officer Goodfellow to arrive. As a result, the right to consult a lawyer had to be suspended pending the arrival of a peace officer who spoke the language chosen by the detainee. After he arrived, in my opinion, Officer Goodfellow proceeded immediately to give Mr. Mazerolle the order to provide a breath sample pursuant to section 254(2) of the *Criminal Code*. There was no unreasonable delay.

R. v. Peralta-Brito, 2008 ONCJ 4 (CanLII)

[44] Having considered the trial record in its entirety, I conclude "special circumstances" existed in this case which obliged the arresting officer to take reasonable steps to ensure the accused fully understood his right to counsel and made an informed choice to waive this right until after he had provided samples of his breath to the qualified technician. While the accused appeared to understand English, as indicated by his appropriate responses to the arresting officer's inquiries and directives, his "thick" Spanish accent and limited verbalizations ought to have alerted the officer that English was not the accused's first language and that he might, therefore, encounter some difficulty understanding the right to counsel.

[45] Notwithstanding the accused's expressed confirmation of an understanding of his s. 10(b) rights and his subsequent waiver of the right to consult counsel prior to the administering of the breath test, the principle established in Vanstaceghem, a decision which is binding on this court, requires the police in circumstances where "special circumstances" exist to take reasonable steps to objectively ascertain the accused's constitutional rights are understood. The onus is not on the accused to request interpretive assistance, the onus rests on the police to ensure that the accused understood the right to counsel. Objectively that assurance can be provided by provision of the right to counsel in the accused's native language in either written or oral form, or by facilitation of contact with an interpreter or duty counsel proficient in the accused's native language.

[46] Although the officers acted in good faith throughout the course of their dealings with the applicant in this particular case and had reason to believe the accused enjoyed a sound working knowledge of English as demonstrated by his responsive conduct and generally appropriate verbal replies, the failure to take any steps to objectively ensure or confirm the accused understood his rights in a meaningful and comprehensible manner constitutes an infringement of the accused's s. 10(b) rights. While each case turns on its own facts, I am satisfied the accused has established an infringement of his s. 10(b) rights on a balance of probabilities.

[47] I reach this conclusion in spite of my significant reservations regarding the veracity of aspects of the testimony offered by the accused on this application relating to the accused's professed limited facility with the English language. I am also aware of the fact the Information or charging document in this matter indicates the accused, who was unrepresented at the time the trial date was scheduled in this matter indicated that he did not require interpretive assistance at this trial. The transcript of proceedings of the set date appearance on May 4th, 2006, confirms the clerk's entry on the information for that date which references the accused's expressed confirmation that he did not want the assistance of an interpreter at trial. As noted, Mr. Peralta-Brito has been assisted throughout this proceeding by a Spanish-speaking interpreter.

[48] These reservations notwithstanding, I am nevertheless satisfied that the applicant has established on the balance of probabilities that he did not truly understand his right to counsel and all that that right entails. Confirmation of this assessment may be found in the fact the accused's request to speak to counsel occurred after he had completed the breath test procedure. The accused's verbal interactions with the arresting officer and the accused's assertion that the arresting officer had made "a mistake" by not providing a lawyer to the accused upon his arrival at the police station may serve to reflect the applicant's faulty understanding of the right to counsel. This misunderstanding may have contributed to the accused's initial pre-test wavier of the right to speak to lawyer prior to the securing of the breath samples.

Consequences of the *Charter* Breach

[49] I conclude Mr. Peralta-Brito's right to counsel pursuant to s. 10(b) of the *Charter of Rights and Freedoms* has been infringed as a consequence of the referenced linguistic concern and the absence of any objective inquiry that may have assured the officers that the accused possessed a sufficient understanding of the English language. I am unable to conclude his initial waiver of his right to counsel was made with a full understanding of that right. As a consequence of this *Charter* breach, conscriptive evidence in the form of breath tests has been secured.

[…]

[51] An individual subject to detention by the police must be informed of his or her right to counsel in a meaningful fashion. On the facts here, the officer's subjective assessment of the detained individual's facility with the English language is not a sufficient factual basis to conclude the accused had been informed of his rights in an understandable or meaningful way. The infringement of this fundamental right is serious and as a result, I conclude the admission of the Certificate of Analysis into evidence would bring the administration of justice into disrepute.

SEE ALSO:

R. v. Girard, 1993 CanLII 3159 (NS CA)

R. v. Ibrahem, 2016 ONSC 3196 (CanLII)

R. v. Ibrahim, 2016 ONSC 485 (CanLII)

R. v. Dumont, 2014 ONSC 4133 (CanLII)

H.M.T.Q. v. Blackduck, 2014 NWTSC 58 (CanLII)

R. v. Doan and Nguyen, 2012 ONSC 3776 (CanLII)

R. v. Chen and Ye, 2012 ONSC 2832 (CanLII)

R. v. Lee, 2012 BCSC 1548 (CanLII)

R. v. Chodzba, 2009 CanLII 46659 (ON SC)

R. v. Poon and Wong, 2006 BCSC 869 (CanLII)

R. v. Wroblewski, 2002 CanLII 36530 (ON SC)

R. v. Kanuma, 2002 BCSC 355 (CanLII)

R. v. Cho, 1998 CanLII 3774 (BC SC)

R. v. Albert, 2015 ABPC 155 (CanLII)

R. v. Singh, 2015 ABPC 62 (CanLII)

R. v. Iyadurai, 2015 ONCJ 806 (CanLII)

R. v. Kim, 2014 ONCJ 106 (CanLII)

R. v. Melo, 2012 ONCJ 765 (CanLII)

R. v. Haidari, 2012 ONCJ 290 (CanLII)

R. v. Liagon, 2012 ABPC 56 (CanLII)

R. v. Tran, 2011 ONCJ 75 (CanLII)

R. v. Xhango, 2010 ONCJ 503 (CanLII)

R. v. Oliva Baca, 2009 ONCJ 194 (CanLII)

R. v. Marcel Losier, 2009 NBPC 43 (CanLII)

R. v. Quach, 2007 ONCJ 645 (CanLII)

R. v. A.M., 2007 MBQB 205 (CanLII)

R. v. Liard, 2006 ONCJ 64 (CanLII)

R. v. Silva, 2005 ONCJ 2 (CanLII)

R. v. Berezin, 2005 ONCJ 137 (CanLII)

R. v. Rose, 2003 CanLII 32 (NL PC)

R. v. Ly, 1993 CarswellOnt 4100, [1993] O.J. No. 268, 18 W.C.B. (2d) 581 (ON CJ) [hyperlink not available]

R. v. Lim, [1993] O.J. No 3241 (ON CJ) [hyperlink not available]

R. v. Saini, [1992] B.C.J. No. 945, Vancouver Registry No. CC911319 (BC SC) [hyperlink not available]

R. v. Lukavecki, [1992] O.J. No. 2123 (ON CJ) [hyperlink not available]

R. v. Shmoel, [1998] O.J. No. 2233 (ON CJ) [hyperlink not available]

R. v. Tanguay (1984), 27 M.V.R. 1 (Co.Ct. Ont.) [hyperlink not available]

N.B. – This list is not exhaustive due to the great volume of decisions relating to s. 10 of the *Canadian Charter* and issues of linguistic comprehension.

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11. Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[…]

[LAST UPDATE: APRIL 2017]

ANNOTATIONS – SUBSECTION 11(A)

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 1986 CanLII 65 (SCC)

[105] This brings me to the other approach urged upon us and which would have us look at s. 133 as re-enforcing the appellant's interpretation of his language rights by reading into the section or relating to it requirements of natural justice and procedural fairness. In this connection, the appellant referred in his factum to s. 11(a) of the *Canadian Charter of Rights and Freedoms*:

> 11. Any person charged with an offence has the right
>
> (a) to be informed without unreasonable delay of the specific offence;

The requirements of this provision, according to him "serve to supplement the protections provided for in s. 133". And he adds:

> Further, the requirements in respect to language rights as provided for in section 133 of our constitution and section 11(a) of our *Charter of Rights and Freedoms* are re-enforced and made more explicit in:

R. vs. Coté (1977) 1977 CanLII 1 (SCC), 33 C.C.C. (2d) 353, per de Grandpré, J.:

> "The 'golden rule' as regards the sufficiency of an information is whether the accused was reasonably informed of the transaction alleged against him, thus giving the opportunity of making a full defence and ensuring a fair trial". [Extract from the headnote.]

[…]

[118] Before I leave this subject however, I wish to dismiss any suggestion, if there be one, that the rights of the appellant to a fair hearing, as distinct from his language rights, might somehow have been infringed on the facts of this case, and that he might be entitled to be discharged or to have a new hearing on any basis other than s. 133 of the *Constitution Act, 1867*.

[119] I did not understand that such was the position of the appellant. From the beginning to the end of these proceedings, the sole thrust of his argument was his interpretation of s. 133. This is what was stated by Judge Bourassa. In his notice of appeal to the Superior Court, which is subsequent to the coming into force of the *Charter*, the appellant invoked neither the *Charter* nor any principle of natural justice or procedural fairness; the only provision he expressly relied upon was s. 133. He did the same in his application for leave to appeal and notice of appeal in the Court of Appeal. In his reasons for judgment at p. 999 Meyer J. alluded to the *Charter*, either of his own notion or because it was mentioned in argument and, in my opinion, rightly held:

> ...my decision would be identical whether or not the new *Charter of Rights* were applicable. To my mind, the only relevant question is the meaning of Section 133 and whether or not it applies in the present instance.

[120] The first and only pleadings of the appellant which briefly refer to the *Charter* and to the requirements of natural justice are his application for leave to appeal to this Court and his factum. Both are to the same effect and I have quoted above the main part of the factum on this point: The *Charter* and the requirements of natural justice are invoked by the appellant only to re-enforce his essential submission on s. 133. It is significant also that the constitutional question which the appellant submitted to Ritchie J. and which was accepted by the latter, relates only to s. 133 and not to the *Charter*. To sum up, the sole purpose of the appellant, as I understand it, has been from the start and throughout these proceedings to vindicate his language rights as an English-speaking Quebecer the way he understands them, not the rights to a fair hearing which he has in common with everybody else.

[121] If I misunderstood the appellant however, I would still be of the view that, on the facts and pleadings of this case, we are not concerned with the *Charter*, nor with the question whether the appellant was denied a fair hearing or was entitled to a trial in English if that is not what he had.

[122] There is nothing in the case to indicate in what language or languages the trial and trial *de novo* were conducted, except that the appellant argued his case in English before Judge Bourassa. At no point did the appellant allege he did not understand the charge or the case he had to meet; by his own account, he secured a translation of the summons. There is nothing to show that he asked the court for a translation and we need not decide whether he would have been entitled to one.

R. v. Simard, [1995] O.J. No. 3989, 27 O.R. (3d) 116 (ON CA) [hyperlink not available]

[42] I am of the opinion that the obligation of the agent for the Attorney General to supply, upon request by the accused, a written translation exists irrespective of the complexity of the information. Just as the accused in a proceeding by indictment is the one who decides whether or not he or she requires the assistance of an interpreter (*R. v. Tran*, *supra*), only the accused or his or her counsel, in a summary conviction proceedings, are in a position to decide whether or not it is necessary to obtain an information translated into the official language of the trial in order to inform them properly of the specific offence: s. 11(a) of the *Charter*. While respecting the distinction that must be maintained between language rights and principles of fundamental justice (*MacDonald*, *supra*), I repeat that it is up to them alone to decide

whether or not a written translation is necessary to understand the reach and scope of the information in order to make full answer and defence. As I see it, this is what is required to make sure that the accused will have a fair trial in his or her official language.

ANNOTATIONS – SUBSECTION 11(B)

R. v. Munkonda, 2015 ONCA 309 (CanLII)

[110] The appellant submits that the numerous violations of his language rights constitute violations of not only ss. 530 and 530.1 of the *Criminal Code*, but also ss. 7 and 11(b) of the *Canadian Charter of Rights and Freedoms*. In the appellant's submission, a stay of proceedings under s. 24(1) of the *Charter* or the common law would be an effective remedy for the violations of his rights. The Crown submits that there was no violation of the appellant's rights, and in the event that this court concludes otherwise, the appropriate remedy would be continuation of the proceedings with an order for a unilingual trial in French.

[111] In my opinion, given the number and severity of the violations of the appellant's rights, it is essential that an effective remedy be imposed. It should be recalled that language rights are not procedural rights; rather, they are substantive rights. An appropriate remedy must correct the situation to the extent possible, while also ensuring that the Crown is held accountable for the failure to meet its obligations.

[…]

[116] The appellant also seeks to rely on s. 11(b) of the *Charter* and asks that a stay of proceedings be granted in light of the intolerable delays the appellant has experienced because he had to initiate these proceedings in order to have his language rights respected.

[117] This issue was raised by the appellant for the first time before this court. The Crown has therefore been denied an opportunity to submit relevant evidence. The record contains no transcripts of the various court appearances made before the preliminary inquiry was held. Nor does it contain the evidence required to apply the other factors relevant to assessing the reasonableness of the delays beyond those caused by the application for certiorari, such as waivers of time limits, the reasons for the delays, or the prejudice suffered by the appellant.

[118] In my opinion, the record presented to us does not allow us to conduct the necessary analysis. The question of delay and of whether s. 11(b) can be relied on to obtain a stay of proceedings as a remedy should be the subject of a motion in the trial court if the appellant wishes to pursue it.

[119] However, nothing in these reasons should be taken as suggesting that the appellant is not free to make that request, supported by the necessary evidence, including the delays caused by the failure to respect his language rights.

Bossé v. R., 2015 NBQB 177 (CanLII)

[26] The trial judge attributed what I called the "translation delay" to the actions of the accused although in his brief, the crown prosecutor had conceded that this 8-month delay was attributable to the Crown. In fact, it was not even discussed in the oral submissions and no questions were asked on that part of the delay. The trial judge was not bound by Crown's concession. But questions could have been put to either lawyer by the Court. It was not done.

[27] In any event, I find that the trial judge erred in law when she attributed this delay to the accused. This is a delay that must be considered to have been caused by the Crown. Crown prosecutor rightfully conceded this at the hearing of the motion although the new crown prosecutor on appeal does not agree with that position.

[28] It was well known from the filing of the Information that this would be a trial to be conducted in English. Disclosure was provided early on and parties stated that there were thousands of documents,

maybe in the vicinity of 5,000. The accused was not advised as to which documents were intended to be introduced into evidence until less than two weeks before trial when his lawyer received an email with an attached letter or list of documents. Six binders came the following day or shortly after. But when he received the email, within an hour, one of the counsel for the accused responded by hitting "reply" and as both lawyers confirmed in Court, Mr. Matchim wrote, maybe not in those exact words, but as summarized by the crown prosecutor on the record (transcript, November 6, 9 & 19, 2012, page 89): "…I assume that you will have translation of all of your – any French documents into English. That's what it said." It is to be noted that crown prosecutor just saw the email on the morning of the original scheduled trial date. Lawyers explained that the original email came from the prosecutor's assistant and when defense lawyer hit "reply", it went back to the assistant. Nevertheless, even if he would have seen it earlier, crown counsel admitted that it would have been too late to get a translation and it was in fact his position that no translation was required.

[29] The trial judge considered this reply email of October 25 or 27 as a request for translation. Then she said that the request or motion made by the accused on November 5, 2012, when trial was supposed to start, resulted in the necessity of the following 8-month adjournment. Respectfully, I do not agree. What caused this adjournment is the fact that even though this was a trial to be held in English, the Crown forgot about its obligation to make sure evidence would be translated, be it oral or written evidence. In fact, the crown prosecutor was surprised that this question came up on November 5 and was convinced that the Crown had no obligation to provide translation of documents. Legally, this obligation was there from day 1, on April 30, 2012, and had the Crown discussed this matter with the defence earlier, it could have been dealt with from the start. The request for an adjournment then had to be done but the judge and even the crown prosecutor alluded to the fact that this may trigger a motion under section 11 (b), which it did.

[30] When the accused chose to be tried in English, he had no further obligation to remind the Crown that he wanted all of his trial in English, including any document to be introduced into evidence and not only the oral testimonies or the lawyers' submissions and questioning. The New Brunswick Court of Appeal stated in *Boudreau v. R.*, 1990 CanLII 4056 (NB CA), 107 NBR (2d) 298, that documents entered into evidence ought to be translated in the language of the trial.

[31] The judge who set the original trial dates had ordered that any *Charter* challenges were to be made before September 10, 2012. The trial and motion judge said: "That request/motion of the accused should have been filed on or before September 10, 2012 as originally agreed by the parties on June 18, 2012 and confirmed by the Court on June 25, 2012, or at least raised with the prosecution much sooner as disclosure took place on May 1, 2012." Once again, I find that the onus was not on the accused to make sure that the Crown would do its work. I also find that his request for a trial in English and his expectation to have documents entered into evidence in that language were not equivalent to a *Charter* challenge. In fact, on September 10, 2012, he had not even been advised by the Crown of what documents, if any, would be entered into evidence.

[32] Consequently, I am of the opinion that the 8-month delay caused by the Crown's request for an adjournment in November 2012 is not to be attributed to the accused but rather to the Crown.

R. v. Tran, 2011 ONCJ 75 (CanLII)

[117] Mr. Tran's trial in this matter had be (sic) adjourned for three months, from 23 April to 27 July 2010 because of the failure of the Ministry of the Attorney General to provide an interpreter, thereby breaching Mr. Tran's s. 14 *Charter* right to proceed with an interpreter, and resulted in additional delay, contrary to Mr. Tran's s. 11(b) right to have his trial within a reasonable time. In my view this suggests a systemic lack of attention to language rights in Ontario, and compounds the impact on Mr. Tran's *Charter*-Protected (sic) interests.

SEE ALSO:

R. v. Papatie, 2008 QCCA 1135 (CanLII) [judgment available in French only]

ANNOTATIONS – SUBSECTION 11(C)

R. v. Singh, 2015 ONSC 7376 (CanLII)

[3] Counsel for the defense submits that the utterances and statement must be excluded because were (sic) not voluntary, and the Defendant was not properly advised of his right to counsel under s. 10(b) of the *Charter*. The Defendant contends that he was pressured into making a statement, and that his command of the English language was insufficient to understand his rights or to have comprehended the caution that he was given by the police.

[4] Generally speaking, an accused person may not be compelled to be a witness against himself, and so only voluntary statements made to police are admissible as evidence: *Charter*, ss. 7, 11(c). Accordingly, once detained and prior to an accused being informed of his or her right to legal counsel any statements made to the police are considered involuntarily compelled and are generally excluded as evidence under s. 24(2) of the *Charter*: *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, at paras 58, 98. After being cautioned about the right to remain silent and the right to consult counsel, an accused may choose to voluntarily answer questions and those statements would be admissible.

[…]

[21] Nevertheless, given the Defendant's linguistic difficulties, it is apparent that he did not get the kind of warning that enabled him to understand his rights. As the Supreme Court of Canada pointed out in *R v Hebert*, 1990 CanLII 118 (SCC), [1990] 2 SCR 151, "the fact that the accused may not have realized he had a right to remain silent (e.g. where he has not been given the standard warning)…[is] relevant to the question of whether the statement is voluntary."

[22] Under the circumstances, the Defendant's utterances upon arrest, like his more lengthy statement given at the police station several hours later, lacked the requisite voluntariness. These statements are therefore inadmissible.

ANNOTATIONS – SUBSECTION 11(D)

R. v. Tran, [1994] 2 S.C.R. 951, 1994 CanLII 56 (SCC)

[37] Support for an expansive interpretation of s. 14 may also be found within the *Charter* itself. This Court has already indicated that provisions of the *Charter* are not to be read in isolation, but rather interpreted in light of one another: e.g., *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588, *per* Wilson and La Forest JJ., *Dubois v. The Queen*, 1985 CanLII 10 (SCC), [1985] 2 S.C.R. 350, *per* Lamer J. (as he then was), and *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357. It has already been noted by this Court that s. 7 of the *Charter* is a general expression of the legal rights contained in ss. 8 to 14 of the *Charter*: *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, *per* Lamer J. (as he then was), at p. 502. Not surprisingly, therefore, s. 14 bears a close relationship to s. 7 and the other "legal rights" guaranteed under the *Charter*. Indeed, I would argue that the right to interpreter assistance under s. 14 is a means of ensuring that criminal proceedings comply with the constitutional guarantee of a fair and public hearing found in s. 11(*d*) of the *Charter*. At the same time, the force of s. 14 can be understood in part by reference not only to the right to make full answer and defence, but also to the right to have full disclosure of the case which has to be answered prior to making one's defence, both rights which are protected under ss. 7 and 11 of the *Charter*. Indeed, the close connection between s. 14 and these other *Charter* guarantees suggests that the right to interpreter assistance in the criminal context should be considered a "principle of fundamental justice" within the meaning of s. 7 of the *Charter*.

[…]

[77] In light of the fact that the right to interpreter assistance is not only a fundamental constitutional guarantee in its own right, but also an important means of ensuring a full, fair and public hearing,

something which is separately protected under ss. 7 and 11(*d*) of the *Charter*, it follows that s. 14 *Charter* rights will be more difficult to waive than may formerly have been the case under the common law and under statutory instruments, such as the *Criminal Code* and the *Canadian Bill of Rights*. Indeed, there will be situations where the right simply *cannot*, in the greater public interest, be waived. This has already been recognized under the common law in the two early cases of *Kwok Leung*, supra, and *Lee Kun*, supra. In both cases, the courts imposed definite restrictions on the possibilities for valid and effective waivers of the right to an interpreter, whether or not the accused was represented by counsel. […]

R. v. J. K., 2011 ONSC 800 (CanLII)

[52] However, the Defence argument is much more subtle than simply determining whether s.7 of the *Charter* has been breached. The argument is as follows:

[…]

> ii. By continuing with the interview without an interpreter, violated and undermined J.K.'s right to silence (s.7 of the *Charter*), his right to a fair trial (s. 11(d) of the *Charter*) and his right to an interpreter in any proceeding (s. 14 of the *Charter*). The Defence submits that the appropriate remedy is the exclusion of the videotaped statement under s. 24(2) of the *Charter*.

[…]

[57] In this case, the legal test is whether the accused's understanding and ability to communicate in the English language was so deficient that it was impossible for him to have understood the police or to have made any statements in English (para 44 *Lapoint* (sic), para. 33 *L.B.*). At the *voir dire*, the court must determine "the accused's ability to comprehend and communicate in the language of the statement" (para 44 *Lapoint* (sic)).

[58] Given the evidence in this voir dire, as I have said above, I have no hesitation in concluding that J.K. had sufficient communicative ability in English that he could understand the type of questions asked and understand the type of responses he gave during the course of the videotaped interview.

[59] The Defence counsel submitted J.K. could have better communicated through an interpreter. I don't disagree that his answers *might* have been more eloquent or thorough. However, that is not the test. If the possibility the accused might communicate better through an interpreter were the test, the police would be faced with the task of having an interpreter at interviews in all cases where English was the accused's second language or any number of other occasions such as where the accused's English language skills are deficient even if English is the accused's first language. What about statements when an accused is arrested at the scene or in the police cruiser or to third persons etc.? The list would be endless.

[60] To be clear, I am not suggesting that police do not have to provide an interpreter where it is clear or there is good reason to believe that the person being interviewed has genuine difficulty understanding the questions or has genuine difficulty in expressing their answers because of language comprehension or proficiency. Failure to do so puts the admissibility of the statement at risk.

R. v. Maurice Frenette, 2007 NBPC 33 (CanLII)

[15] I therefore proceed on the basis that the failure to provide a translated version of a disclosure package may in certain cases constitute a violation of sections 7 and 11(d) of the *Charter*, but that the failure to do so does not automatically constitute a breach. The issue then becomes under what circumstances does the failure or refusal to translate become a *Charter* violation?

[…]

[29] In this case, only the defence lawyer does not understand the evidence against the accused. In such a case, other options are available to the accused. He can hire another lawyer, one who speaks the French language, to assist Ms Mahoney. There is no paucity of bilingual lawyers in this area of the province. He can assist his lawyer by translating the documents himself, or summarizing the evidence for her benefit. He can pay to have the essential documents translated. He could hire a translator, or any other person who has a fluent knowledge of both languages, to assist his counsel, both prior to or at trial. Or he can hire a lawyer who speaks both the French and English language to conduct his defence. All of these options are available to him.

[30] The accused, having chosen trial in the English language, knows that the documentary evidence to be presented against him at the trial on the absolute jurisdiction offences will have to be translated for his benefit and in accordance with his right to a trial in the language of his choice. He also knows that an interpreter will translate all oral evidence at the trial from the French language to the English language. His lawyer will therefore understand the evidence presented against him at court hearings. He also has the benefit of a preliminary inquiry should he so choose for those offences for which he has an election as to his mode of trial.

[31] Undeniably Ms Mahoney is at a disadvantage in these proceedings. She maintains that she cannot adequately prepare for her client's defence. But this disadvantage is at the making of her client. This disadvantage was not created by the state. The state has fully complied with its constitutional obligations of disclosure and has not by any means denied Mr. Frenette procedural or substantive fairness. I cannot see how Mr. Frenette's decision to hire a lawyer who is at a disadvantage is a decision which must be cured by the state which is now being asked, at taxpayer's expense, to nullify that disadvantage.

[32] I find for the reasons stated above that the failure by the prosecution to provide translated disclosure in the official language of Mr. Frenette's choice has not prejudiced or had an adverse effect on his ability to make full answer and defence. The applicant has therefore failed to prove on a balance of probabilities any *Charter* violation.

[33] I also find that the applicant has failed to establish a factual or evidentiary foundation for his requested *Charter* relief. He has indicated in his Affidavit what the projected cost of translation would be for the evidence in question, but he has not demonstrated that he does not have the financial wherewithal or resources to obtain translation of this disclosure. There is no evidence before me as to the lack of financial means to obtain the translation. Also, there is no evidence concerning the applicant's inability to pay for a francophone co-counsel or translator, should he wish to avail himself of this assistance. Mr. Frenette has simply failed to discharge the evidential burden on him.

R. v. Butler, 2002 NBQB 325 (CanLII)

[2] He [the accused] has brought an application seeking a stay of proceedings pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* on the grounds that sections 20(2), 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* have been violated. He argues that this infringement of his rights arise as a result of the crown prosecutor's refusal to translate the information disclosed in his case, from French to English.

[…]

[25] Although I have decided that Mr. Butler's language rights pursuant to section 20(2) have not been violated, I, nevertheless, am of the opinion that language can be and is, in this case, an important factor to be considered in determining whether Mr. Butler's ability to make full answer and defence has been impaired due to his failure to obtain disclosure in English.

[…]

[28] Disclosure is not a process which is extrinsic to the advancement of the prosecution's case. Although it occurs prior to the commencement of the trial proper, it is so inextricably linked with the ability of the

accused to make full answer and defence, that is it (sic), in my opinion, co-extensive with the right to a fair hearing.

[…]

[45] Succinctly put, his [the accused's] position is as a unilingual anglophone who has made a formal request for disclosure in English, he has the unqualified right to receive it in that language. Due to this extremely broad premise, I am of the opinion that it becomes incumbent upon him to establish that the refusal to provide translated disclosure has resulted in actual prejudice to his ability to make full answer and defence. This was the standard articulated by L'Heureux-Dubé J, in *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) at para. [74].

[46] The objective of disclosure is to communicate and to apprise the accused of the information the Crown has, and thus the case one has to meet. This information also allows the Defence to decide on its strategy at trial.

[47] I accept that Mr. Butler did not understand the substance of what was communicated to him. His specific request for translation was denied.

[48] In the case at bar, however, there was no evidence adduced with respect to his counsel's competency in the French language, which is another important consideration.

[49] In addition, a preliminary hearing was conducted in English, resulting in the accused's committal to stand trial. The preliminary hearing is not a substitute for the disclosure process. It does, however, afford the accused a limited opportunity to discover the case to be made against him at trial.

[50] The accused has also failed to demonstrate that he does not have the financial wherewithal or resources to obtain the translation of this disclosure. In this regard, I adopt Mr. Justice MacDonald's comments in *R. v. Rodrigue*, *supra*, at p. 479:

> It is highly unlikely that a court would look with favour upon a claim by an accused that he has a right to legal or scientific assistance or to translation services if he himself has the means to pay for these kinds of services.

[51] The accused has affirmed that he has been prejudiced owing to his inability to understand the disclosure provided in the French language. This assertion, without more evidence as to the actual effect on his ability to exercise his constitutional rights is, in my opinion, insufficient to prove on a balance of probabilities that he has suffered actual prejudice. The onus is on Mr. Butler to show at the very least that the nature of the disclosure in this case, realistically denied him the opportunity to assess the evidence and make informed decisions about his defence.

[52] Having considered all of the facts of this case, I have concluded that denying a request for translation may, in some cases, amount to a breach of *Charter* rights. Nevertheless, in this particular case, Mr. Butler has failed to discharge the evidential burden. Accordingly, I find that he has not established a violation of section 7 and section 11(d) of the *Canadian Charter of Rights and Freedoms*.

R. v. Rodrigue, 1994 CanLII 5249 (YK SC)

[p. 29] Does the right to make full answer and defence include the right to assistance from the state to translate into the official language chosen by the accused for his trial, a statement or other document of which the original is in the other official language?

[p. 29] The extent of the right to make full answer and defence, and the constitutional right to a fair hearing (under section 11(d) of the *Canadian Charter of Rights and Freedoms*) has been explored most often in the context of the extent of one's right to legal aid. Does the accused have an absolute right to counsel at the expense of the state? The answer of the Court of Appeal of Ontario, in *R. v. Rowbotham*

(1988), 1988 CanLII 147 (ON CA), 63 C.R. (3d) 113, at p. 173, is that section 11(d) and section 7 of the *Charter*, which guarantee a fair trial by virtue of the principles of fundamental justice, require that the state provide the accused with a lawyer at the state's expense if the accused wants a lawyer but is unable to pay for one, and if the assistance of a lawyer is essential in order to have a fair trial. The right is therefore not absolute. Does the accused have a right to counsel of his choice at the expense of the state? The courts have said that there is no such absolute right: *Panacui v. Legal Aid Society of Alberta* (1988) 1987 CanLII 148 (AB QB), 1 W.W.R. 60 40 C.C.C. (3d) 459 (Alberta Queen's Bench); *R. v. Robinson* (1990) 1989 ABCA 267 (CanLII), 70 Alta L.R. (2d) 31 at p. 70 (Alberta Court of Appeal).

[p. 30] The response of the courts has been to deny the existence of any such absolute right; the court will agree that one's right to the assistance of a lawyer at the state's expense depends on whether the circumstances warrant it, for instance, the gravity of the alleged crime, or the complexity of issues of the admissibility of evidence or of the law which is involved in the case. The extent of one's right to scientific expertise has not yet been explored, perhaps because of the generosity of the police forces and the Crown. To the extent that general principles can be enunciated from the cases, I would say that one's common law right to "a full answer and defence" as expressed in s. 650(3) of the *Criminal Code* and the constitutional right to a fair hearing do not include any absolute rules as' to the extent of the state's duty. What that duty is will depend on the circumstances of the case: the circumstances of and the preparation for the trial, and the circumstances of the accused, including his financial resources. It is highly unlikely that a court would look with favour upon a claim by an accused that he has a right to legal or scientific assistance or to translation services if he himself has the means to pay for these kinds of services.

[pp. 30-31] There may be circumstances where the court would, before the trial, make a ruling that without the translation of a document from a language other than an official language to an official language, or from one official language to the official language in which the accused has chosen to be tried, the right of the accused to "make full answer and defence" or to a fair hearing would be compromised. We will have to wait for another case to determine under what circumstances the court would come to such a conclusion. In the present circumstances, the accused and his counsel admit that they are both able to understand English and they do not allege that the accused would suffer any prejudice if the statements and documents disclosed by the prosecution before the trial were not accompanied by a French translation. The claim of the accused is founded exclusively on the principle that since French has been chosen as the official language of the trial, he has a right to obtain disclosure of the evidence accompanied by a French translation. I have rejected this argument.

[p. 31] There remains no other circumstance which might invoke the sympathy of the court to recognize that the right to prepare and make full answer and defence would be jeopardized if the prosecution did not disclose the information in French. It is possible that in other circumstances an accused would be successful in persuading the court that, given the private, resources of the accused, without a translation the preparation for trial would be so difficult that it would be ineffective to the point that at the trial itself the accused would not be able to make full answer and defence.

N.B. – The appeal of this judgment was dismissed on other grounds by the Yukon Court of Appeal and the application for leave to appeal to the Supreme Court of Canada was dismissed.

SEE ALSO:

H.M.T.Q. v. Blackduck, 2014 NWTSC 58 (CanLII)

R. v. Larcher (19 September 2002), Ontario (ON SC), J. Lalonde [hyperlink not available]

R. v. Fiddler, 1994 CanLII 7396 (ON SC)

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14. Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

[LAST UPDATE: MAY 2017]

ANNOTATIONS

R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

[41] Another important consideration with regard to the interpretation of the "best interests of justice" is the complete distinctiveness of language rights and trial fairness. […] The right to full answer and defence is linked with linguistic abilities only in the sense that the accused must be able to understand and must be understood at his trial. But this is already guaranteed by s. 14 of the *Charter*, a section providing for the right to an interpreter. The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English. […]

R. v. Tran, [1994] 2 S.C.R. 951, 1994 CanLII 56 (SCC)

[1] This appeal raises for the first time before this court s. 14 of the *Canadian Charter of Rights and Freedoms*, which guarantees the right to the assistance of an interpreter. As a result, these reasons for judgment are somewhat longer than would normally be warranted. The context is that of a criminal proceeding and the claimant of the right is an accused who neither spoke nor understood English, the language of the proceedings. Following the hearing of this case, the appeal was unanimously allowed from the bench and a new trial ordered, with reasons to follow.

[…]

IV. Analysis

[9] This is the first appeal heard by this court in which the right to interpreter assistance guaranteed by s. 14 of the *Charter* has been directly in issue. Section 14 provides as follows:

> 14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Subsections 650(1) of the *Criminal Code*, which stipulates that an accused "shall be present in court during the whole of his trial", and 650(3), which entitles an accused to "make full answer and defence", are also implicated in this appeal. However, these provisions of the *Criminal Code* play a subordinate role to that of s. 14 of the *Charter*. Not only does s. 14 *expressly* provide for the right to the assistance of an interpreter, but also it is, by virtue of its constitutional status, part of the supreme and overarching law of the country. Section 14 of the *Charter* also has a wider reach than s. 650 of the Code. Section 650 applies most directly and fully to proceedings upon an indictment. The rules governing the appearance and presence of an accused in connection with offences punishable upon summary conviction are somewhat different and less rigorous: see ss. 800(2), 800(3) and 803(2)(*a*), but also s. 795 of the Code. Section 14 of the *Charter*, however, confers upon *all* accused, irrespective of the gravity of the offence charged and its classification, a constitutionally guaranteed right to the assistance of an interpreter where the accused does not understand or speak the language of the court.

[10] The elevation of the right to interpreter assistance to the level of a constitutional norm is a significant step requiring, at a minimum, that the rules and principles governing interpreters which have been developed under the common law and under various statutes be reconsidered and, where necessary,

adapted to fit with the dictates of the new *Charter* era. At the same time, there is no doubt that the rich body of jurisprudence which already exists with respect to interpreters, including that which has been developed under s. 650 of the Code, will play an important role in determining the scope of the right guaranteed by s. 14 of the *Charter*.

[11] At the outset, I would like to make it very clear that the discussion of s. 14 of the *Charter* which follows relates specifically to the right of an *accused* in *criminal* proceedings, and must not be taken as necessarily having any broader application. In other words, I leave open for future consideration the possibility that different rules may have to be developed and applied to other situations which properly arise under s. 14 of the *Charter* — for instance, where the proceedings in question are civil or administrative in nature.

[12] This case requires this court to begin the process of delineating the parameters of the right to interpreter assistance, a right which is framed in very general terms under s. 14 of the *Charter*. In determining the scope of a *Charter* right, the words of Dickson J. (as he then was), writing for the court on s. 8 of the *Charter* in *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 156-57 [hereinafter "*Hunter v. Southam Inc.*"], are a useful starting point:

> The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines.
>
> ... the proper approach to the interpretation of the *Charter of Rights and Freedoms* is a purposive one ... [which makes it] first necessary to specify the purpose underlying [the section of the *Charter*]: in other words, to delineate the nature of the interests it is meant to protect.

In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, Dickson J. (as he then was) elaborated on how the interests which are intended to be protected by a particular *Charter* right are to be discovered:

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

[…]

[35] It is clear that the right to the assistance of an interpreter of an accused who cannot communicate or be understood for language reasons is based on the fundamental notion that no person should be subject to a Kafkaesque trial which may result in loss of liberty. An accused has the right to know in full detail, and contemporaneously, what is taking place in the proceedings which will decide his or her fate. This is basic fairness. Even if a trial is objectively a model of fairness, if an accused operating under a language handicap is not given full and contemporaneous interpretation of the proceedings, he or she will not be able to assess this for him or herself. The very legitimacy of the justice system in the eyes of those who are subject to it is dependent on their being able to comprehend and communicate in the language in which the proceedings are taking place.

(iii) Relationship with Other Charter Provisions

[37] Support for an expansive interpretation of s. 14 may also be found within the *Charter* itself. This court has already indicated that provisions of the *Charter* are not to be read in isolation, but rather interpreted in light of one another: e.g., *R. v. Rahey*, [1987] 1 S.C.R. 588, per Wilson and La Forest JJ., *R. v. Dubois*, [1985] 2 S.C.R. 350, per Lamer J. (as he then was), and *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357. It has already been noted by this court that s. 7 of the *Charter* is a general expression of the legal rights contained in ss. 8 to 14 of the *Charter*: *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, per Lamer J. (as he then was) at p. 502. Not surprisingly, therefore, s. 14 bears a close relationship to s. 7 and the other "legal rights" guaranteed under the *Charter*. Indeed, I would argue that the right to interpreter assistance under s. 14 is a means of ensuring that criminal proceedings comply with the constitutional guarantee to a fair and public hearing found in s. 11(*d*) of the *Charter*. At the same time, the force of s. 14 can be understood in part by reference not only to the right to make full answer and defence, but also to the right to have full disclosure of the case which has to be answered prior to making one's defence, both rights which are protected under ss. 7 and 11 of the *Charter*. Indeed, the close connection between s. 14 and these other *Charter* guarantees suggests that the right to interpreter assistance in the criminal context should be considered a "principle of fundamental justice" within the meaning of s. 7 of the *Charter*.

[…]

(iv) Conclusions on the Purposes Served by Section 14

[38] The right of an accused person who does not understand or speak the language of the proceedings to obtain the assistance of an interpreter serves several important purposes. First and foremost, the right ensures that a person charged with a criminal offence hears the case against him or her and is given a full opportunity to answer it. Second, the right is one which is intimately related to our basic notions of justice, including the appearance of fairness. As such, the right to interpreter assistance touches on the very integrity of the administration of criminal justice in this country. Third, the right is one which is intimately related to our society's claim to be multicultural, expressed in part through s. 27 of the *Charter*. The magnitude of these interests which are protected by the right to interpreter assistance favours a purposive and liberal interpretation of the right under s. 14 of the *Charter*, and a principled application of the right.

[…]

[47] The first step in the analysis as to whether a breach of s. 14 of the *Charter* has in fact occurred requires consideration of the need for interpreter assistance. That is, the claimant of the right must demonstrate that he or she satisfies (or satisfied) the conditions precedent to entitlement to the right. Section 14 of the *Charter* states clearly that, to benefit from the right, an accused must "not understand or speak the language in which the proceedings are conducted".

[48] While the right to interpreter assistance is not an automatic or absolute one, it stands to reason, particularly with the elevation of the right to the level of a constitutional norm, that courts should be generous and open-minded when assessing an accused's need for an interpreter. As a general rule, courts should appoint an interpreter when either of the following occurs:

> (1) it becomes apparent to the judge that an accused is, for language reasons, having difficulty expressing him or herself or understanding the proceedings and that the assistance of an interpreter would be helpful; or
>
> (2) an accused (or counsel for the accused) requests the services of an interpreter and the judge is of the opinion that the request is justified.

Importantly, neither the language of s. 14 of the *Charter* nor the legal-historical underpinnings of the right require courts to inform all accused appearing before them of the existence of the right to interpreter assistance. Similarly, courts are not obliged to inquire, as a matter of course, into every accused's capacity to understand the language used in the proceedings. At the same time, however, there is no

absolute requirement on an accused that the right be formally asserted or invoked as a pre-condition to enjoying it. This is because courts have an independent responsibility to ensure that their proceedings are fair and in accordance with the principles of natural justice and, therefore, to protect an accused's right to interpreter assistance, irrespective of whether the right has actually been formally asserted.

[49] Just as a court should conduct a hearing into an accused's mental capacity if it appears that the accused may not be competent to participate fully in his or her own defence, or likewise should decline to accept a guilty plea if not satisfied that an accused understands the nature of the charge and appreciates what it is he or she is doing, so too should a court conduct, on its own motion, an inquiry into the need for an interpreter when it appears that an accused is having language difficulties. As I suggested above, the overriding consideration is that of understanding. Failure to conduct an inquiry where there is some *positive* indication that the accused may not understand or cannot be understood for reasons related to language, and to appoint an interpreter where one may prove helpful, could result in a miscarriage of justice and the ordering of a new trial.

[50] However, it should be borne in mind by defence counsel that the safer course will always be to request an interpreter when one is required, rather than to rely on a court to appoint one entirely on its own motion. Indeed, as officers of the court, there is an obligation on both Crown and defence counsel to draw a court's attention to the need for an interpreter where counsel become aware that such a need exists. While courts must be alert to signs which suggest that an accused may have language difficulties, they are not nor can they be expected to be mind readers. Where there are no outward indications which point to a lack of understanding on the accused's part and where the right has not been invoked by the accused or by counsel (in the case of represented accused), these may be factors which are weighed against the accused if, after sitting quietly throughout the trial, the issue of interpretation is suddenly raised for the first time on appeal. The cases of *R. v. Tsang* (1985), 27 C.C.C. (3d) 365 (B.C. C.A.), and *R. v. Tabrizi*, [1992] O.J. No. 1383 (Ont. Gen. Div.) are illustrative of this point.

[…]

[52] I would stress that courts must, as many have in the past, approach the question of the *need* for an interpreter with a spirit of sensitivity and understanding, particularly now that the right to interpreter assistance has been entrenched in our Constitution. As Steele makes clear in his article, "Court Interpreters in Canadian Criminal Law", *supra*, at pp. 226-27:

> ... linguistic competence takes colour from circumstances. For example, an allophone [i.e., a person not conversant in the language of the proceedings] might find it easy to understand her lawyer, particularly because she has had time outside the court-room to eliminate misunderstandings, but not opposing counsel, the judge or a witness. In the same way, she might be able to understand her lawyer in the relative calm of the lawyer's office, but not under stress in the court-room.
>
> [In addition], speaking, reading and oral comprehension are distinct skills. A party who is able to testify fluently may be unable to read documentary evidence. Similarly, a witness who is able to follow instructions or understand a question may be incapable of responding fully.

[53] On these and other grounds, Steele argues for "a rather low standard in the assessment of need" (p. 227), whereby an interpreter would be allowed unless a court were convinced that the applicant was able to understand the proceedings to the same degree as if those proceedings were conducted in the language in which the applicant has the greatest facility.

[54] Along the same lines, Lacourcière J.A. of the Ontario Court of Appeal has provided some sound advice with respect to assessing the need for an interpreter. In *R. v. Petrovic* (1984), 13 C.C.C. (3d) 416 (Ont. C.A.), he stated, at p. 423:

> It was common ground at the trial that a Serbo-Croatian interpreter was required, and the appellant entered his plea through an interpreter. While both the *Bill of Rights* and the *Canadian Charter of Rights and Freedoms* refer to the right to the assistance of an interpreter in any proceedings where the

> witness does not understand or speak the language in which the proceedings are conducted, *it is not for the trial court and much less for an appellate court to conduct a detailed inquiry into the party's or witness' ability to understand or speak the language of the court proceedings. A person may be able to communicate in a language for general purposes while not possessing sufficient comprehension or fluency to face a trial with its ominous consequences without the assistance of a qualified interpreter. Even if that person speaks broken English or French and understands simple communications, the right constitutionally protected by s. 14 of the Charter is not removed*. [Emphasis added.]

I would also agree with the position taken by Lacourcière J.A. in *Petrovic*, at p. 423 [C.C.C., p. 284 C.R.], and reiterated by the B.C. Court of Appeal in *Tsang*, *supra*, at p. 371, that, once claimed, the s. 14 *Charter* right to interpreter assistance should not be denied unless there is "cogent and compelling evidence" that an accused's request for an interpreter is not made in good faith, but rather for an oblique motive. In *Roy v. Hackett*, *supra*, a case involving interpretation at an arbitration hearing, Lacourcière J.A. pointed out, at p. 427, that in coming to a decision regarding the good faith of a witness or party who requests an interpreter, a judge or chairman of a tribunal

> ... must take into account the legitimate desire of any witness to express himself in the language he knows best, usually his mother tongue ... [and] avoid imputing an ulterior motive to a witness who asks for an interpreter, even if the witness has some familiarity with the language used and could, in a general way, understand the proceedings.

This comment attests to the sensitivity required when assessing an accused's need for an interpreter, and to the fact that courts must not be too quick to draw adverse inferences where the claimant of the right has *some* facility with the language being used in the court.

(ii) Guaranteed Standard of Interpretation

[54] The second step in determining whether an accused has been deprived of his or her constitutionally guaranteed right to interpreter assistance involves a consideration of whether there has been a departure or deviation from what is considered "proper" interpretation. Where the accused shows that he or she was in need of an interpreter, but was refused such assistance, the limitation on the right will be self-evident (subject, of course, to the accused establishing that the denial occurred at a point when the case was being advanced). However, where, as here, an interpreter was appointed and it is the *quality* of the interpretation provided that is being challenged, assessing whether there has been an infringement of the right becomes more complicated. To do so, it is necessary to consider the scope of the right guaranteed by s. 14 of the *Charter* and to begin to define what constitutes an appropriate standard of interpretation in criminal proceedings.

[55] While the standard of interpretation under s. 14 will be high, it should not be one of perfection. In my view, it can be defined by reference to a number of criteria aimed at helping to ensure that persons with language difficulties have the same opportunity to understand and be understood as if they were conversant in the language being employed in the proceedings. These criteria include, and are not necessarily limited to, continuity, precision, impartiality, competency and contemporaneousness. I shall consider each one in turn.

I. Continuous

[56] In considering what constitutes adequate interpretation, courts and commentators have generally treated continuity as a necessary requirement. As a result, breaks in interpretation and/or summaries of the proceedings have usually not been viewed in a favourable light.

[…]

[58] I find, therefore, that s. 14 of the *Charter* requires that interpretation of proceedings be continuous. Breaks and interruptions in interpretation are not to be encouraged or allowed.

II. Precise

[59] The need for precision in interpretation is self-evident. As Steele suggests at pp. 240-41 of his article, *supra*:

> ... the interpretation must be, as close as can be, word-for-word and idea-for-idea; the interpreter must not "clean up" the evidence by giving it a form, a grammar or syntax that it does not have; the interpreter should make no commentary on the evidence; and the interpretation should be given only in the first person, *e.g.*, "I went to school" instead of "he says he went to school".

This necessity for precision is an additional reason why summaries are most unlikely to meet the general standard of interpretation required under s. 14 of the *Charter*. Indeed, in the American case *Negron*, supra, Kaufman J. held, at pp. 389-90, that the summaries provided to the defendant by the prosecutor's interpreter were inadequate because:

> However astute [the interpreter's] summaries may have been, they could not do service as a means by which Negron could understand the precise nature of the testimony against him during that period of the trial's progress when the state chose to bring it forth.

[60] However, it is important to keep in mind that interpretation is an inherently human endeavour which often takes place in less than ideal circumstances. Therefore, it would not be realistic or sensible to require even a constitutionally guaranteed standard of interpretation to be one of perfection. As Steele explains, at p. 242:

> Even the best interpretation is not "perfect", in that the interpreter can never convey the evidence with a sense and nuance identical to the original speech. For that reason, the courts have cautioned that interpreted evidence should not be examined microscopically for inconsistencies. The benefit of a doubt should be given to the witness.

In this respect, it may be helpful to note the conceptual distinction that exists between "interpretation", which is primarily concerned with the spoken word, and "translation", which is primarily concerned with the written word. In light of the fact that interpretation involves a process of mediation between two people which must occur on the spot with little opportunity for reflection, it follows that the standard for interpretation will tend to be lower than it might be for translation, where the source is a written text, where reaction time is usually greater and where conceptual differences which sometimes exist between languages can be more fully accommodated and accounted for.

III. Impartial

[61] It also stands to reason that interpretation, particularly in a criminal context, should be objective and unbiased: see, e.g., *Unterreiner*, infra, *Tabrizi*, supra, and *Morel*, supra, at pp. 535-36. As Steele suggests, at pp. 238-39:

> Certain persons are disqualified, by reason of apprehension of bias, from acting as interpreter. Obviously a party litigant will not be permitted to interpret, but neither will a relative or friend of a party, the judge, nor a person closely connected to the events giving rise to a criminal charge. These rules may be relaxed if the proceedings are non-adversarial. [Footnotes omitted.]

While I agree with Steele that an interpreter should be impartial, I would further relax these rules, particularly on preliminary issues such as bail release or adjournment in remote areas of our country, where the practical reality of Canadian geography coupled with the urgency presented by some cases would result in the interests of justice being better served.

IV. Competent

[62] To meet the standard of protection guaranteed by s. 14 of the *Charter*, interpretation must be of a high enough quality to ensure that justice is done and seen to be done. This means, at a minimum, that an accused has a right to competent interpretation. While there are, as of yet, no universally acceptable standards for assessing competency, a point stressed by Steele at p. 238, an interpreter must at least be sworn by taking the interpreter's oath before beginning to interpret the proceedings: see, *e.g.*, *R. v. L.L.*, [1986] O.J. No. 1954 (Ont. Dist. Ct.), and *Petrovic*, *supra*, at p. 423. Where there is a legitimate reason to doubt the competency of a particular interpreter, a court will be well advised to conduct an inquiry into the interpreter's qualifications.

[…]

V. Contemporaneous

[64] A further factor which needs to be taken into account when defining the proper standard for interpretation is that of timing. To meet the constitutionally guaranteed standard of protection under s. 14 of the *Charter*, interpretation must take place contemporaneously with the proceeding in question. Here, it may be useful to keep in mind the distinction between "consecutive" (after the words are spoken) and "simultaneous" (at the same time as words are spoken). While it is generally preferable that interpretation be consecutive rather than simultaneous, the overriding consideration is that the interpretation be contemporaneous. Although I need not decide the matter, I would tend to agree with Steele, at pp. 248-49 of his article, that, although consecutive interpretation effectively doubles the time necessary to complete the proceedings, it offers a number of advantages over simultaneous interpretation. Simultaneous interpretation is a complex and demanding task for which court interpreters, unlike conference interpreters, are seldom trained. Moreover, it requires expensive sound equipment with which our trial courtrooms are rarely equipped. In addition, simultaneous interpretation works best when there is a minimum of distraction both for the interpreter and the listener(s), a feature which will not always be present in our busy courtrooms. Consecutive interpretation, on the other hand, has the advantage of allowing the accused to react at the appropriate time, such as when making objections. It also makes it easier to assess on the spot the accuracy of the interpretation, something rendered more difficult when one has to listen to the original language *and* its translation at the same time, as would be the case with simultaneous interpretation.

[65] All of these factors suggest that consecutive interpretation is the better practice as compared to simultaneous interpretation. However, I recognize that the different needs of persons targeted by s. 14 of the *Charter*, such as those with a hearing disability, as well as the possibility of technological advances in interpretation methods may change this. What is important above all is that interpretation be contemporaneous with that which is being interpreted.

VI. Summary

[66] In sum, the purpose of furthering understanding of the proceedings which underpins the right to interpreter assistance is most likely to be fulfilled if the standard for interpretation under s. 14 of the *Charter* is defined as one of continuity, precision, impartiality, competency and contemporaneousness. Given the underlying importance of the interests being protected by the right to interpreter assistance, the constitutionally guaranteed standard of interpretation must be high and allowable departures from that standard limited. In assessing whether there has been a sufficient departure from the standard to satisfy the second stage of inquiry under s. 14, the principle which informs the right — namely, that of linguistic understanding — should be kept in mind. In other words, the question should always be whether there is a possibility that the accused may not have understood a part of the proceedings by virtue of his or her difficulty with the language being used in court.

(iii) Whether Departure Occurred While Case was Being Advanced

[67] Importantly, it will not be every deviation from the protected standard of interpretation which will constitute a violation of s. 14 of the *Charter*. The claimant of the right must establish something more — namely, that the lapse in interpretation which occurred was in respect of the proceedings themselves,

thereby involving the vital interests of the accused, and was not merely in respect of some collateral or extrinsic matter, such as an administrative issue relating to scheduling. To distinguish between a limitation of the right which is of such a de minimis nature as not to constitute a violation of s. 14 and one which is more material and which does infringe s. 14, I find it helpful to borrow the language and accompanying rationale developed in the context of the right to be present under s. 650 of the *Criminal Code*, where absences which occur while the case is actually "proceeding" or being "advanced" or where the "vital interests" of the accused are involved are deemed to take place during the "trial" and to be in violation of s. 650. Of course, unlike s. 650 of the Code which mandates an accused's presence during the whole of a "trial", s. 14 of the *Charter* uses the more all-encompassing term "proceedings". Nonetheless, I believe that the case law under the Code provision is helpful in delineating the kinds of circumstances in which interpretation must comply with constitutional standards, particularly in light of the purposive and expansive definitions which courts have, on the whole, given to the term "trial" under s. 650 of the Code.

[…]

[70] By embracing for the purposes of s. 14 of the *Charter* the language of "advancing the case" and its underlying rationale found in *Meunier* and subsequently developed in the case law under s. 650 of the Code, I am not suggesting that there is any magical or fixed meaning to this phrase. Indeed, I would agree with the Ontario Court of Appeal's observations in *R. v. Grimba* (1980), 56 C.C.C. (2d) 570 (Ont. C.A.), a case where s. 650 (then s. 577) of the Code was held to have been contravened when the accused was twice excluded from the courtroom during his re-examination while arguments took place and rulings were made regarding admissibility of evidence. With respect to the phrase "advancing the case", Zuber J.A., writing for the Court of Appeal, stated at p. 574:

> I cannot think that this phrase was intended to be definitive. *It is one way of putting the essential question of whether or not the trial continued* and it is of little consequence whether the continuance embraced the adduction of evidence, the presentation of argument, rulings on evidentiary points, the address to the jury, etc. [Emphasis added.]

My intention is simply to make it clear that where a lack of or lapse in interpretation occurs in respect of some purely administrative or logistical matter which does not involve the vital interests of the accused, such as scheduling or agreeing to a recess, this will not be a violation of s. 14 of the *Charter*. Indeed, to say it was a violation would trivialize the right to interpreter assistance protected under the Constitution.

[…]

(iv) Prejudice

[72] With respect to the question of what has to be established by the party asserting a violation of s. 14 of the *Charter*, I wish to make one final comment. In my view, it is crucial that, at the stage where it is being determined whether an accused's s. 14 rights were in fact violated, courts not engage in speculation as to whether or not the lack of or lapse in interpretation in a specific instance made any difference to the outcome of the case. To second-guess the defence's strategy in a particular case, or to ponder the utility of proper interpretation, is an inherently dangerous exercise. It is impossible to know for sure what would have happened if an accused had been provided with full and contemporaneous interpretation of the proceeding in question. For example, one can never really know what might have been triggered in an accused's mind had he or she received the interpretation to which he or she is entitled under s. 14 of the *Charter*.

[73] Section 14 expressly guarantees the right to the assistance of an interpreter when certain conditions precedent are met. Nowhere does it require or suggest that an ex post facto assessment of prejudice to an accused's right to full answer and defence be carried out before a violation of the right can be found. Furthermore, the right under s. 14 of the *Charter* is one held not only by accused persons, but also by parties in civil actions and administrative proceedings and by witnesses. If the right to interpreter assistance were based exclusively on the right to make full answer and defence and on avoiding

prejudice to that right, there would be no reason for parties in non-criminal proceedings as well as witnesses to be *separately* guaranteed the right.

[74] Section 14 guarantees the right to interpreter assistance without qualification. Therefore, it would be wrong to introduce into the assessment of whether the right has been breached any consideration of whether or not the accused actually suffered prejudice when being denied his or her s. 14 rights. The *Charter* in effect proclaims that being denied proper interpretation while the case is being advanced is in itself prejudicial and is a violation of s. 14. Actual resulting prejudice is a matter to be assessed and accommodated under s. 24(1) of the *Charter* when fashioning an appropriate and just remedy for the violation in question. In other words, the "prejudice" is in being denied the right to which one is entitled, nothing more.

(v) Waiver

[75] In light of the fact that the right to interpreter assistance is not only a fundamental constitutional guarantee in its own right, but also an important means of ensuring a full, fair and public hearing, something which is separately protected under ss. 7 and 11(*d*) of the *Charter*, it follows that s. 14 *Charter* rights will be more difficult to waive than may formerly have been the case under the common law and under statutory instruments, such as the *Criminal Code* and the *Canadian Bill of Rights*. Indeed, there will be situations where the right simply *cannot*, in the greater public interest, be waived. […]

[76] Where waiver of the right to interpreter assistance is possible, the threshold will be very high. In *Korponey v. Canada (Attorney General)*, *(*sub nom. *Korponay v. Canada (Attorney General))* [1982] 1 S.C.R. 41, this court made it clear per Lamer J. (as he then was) that to be valid, waiver of a statutory procedural right has to be clear and unequivocal and must be done with full knowledge of the rights the procedure was enacted to protect and the effect that waiver will have on those rights. This standard for a valid waiver has subsequently been adopted in the context of the *Charter*, specifically with respect to s. 10(*b*) which guarantees the right to retain and instruct counsel upon arrest or detention: see, *e.g.*, *R. v. Evans*, [1991] 1 S.C.R. 869, per McLachlin J., at pp. 892-94. In the specific case of waiver of the s. 14 right to interpreter assistance, I would add to existing safeguards the following condition. The waiver should be made *personally* by the accused, if necessary following an inquiry by the court through an interpreter to ensure that the accused truly understands what it is he or she is doing, unless counsel for the accused is fluent in the accused's language or has communicated with the accused through an interpreter before coming to court and satisfies the court that the nature of the right and the effect on that right of waiving it have been explained to the accused.

[…]

(vi) Summary of Conclusions

[78] The scope of the right to interpreter assistance guaranteed by s. 14 of the *Charter* may be stated in the following broad terms. The constitutionally guaranteed standard of interpretation is not one of perfection; however, it is one of continuity, precision, impartiality, competency and contemporaneousness. An accused who does not understand and/or speak the language of the proceedings, be it English or French, has the right at every point in the proceedings in which the case is being advanced to receive interpretation which meets this basic standard. To establish a violation of s. 14, the claimant of the right must prove on a balance of probabilities not only that he or she was in need of assistance, but also that the interpretation received fell below the basic, guaranteed standard and did so in the course of the case be ing advanced. Unless the Crown is able to show on a balance of probabilities that there was a valid and effective waiver of the right which accounts for the lack of or lapse in interpretation, a violation of the right to interpreter assistance guaranteed by s. 14 of the *Charter* will have been made out. While there will be circumstances in which waiver of the right to interpreter assistance will not be permitted for reasons of public policy, in situations where waiver is possible, the Crown must not only show that the waiver was clear and unequivocal and made with a knowledge and understanding of the right, but also that it was made personally by the accused or with defence counsel's

assurance that the right and the effect on that right of waiving it were explained to the accused in language in which the accused is fully conversant.

[…]

[80] The question here is whether the appellant was denied his s. 14 *Charter* rights in the course of his trial. Specifically, was the appellant's right to interpreter assistance violated when the interpreter testified as a defence witness and, rather than giving his answers in English and Vietnamese, simply provided summaries in Vietnamese of his testimony and, in the case of a brief exchange with the trial judge, failed to provide any interpretation whatsoever? To answer this question, the analytical framework developed above must be applied to the facts of this case.

[…]

[82] Since I am satisfied that the appellant did not understand or speak English, the language of the proceedings, and, therefore, that he was in need of interpreter assistance throughout his trial as found by the trial judge, the first step in the analysis will be to determine whether there was in fact a departure from the general standard of continuous, precise, impartial, competent and contemporaneous interpretation guaranteed by s. 14 of the *Charter*. In my view, there is no doubt that the interpretation of the proceedings in which Mr. Nguyen was involved as a witness fell well below what it should have been.

[83] First, the appellant did not receive continuous interpretation of all of the evidence at his trial. Rather, the questions posed to and answers given by Mr. Nguyen were distilled and condensed into two, one-sentence summaries. Moreover, there is nothing in the record to suggest that the interpreter's exchange with the judge was translated at all, not even in summary form. In other words, the requirement of continuity was not complied with.

[84] Second, the interpretation provided to the appellant was not precise. Not only was it completely missing in the case of the interchange with the judge, but also the one-sentence summaries which were provided failed to convey everything that had been said. In addition, the first summary was incorrect in that it referred to something which had not in fact been said. That is, Mr. Nguyen told the appellant that he had testified that the appellant's "face hasn't changed at all". However, nowhere in Mr. Nguyen's actual evidence was the appellant's face mentioned.

[85] Third, while there is no reason to doubt the actual impartiality or objectivity of the interpretation provided by Mr. Nguyen, the practice of having an interpreter act as both a witness and an interpreter is one which should be avoided in all but exceptional circumstances (e.g. where there is nobody else who can testify on the matter in question). In the rare event that such a dual role becomes necessary, it is the court's responsibility to make it clear that the interpreter is no longer serving in his or her capacity as an officer of the court and to appoint another interpreter for the remainder of the proceedings. Otherwise, having the interpreter double as a witness may give rise to a reasonable apprehension of bias, not to mention practical and logistical dif ficulties with respect to the interpretation being provided.

[86] Lastly, the timing of the interpretation was unsatisfactory. It should have occurred contemporaneously with the asking of questions and the giving of answers. Indeed, at the outset, both the trial judge and defence counsel instructed the interpreter to give his answers in English and Vietnamese. However, these instructions were disregarded by Mr. Nguyen, who failed to provide consecutive interpretation.

[87] To summarize, the interpretive assistance which was furnished to the appellant at the stage in the proceedings when the interpreter was on the witness stand was clearly deficient. At a minimum, it was neither continuous, precise nor contemporaneous. There is no doubt in my mind that it fell below the general standard of interpretation which is protected under s. 14 of the *Charter*. The next question then is whether the lapses in interpretation occurred in the course of the case being advanced. While the Court of Appeal below was correct in saying that the assistance provided to the appellant fell short of the "ideal

standard", in my respectful opinion, it was wrong not to recognize that this lapse was a significant one which infringed the appellant's s. 14 *Charter* rights.

[88] The lapses in interpretation which occurred were not trivial or de minimis in nature. Rather, they occurred at a point when the appellant's vital interests were clearly involved and, therefore, the case was being advanced. The problems with the interpretation arose during the testimony of a witness. It is axiomatic that an accused has the right to confront all witnesses and to be meaningfully present while evidence is being adduced, be it for or against the accused. In addition, the evidence given by Mr. Nguyen covered a topic of considerable importance to the appellant — namely, the issue of identification upon which his entire defence was built. The details of Mr. Nguyen's testimony concerning the appellant's weight were vital. By simply being given one-sentence summaries of the evidence, the damage that had been done to Mr. Nguyen's testimony in cross-examination and in the exchange with the trial judge was not conveyed to the appellant. The trial judge's questions to the interpreter and the answers he received indicated that the interpreter did not know the appellant until two months after the alleged assault. In other words, the interpreter's evidence was not probative of the accused's weight at the time of the offence. Moreover, the first one-sentence summary which the appellant received was misleading. By telling the appellant that he had testified that the appellant's face had not changed at all, when in fact he had said no such thing, the interpreter may have left the appellant with the impression that his evidence would cover concerns about fluctuations in his weight (since the complainant's identification was based on a photo line-up).

[89] As a consequence of not being fully informed in a timely fashion of what was actually being said, the appellant was not in a position to instruct his counsel with respect either to re-examination of the interpreter, or to calling another witness who might have been able to testify about his weight at the time of the alleged offence. If, for example, another witness had been called and been credible, that witness' evidence might have raised the necessary reasonable doubt required for an acquittal. The uncertainty associated with the question of what *might* have happened had the accused received the quality of interpretation to which he was entitled under s. 14 of the *Charter* demonstrates that courts must not engage in speculating about the utility or non-utility of proper interpretation. What is important is that the appellant was in need of interpreter assistance and was denied at a point when the case was clearly being advanced the standard of assistance to which he was entitled and which he is presumed to have required in order to understand the proceedings.

[90] With the greatest of respect, I simply cannot agree with the Court of Appeal that, because the evidence which was not properly interpreted proved in the end to be of minor probative value, the appellant was not deprived of his right to be present or to make full answer and defence. The evidence concerning the appellant's weight was relevant to the central issue in the case, that of identification. In his reasons for judgment, the trial judge discussed at some length the question of the appellant's weight at the time of the alleged offence and ultimately relied on the identification evidence of the police officer and the complainant. Had there been credible evidence from the defence that the accused was not "fat" at the time of the assault, this evidence might have created a reasonable doubt in the trial judge's mind. For the Court of Appeal to say after the fact that the poor interpretation received by the appellant made no difference to the outcome of the case is, in my opinion, to engage in the kind of second-guessing and speculation which I have suggested is inappropriate in determining whether there has been a breach of s. 14 of the *Charter*. Irrespective of whether the interpreter's evidence actually affected the appellant's right to full answer and defence, something we cannot know with certainty, the appellant was entitled under s. 14 to hear fully and contemporaneously what was being said on the topic of his weight.

[…]

[95] To conclude, I find that the appellant needed an interpreter, that the standard of interpretation provided to him fell well below what was required under s. 14 of the *Charter*, and that the lapse in interpretation which occurred took place at a point in the proceedings when the case was clearly being advanced. In addition, the Crown has not satisfied me that there was a valid and effective waiver of the right in this case.

[56] Turning first to the languages of the courts, it is settled by *Société des Acadiens*, *supra*, that while a person is constitutionally entitled to speak French in court in New Brunswick under s. 19(2) of the *Charter*, he has no right to be understood in that language. The judge and all court officials may use English or French as they wish both in oral and in written communication; see also *MacDonald v. City of Montreal*, *supra*, at pp. 483 and 497. As I read Beetz J.'s judgment in *Société des Acadiens*, the appellant has no right to a translator, except as required for a fair trial either at common law or under ss. 7 and 14 of the *Charter* (p. 577). The right to be understood is not a language right but one arising out of the requirements of due process. Beetz J. in *Société des Acadiens* carefully employs the word "power" to describe the language rights accorded an individual. He says, at p. 574: "They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice" (emphasis added). At page 575, he contrasts this power to language provisions that provide for the right to communicate (s. 20 of the *Charter*) or to be heard (s. 13(1) of the *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1).

[57] Applying these principles to the present case, it seems to me that the trial judge could, subject to what I shall have to say later about records, proceed with the trial in English. There is no evidence to indicate that the appellant needed the services of a translator to understand the proceedings, so a fair trial could be conducted without making a translation available from English to French. At all events, what the appellant sought throughout these proceedings was to vindicate his language rights, not the right to a fair hearing.

[58] Counsel for the Freedom of Choice Movement, however, argued that the principle of equality in the use of language is breached by employing a translator to make a person understood by the trial judge. Such translation, he stressed, puts a person whose words must be translated in a far less favourable position than one who can be understood directly. However, it seems to me that this argument, too, was rejected by the majority of this Court in *Société des Acadiens*. There Beetz J. had this to say on the point at p. 580:

> I do not think the interpretation I adopt for s. 19(2) of the *Charter* offends the equality provision of s. 16. Either official language may be used by anyone in any court of New Brunswick or written by anyone in any pleading in or process issuing from any such court. The guarantee of language equality is not, however, a guarantee that the official language used will be understood by the person to whom the pleading or process is addressed.
>
> Before I leave this question of equality however, I wish to indicate that if one should hold that the right to be understood in the official language used in court is a language right governed by the equality provision of s. 16, one would have gone a considerable distance towards the adoption of a constitutional requirement which could not be met except by a bilingual judiciary. Such a requirement would have far reaching consequences and would constitute a surprisingly roundabout and implicit way of amending the judicature provisions of the Constitution of Canada.

Beetz J. in that case at p. 574 and in *MacDonald*, *supra*, at pp. 500-501, was at pains to indicate that the right to due process, which is substantially what concerns the intervener, should not be linked with language rights because they are conceptually different, and the effect of doing so would involve the risk of distorting both rather than reinforcing either.

[59] There is a matter regarding translation, however, that was not raised in *Société des Acadiens* but that does arise in this case. In the *Société des Acadiens*, the issue was whether the judge understood the appellant (which it was held he did). Beetz J., however, left to another day the issues regarding the reasonable means necessary to ensure that the members of the courts understand the proceedings. He also did not deal with the issue, which has some relation to the matters just mentioned, whether when proceedings are required by law to be recorded, a person using one or the other official language has the right to have his remarks recorded in that language. Nor did that issue arise in *MacDonald*, *supra*, or *Bilodeau v. Attorney General of Manitoba*, [1986] 1 S.C.R. 449. These cases were essentially addressed

to whether processes validly made in one only of the official languages were required to be translated in the other. As already mentioned, however, it does arise in the present case, both as regards the making of a plea and the giving of evidence by the appellant.

[60] In my view, the appellant's right or power to use French would be seriously truncated if recorded in another language. For his use of the language goes beyond the immediate forum. The proceedings, for example, may continue in the Court of Appeal where the judges may quite properly wish to refer to the exact words used by a person at trial, words that person has a right to use. Absent valid legislation requiring the recording of the appellant's statements in one language only, and none was brought to our attention, the appellant would seem to me to have a right to have his statements recorded in the French language. His situation, of course, differs from that of a person who uses a language other than English or French whose rights to translation derive solely from the requirements of due process.

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 1986 CanLII 65 (SCC)

[110] Suppose that a person is charged with a criminal offence drafted in either the French or the English language and that person does not understand the language of the charge. It goes without saying that this person cannot be asked to plead and be tried upon the charge in these circumstances. What will happen as a matter of practice as well as of law is that the judge will call upon a sworn interpreter to translate the charge into a language that the accused can understand. But this is so whether the accused speaks only German or Cantonese and has nothing to do with what s. 133 [of the *Constitution Act, 1867*] stands for. Provision is made for this different purpose by other enactments relating for instance to interpreters and under other principles of law some of which are now enshrined in the provisions of distinct constitutional or quasi-constitutional instruments, such as s. 2(g) of the *Canadian Bill of Rights* and s. 14 of the *Charter*, also relating to interpreters. See for instance: *Attorney General of Ontario v. Reale*, 1974 CanLII 23 (SCC), [1975] 2 S.C.R. 624; *Unterreiner v. The Queen* (1980), 51 C.C.C. (2d) 373 (Ont. Co. Ct.); *Sadjade v. The Queen*, 1983 CanLII 163 (SCC), [1983] 2 S.C.R. 361.

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

[60] The common law right of the parties to be heard and understood by a court and the right to understand what is going on in court is not a language right but an aspect of the right to a fair hearing. It is a broader and more universal right than language rights. It extends to everyone including those who speak or understand neither official language. It belongs to the category of rights which in the *Charter* are designated as legal rights and indeed it is protected at least in part by provisions such as those of ss. 7 and 14 of the *Charter*. […]

Thibeault J.R.N.J. (Captain), R. v., 2014 CM 3022 (CanLII)

[11] My understanding of the situation is through the *Official Languages Act*, which is a federal act and would apply to this tribunal, a court martial, because my understanding is that the court martial is a federal tribunal, a federal court in the sense that it's a court enacted by a federal act. So, provisions of the *Official Languages Act* would apply and, also as a matter of fact, the Constitution would find application to the court martial especially sections 19, 14, and 7 of the *Canadian Charter of Rights and Freedoms*.

[12] I closely reviewed various scenarios concerning this situation.

> (a) First, if I look at the context of a bilingual trial, the judge and the prosecutor would be able to proceed, as they are bilingual, and the witnesses would be able to testify in their own language, without the need of an interpreter. Defence counsel would be unilingual Anglophone, witnesses would testify in English, and if the accused does testify, he would do it in French.
>
> (b) Then, there is the question of requiring an interpreter, not for the accused testifying in French, but rather for allowing the defence counsel to understand the testimony of his own client. This context relies on the interpretation of section 14 of the *Charter*. Does section 14 apply in the situation where an interpreter be provided for defence counsel, in representing the accused? I rely primarily on the decision of *Cormier v. Fournier*, a decision rendered by Justice Godin on 23 May 1986 (1986 CanLII

92 (NB QB)), at page 20. “Section 14 has no application to lawyers.” Protection under section 14 is mainly for the accused and cannot be expanded to a lawyer representing the accused. So, if I order a bilingual trial in the circumstances, providing an interpreter for defence counsel, Mr Brown, as is my understanding, would not be possible.

(c) If we were to proceed with a French trial, as it was done for the first trial, the judge has the ability to speak and understand French, as does the prosecutor; defence counsel would not have the ability to understand nor speak French; witnesses would provide their evidence in English and an interpreter would be provided in accordance with section 14 of the *Charter*; the accused would be able to testify in his own language, which is French. There, again, the issue would be the requirement for an interpreter for defence counsel. The court would likely respond as in the context of a bilingual trial, that is, the right to an interpreter for counsel, an officer of the court, such as defence counsel of the accused, would not be allowed.

(d) So, I am turning now to the third possibility which is the actual one before me. My understanding is that, in the military justice system, when a charge is laid, the accused must indicate in which language he would like the trial to take place before any service tribunal. In this case, Captain Thibeault has indicated that his language of choice for his trial is English. An English trial would mean, therefore, in this case, that again the judge and both counsel have the ability to speak and understand English, as do the witnesses. The accused, however, would be in a different position. The question is, considering the context presented to me: can the accused be provided with an interpreter when he is presumed to understand and speak the language in which the proceedings are conducted? In this case, I must conclude that the accused is not presumed to understand nor speak English, the language of the trial.

[13] I am taking a practical approach to this issue. I am governed by, and my main concern is that, throughout this entire trial and all its proceedings, the benefit of a fair trial for the accused, including his ability to make a fair and full defence in these proceedings in accordance with his right entrenched in section 7 of the *Charter*. To understand the meaning of that right, I looked at *R. v. Tran*, 1994 CanLII 56 (SCC), [1994] 2 S.C.R. 951, a Supreme Court of Canada decision, which although different in facts (in *Tran*, the accused was unable to speak either French or English), provided inspiration to this court in finding a solution for this matter. The accused chose to have his trial in English for several reasons. First, the evidence, apart from the accused’s own testimony, is in English. Second, the accused chose to be represented by a unilingual (English) defence counsel, which raises the issue of choice of counsel. Those rights (the fairness of trial, choice of counsel) are established in section 7 of the Charter. To simplify understanding of this unique situation, the areas of concern may be distilled to the following: the accused speaks French, has limitations in understanding and speaking English. His choice of counsel, I infer, is based on the language in which the evidence would be adduced. Finally, the accused wishes to testify in French while being represented by English-speaking counsel.

[14] The rights under section 7 of the *Charter* and as interpreted in *Tran* play a role here. The right to an interpreter relates to the notion of fairness of trial and refers to the right of the accused to have an interpreter. In this matter, if I decide that, for this English trial, the accused has a right to an interpreter when he testifies, in these particular circumstances, I find he will not be afforded any more rights than others, because of it being, considering the very specific context of this case, a retrial based on the Court Martial Appeal Court’s concern about the accused’s ability to testify.

[15] Choosing to have the trial in English, having the evidence adduced in English, being represented by a counsel who speaks and understands English, in this context, makes sense to me. He has the right, if he so chooses, to express himself in French, but his testimony would be delivered through an interpreter, meaning that the court would obtain and consider the evidence, as provided by him, through an interpreter. The court can, at any point, question the quality of the interpretation; therefore, if I have any concern, I may, at some point, raise the issue.

[16] Having said that, I believe that getting duly qualified, experienced interpreters will erase any doubt on that point. To clarify, the evidence provided by the accused would be in French translated into English. The judge of the facts will then have to consider the evidence of the accused as translated into English.

My understanding is that the accused would be comfortable with that process, after having explored many possibilities with his counsel. I believe Mr Brown has been fully instructed by his client on this aspect, language of trial, and his client's willingness to proceed in this fashion, that is, the judge of facts will receive and consider his translated testimony.

[17] The trial would be conducted in English, the language chosen by the accused. It would give effect to the right of the accused to full and fair defence, including being represented by counsel of his choice. Also, it would address one concern I raised, the fact that in order to provide adequate testimony, if he chooses to testify, he would get a good understanding of what had been said by other witnesses.

[18] What I would like is to have an interpreter, not only for translating his own testimony, but also, as a matter of fairness, to have an interpreter sit beside him in order to, when necessary, provide him with interpretation of witnesses' testimony. I understand not many witnesses are involved in this matter, two witnesses, if I'm right, so it is not a lengthy trial in that respect. I think that, as a matter of fairness, having an interpreter sitting beside Captain Thibeault for the full duration of the trial would address my concerns with respect to his understanding of what occurs during the proceedings and, in addition, an interpreter would be provided for his testimony, if choose (sic) to testify.

[19] Choosing to address the language issue in this way, settles for me the matters of fairness of the trial, being represented by his counsel of choice, and his choice of language for the trial. In making this decision, I do not find he gets any more rights than others. This doesn't mean that in other circumstances I would arrive at the same conclusion.

[20] So, my decision concerning this application is not to grant the application for a bilingual trial. The proceedings of this trial will be conducted, as requested by Captain Thibeault, in English. An interpreter will be provided to the accused for the duration of these proceedings starting on the first day of the proceedings. An interpreter will sit beside Captain Thibeault throughout the proceedings, providing translation on request by Captain Thibeault. It won't be simultaneous interpretation because, as raised by defence counsel, the cost outweighs the need. Captain Thibeault is ensured of having a full understanding of what occurs during the proceedings, and, on his request, will obtain translation from the interpreter at any point in the proceedings. The flow of the proceedings may be a little different than is customary; he may ask me to stop in order to ask a question to an interpreter on what was said. It will be up to me to manage this properly, but he may ask me to stop, at any point, in order for him to gain full understanding of what has been said.

[21] As the interpreter is an officer of the court, I intend to proceed as usual and have the interpreter take an oath or solemnly affirm before commencing the proceedings. The qualification and experience of the interpreters will be authenticated, allowing for official interpretation, should Captain Thibeault decide to testify in this trial. I think this is the best way to achieve a fair trial in this matter and address concerns raised by Captain Thibeault with respect to language of trial. So, that is my decision. The Court Administration will address these operational requirements. We will start the trial on Monday with the first thing the court having to address being the application concerning the type of court martial. Once I provide my decision on that application, then unless there is any other application, the court will be adjourned to 15 February, regardless of the type of court martial decided. […]

Clohosy v. R., 2013 QCCA 1742 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[56] What can be learned from these principles [laid down in *Tran*, *Shyshkin*, *Dow* and *Roy Martin*]? The decisions cited above all agree that consecutive interpretation has more advantages than simultaneous interpretation. Moreover, it allows the accused or his or her counsel to react more quickly and to detect problems with the interpretation more easily, should any arise. Finally, for now at least, it is the only method allowing the translation to be recorded and transcribed.

[57] The purpose of s. 530.1(g) *Cr.C.* is to ensure that the parties have a complete recording of the proceedings, as well as their interpretation. *Dow* and *Martin*, in light of the prevailing conditions in Quebec's courthouses, state that consecutive interpretation has now become an indispensable method. While it is preferable to any other form of interpretation in all circumstances, consecutive interpretation is in any event unavoidable in all cases where the court is unable to guarantee the accused full compliance with s. 530.1(g) by any means other than this method.

[58] The record does not show that the judge truly considered the issue of the interpretation method's appropriateness and its consequences. In ordering simultaneous interpretation instead of consecutive interpretation, the judge had to make sure that the record would include the entire recording of the interpretation at all times, which was not done. This is an error that, as we shall see further on, irreparably infringed the appellant's language rights.

Dow v. R., 2009 QCCA 478 (CanLII)

[53] Subject to the issue of waiver, the absence of any interpretation at all would necessarily engage consideration of section 14 of the *Canadian Charter* and the judgment of the Supreme Court of Canada in *R. v. Tran*. In that case it was held, amongst other conclusions, that the failure to provide an accused with a complete translation of the proceedings in a judge-alone trial from English to Vietnamese violated his section 14 *Canadian Charter* rights, and a new trial was ordered.

[…]

[78] I would also add that it is generally recognized that the fulfillment of the language guarantee available to an accused is better served by consecutive rather than simultaneous interpretation, which is the only way to make it possible to have a transcript in both languages.[…]

[…]

[86] In Mr. Dow's case, there is simply no basis on the record before the Court to conclude that the elevated standard mentioned by Lamer, C.J. to constitute a valid waiver of his rights under section 530.1 *Cr. C.* and section 14 of the *Canadian Charter* was satisfied by his affirmative answers to the two inquiries from the trial judge I have mentioned in paragraphs [81] and [83]. Nor do they justify the absence of interpretation in the presence of the jury in the three situations I have described in paragraph [52] of these reasons.

[87] This is particularly the case since the Crown never suggested in its factum or during oral argument there was a valid reason for Mr. Dow to be asked to waive any of his rights. Whatever that reason may have been, it had nothing to do with any concern for Mr. Dow. One is left with the inevitable conclusion that the request to Mr. Dow was made for the personal convenience of the trial judge and counsel, which is as far removed as one can imagine from there being a valid reason. Quite simply, the trial judge should not have made any such request of Mr. Dow.

[88] Moreover, a trial judge in such circumstances exercises considerable influence over an accused such as Mr. Dow simply by the disparate nature of their relationship in light of the function the judge exercises and the precarious position of an accused whose liberty is at stake. It is therefore hardly surprising that someone such as Mr. Dow would have responded affirmatively to the trial judge's two requests.

[89] In any event, in this instance the trial judge and Crown counsel misapprehended the purpose for which an interpreter is present at the trial of an English-speaking accused. The only reason for an interpreter is because one or more French-speaking witnesses will testify. The proper role of the interpreter is thus limited to interpreting the questions of counsel from English to French for a French-speaking witnesses and the answers of such witnesses from French to English. The presence of an interpreter is for the benefit of French-speaking witnesses, the accused and the jury, but not for that of the trial judge and Crown counsel, who must conduct themselves as if there was no interpreter present in the

courtroom. This is the only conclusion to be drawn from the absence of reference to the trial judge and Crown counsel in sub-section 530.1(f) *Cr. C.*

[…]

[95] With respect to the conduct of defence counsel amounting to an acquiescence of what transpired, two comments are warranted.

[96] First, as I have already mentioned, such counsel candidly acknowledged being unaware of the extent of the language guarantees Mr. Dow enjoyed, particularly under section 530.1 *Cr. C.* That is shown by their speaking French knowing there was no consecutive interpretation taking place and thus that there was no possibility of a transcript of the interpretation in English. Hence, they could not have knowingly waived their client's rights by their conduct. I am also persuaded that had they known of such rights, they would have insisted on their respect, just as defence counsel did in *Potvin*.

[97] Second, given the intrinsically personal nature of language rights, it would require some indication that such counsel were acting as they did with the full knowledge and understanding by Mr. Dow of the consequences of that conduct. Such an indication is entirely lacking in the record before the Court.

IV CONCLUSION

[98] In light of the failure to fully respect Mr. Dow's rights under governing appellate case law interpreting section 530.1 *Cr. C.*, and section 14 of the *Canadian Charter*, the curative provisions of sub-section 686(1)(b) *Cr. C.* cannot be applied.

[99] Despite the inapplicability of sub-section 686(1)(b) *Cr. C.* can it nevertheless be said that Mr. Dow's rights were sufficiently respected to the point that the Court should not intervene? After all, the failure to comply with certain aspects of section 530.1 *Cr. C.* and section 14 of the *Canadian Charter* took place for the most part outside the presence of the jury. Mr. Dow was provided with simultaneous translations when voir dire testimony, legal argument and interlocutory judgments occurred in French in that context.

[100] In my opinion there is no justification for not intervening when the object of the language guarantees is considered. As the case law I have reviewed from this Court, the Ontario Court of Appeal and the Supreme Court of Canada makes clear, that object is substantive equality between those of the linguistic majority and those of the linguistic minority in each Canadian province and territory. Moreover, the failure to respect the rights flowing from the applicability of section 530 *Cr. C.* constitutes "a substantial wrong and not a procedural irregularity".

[101] In this instance, substantive equality means at the very least that an accused who is a member of one of Canada's linguistic minorities within a Canadian province or territory should have a trial judge and prosecutor assigned to his or her case who is not only able but also willing to speak the language of that accused throughout the trial, on the same basis as if the accused was a member of that province's or territory's linguistic majority. It also means that the trial judge in any Canadian province or territory should not seek to have such an accused waive his rights, or acquiesce to any purported waiver of his rights, for reasons of convenience to others involved in the trial.

[102] Mr. Dow's trial was not an example of the substantive equality required to an extent that was much more than merely trivial.

[103] In such circumstances, it would be wrong for the Court to close its eyes to what happened to Mr. Dow and simply express the hope that it doesn't happen again to some other accused. He was entitled to a trial that fully respected his language rights, and that is what he should now have.

R. v. Rybak, 2008 ONCA 354 (CanLII)

67] The guarantee in s. 14 serves several important purposes. It ensures that a person charged with a crime hears the case against him or her, and is furnished with a full opportunity to answer it. The right touches on the very integrity of the administration of justice in the country and is intimately related to our basic notions of justice, including the appearance of fairness. Likewise, the right displays an affinity for our claim of multiculturalism, partially demonstrated by s. 27 of the *Charter* (*R. v. Tran*, 1994 CanLII 56 (SCC), [1994] 2 S.C.R. 951, [1994] S.C.J. No. 16, 92 C.C.C. (3d) 218, at pp. 977-78 S.C.R., p. 240 C.C.C.).

The principle underlying the guarantee

[68] The interests protected by the right to interpreter assistance guaranteed by s. 14 are in service of the underlying principle of linguistic understanding (*Tran*, at pp. 977-78 S.C.R., p. 240 C.C.C.).

[69] Linguistic understanding, like physical and intellectual presence, is an aspect of the requirement in s. 650(1) of the *Criminal Code* that an accused, other than an organization, "shall be present in court during the whole of his or her trial", apart from certain exceptions in s. 650(2) none of which apply here (*R. v. Reale*, 1973 CanLII 55 (ON CA), [1973] 3 O.R. 905, [1973] O.J. No. 2111, 13 C.C.C. (2d) 345 (C.A.), at p. 914 O.R., p. 354 C.C.C., affd 1974 CanLII 23 (SCC), [1975] 2 S.C.R. 624, [1974] S.C.J. No. 118, 22 C.C.C. (2d) 571).

[70] The principle of linguistic understanding is reflected in the unqualified language of s. 14 of the *Charter*, and forms an integral part of the presence requirement of s. 650(1) of the *Criminal Code*. In these circumstances, it should scarcely surprise that the level of understanding protected by s. 14 is, of necessity, high (*Tran*, at pp. 977-78 S.C.R., p. 240 C.C.C.).

[71] The substance of the guarantee in s. 14 ensures that a party has the same basic opportunity to understand and be understood as if she or he were conversant in the language of the proceedings. That said, the principle of linguistic understanding is not to be elevated to the point where those with difficulty communicating in or understanding the language of proceedings are given, or are seen to be given, unfair advantage over those fluent in the language of proceedings. In the end, the purpose of the right to interpreter assistance is to create a level and fair field of play, not to provide some individuals with more rights than others (*Tran*, at pp. 978-79 S.C.R., p. 241 C.C.C.).

[…]

[81] The Tran court identified several criteria as inclusive, but not exclusive: continuity, precision, impartiality, competency, contemporaneity (*Tran*, at pp. 985-86 S.C.R., p. 246 C.C.C.).

[82] Continuity ensures that interpretation is continuous, without breaks or mere summaries of evidence or other aspects of the proceedings. Precision does not require perfection. Interpretation involves a lower standard than translation. Impartiality ensures that the interpretation provided is objective and unbiased (*Tran*, at pp. 985-988 S.C.R., pp. 246-48 C.C.C.).

[83] The criterion of competence insists upon an interpretation of sufficiently high quality to ensure that justice is and appears to be done. We lack universally acceptable standards for the assessment of competency, although we do require an interpreter to take an oath or make a solemn affirmation before beginning any interpretation of the proceedings. Competence inquiries are mandated where there are legitimate reasons to doubt an interpreter's competence (*Tran*, at pp. 987-90 S.C.R., pp. 248-49 C.C.C.).

[84] Competence and accreditation are not co-extensive. In the absence of universally acceptable standards for assessing interpreter competency, neither presence nor absence of accreditation can be considered dispositive of the issue of competence (*Tran*, at pp. 987-90 S.C.R., pp. 248-49 C.C.C. See also, *State v. Pham*, 879 P.2d 321, 75 Wn. App. 626 at 326 (1994), at p. 326 P.2d; *R. v. Ungvari*, [2003] E.W.J. No. 4217, [2003] E.W.C.A. Crim. 2346 (C.A. (Crim. Div.)), at para. 23; and *Martins v. Texas*, 2001 Tex. App. LEXIS 5096, 52 S.W.3d 459 (2001), at pp. 473-74 S.W.3d).

[85] Interpretation must occur contemporaneously with the proceedings being interpreted. The preferable method of achieving contemporaneity is to have consecutive, rather than simultaneous interpretation.

[86] It is not every deviation from the procedural standard of interpretation that offends s. 14. Some do. Others do not. A party who claims a s. 14 breach must demonstrate that the lapse in interpretation that occurred had to do with the proceedings themselves, and thus with the vital interests of the accused, not merely with collateral or extrinsic matters like scheduling or something similar (*Tran*, at pp. 990-91 S.C.R., p. 250 C.C.C.).

[…]

[94] It falls to the appellant to demonstrate, on a balance of probabilities, that the interpreter assistance provided here came up short of the constitutionally guaranteed benchmark.

[95] Despite express invitation from the trial judge to alert him to any difficulties encountered by the appellant with the interpreter, or with the interpretation, the trial record is eerily silent, utterly barren of any suggestion of incompetence or other interpretation deficiency. To the contrary, when the interpreter issue was first bruited during pre-trial motions, the appellant supported the assignment of Ms. Zywulko as the interpreter, and sought assurances from the trial judge that she would remain throughout the trial. His request was honoured.

[96] The imposition of an onus on a party who advances constitutional infringement as the foundation for particular relief, here a new trial, carries with it the obligation to discharge the onus by some form of proof. Proof of infringement is a condition precedent to entitlement to a remedy. Said another way, the remedy is not for the asking, only upon the showing.

[97] The appellant's proof consists of fresh evidence culled from another and later proceeding. It shows that the interpreter supplied here was not accredited by the Ministry of the Attorney General (she failed the accreditation test twice and withdrew a third time). She was put forward by the interpreter coordinator, whether knowingly or unwittingly, as accredited. She had served as an interpreter in the courts in Peel Region for a decade. According to one accredited interpreter, Ms. Zywulko was one of the best interpreters available, accredited or not.

[98] What is lacking in the appellant's fresh evidence materials, is a nexus between the systemic and accreditation flaws identified in the materials filed, and the interpreter assistance provided in this case: no affidavit or other evidence from the appellant, none from trial counsel and deafening silence in the trial record. Something supportive of this claim of constitutional infringement is necessary, but lacking (*Pham*, at paras. 5-6; and *Mohammadi c. R.*, [2006] Q.J. No. 6809, 2006 QCCA, at para. 36).

[99] The appellant urges a bright line rule that essentially proceeds from any showing of a need for interpreter assistance to provision of continuous, precise, impartial, competent and contemporaneous interpretation as the only means of ensuring that the language deficient have the same opportunity as those conversant in the language of trial. Such a rule would render the procedure followed here per se constitutionally flawed.

[100] In my respectful view, the teachings of *Tran* are that the interpretation provided must be sufficient to ensure that the language deficient have the same opportunity as the language proficient to understand and be understood in the proceedings. Some require more than others, as in *Tran*, to reach the required level of understanding. *Tran* recognizes allowable departures from its general, though not unremitting rule (*Tran*, at pp. 990-91 S.C.R., p. 250 C.C.C.). This appellant had difficulty with certain words. He was offered and accepted a method of interpretation that serviced his language deficiency. He made no complaint about any inadequacies at trial and has introduced no evidence on appeal indicative of any deficits.

[15] As I have already stated, the issue is not whether Mr. Koaha needed the assistance of an interpreter. The transcript of the hearing shows that early on in his evidence, he said he needed his lawyer's questions translated. From that point on, the court interpreter began assisting Mr. Koaha. The questions, asked in English by Mr. Koaha's lawyer, were translated into Inuinnaqtun by the interpreter. Mr. Koaha's answers in Inuinnaqtun were translated into English.

[16] Mr. Koaha argues that the transcript of the sentencing hearing and the transcript of his cross-examination on his Affidavit show that the interpretation in this case was deficient and did not meet the standards mandated by the *Charter*. […]

[26] Mr. Koaha's failure to say anything about his difficulties with the interpretation is not determinative, but it is a factor to be considered in assessing his claim that his rights were breached, especially since there continues to be no explanation for why he said nothing at the time.

[27] In *R. v. Tran*, *supra*, at para 50, the Supreme Court commented on this issue, albeit in the slightly different context. In its discussion about how courts should approach the assessment of the needs branch of the s. 14 analysis, the Court said:

> While courts must be alert to signs which suggest that an accused may have language difficulties, they are not nor can they be expected to be mind readers. Where there are no outward indications which point to a lack of understanding on the accused's part and where the right has not been invoked by the accused or by counsel (in the case of represented accused), these may be factors which are weighed against the accused if, after sitting quietly throughout the trial, the issue of interpretation is suddenly raised for the first time on appeal.

[28] In my view, these comments are also relevant to the assessment of a person's claim that the interpretation services provided to them were inadequate. If the issue is not raised at the time of the proceedings, that is a factor that may weigh against making a finding that there was in fact a breach.

[29] It is true that Mr. Koaha was not in a position to know, at the time of the proceedings, whether his answers were being translated properly into English. But he certainly was in a position to know whether he understood the questions as translated for him by the interpreter, in the same way as he was able to speak up when he could not understand the questions put to him in English.

[30] I acknowledge that because the proceedings were not audio-recorded, an independent review of the interpreter's work during this sentencing hearing cannot be conducted. It is not possible for Mr. Koaha to hear back his answers in Inuinnaqtun, and verify through another interpreter whether those answers were adequately translated into English. It is also not possible for him to verify that the questions asked in English by his lawyer were correctly translated into Inuinnaqtun.

[31] There is little doubt that it would be a preferable practice to record these types of proceedings as a matter of course. There may be logistical reasons why this is not always possible, but any time an issue related to interpretation is raised on appeal, having a full record of the proceedings and of the interpretation would, obviously, be very helpful. If, on the face of the record, there appeared to be deficiencies with the interpretation, the absence of a more complete record of the proceedings may leave the reviewing Court with no alternative but to find that there was a breach of section 14 of the *Charter*. However, in the circumstances of this case, I am not satisfied that the record of the proceedings raises the type of concern that make (sic) the absence of an audio recording fatal.

[32] Finally, I turn to Mr. Koaha's argument that his section 14 rights were breached because the interpreter who assisted him was not sworn. Mr. Koaha argues that this fact alone is dispositive of this appeal. His arguments rests on Paragraph 62 of *R. v. Tran*, *supra*:

> To meet the standard of protection guaranteed by section 14 of the *Charter*, interpretation must be of a high enough quality to ensure that justice is done and seen to be done. This means, at a minimum, that an accused has the right to competent interpretation. While there are, as of yet, no universally acceptable standards for assessing competency, a point stressed by Steele at p.238, an interpreter must at least be sworn by taking the interpreter's oath before beginning to interpret the proceedings. Where there is a legitimate reason to doubt the competency of a particular interpreter, a court will be well advised to conduct an inquiry into the interpreter's qualifications. (Citations omitted)

[33] This passage suggests that having the interpreter sworn is a prerequisite to a finding that the services offered met the standard of protection guaranteed by section 14. However, I am not persuaded that this general statement should be interpreted as creating an absolute requirement for the interpreter to be sworn, in all cases, and irrespective of context.

[34] Interpreters are used on a regular basis during circuits of the Nunavut Court of Justice. They provide simultaneous translation for members of the public who attend Court. They also provide, as the need arises, interpretation services for accused persons or witnesses who require assistance. It is the norm, not the exception, to have them provide interpretation services during Court sittings. These interpreters are not strangers to the Court. On the contrary, they are fully integrated in its daily workings.

[35] This reality is readily apparent from the record in this case: when Mr. Koaha said he needed an interpreter, there was no need for an adjournment to arrange for the interpreter to attend or even for the interpreter to set up the interpretation equipment. The interpreter immediately began assisting Mr. Koaha and the proceedings continued seamlessly, virtually without any interruption. This speaks volumes about the level to which the interpreters' work is integrated in the daily operations of the Nunavut Court of Justice.

[36] That is not to say that the quality of the interpreters' work in Nunavut cannot be challenged, or that the standards by which the quality of interpretation is assessed should be any lower here than in any other jurisdiction. People in Nunavut are entitled to the same constitutionally guaranteed standard of quality of interpretation as anyone else in Canada. But the differences in context are relevant in assessing whether the failure to swear in the interpreter, alone, can serve as a basis for a finding that a breach of section 14 rights has been established.

[37] That said, as a matter of practice, given the strong language used in *R. v. Tran* about the importance of interpreters being sworn, it would be advisable for such a practice to be implemented for all proceedings where interpreters are used, especially if their services are used to assist witnesses, accused persons, or parties in non criminal proceedings.

[38] In conclusion, in the circumstances of this case, I find that Mr. Koaha has not established that the interpretation fell short of the standards guaranteed by section 14 of the *Charter*. As soon as he requested the assistance of an interpreter, that assistance was provided to him. He did not raise any issue about his ability to understand questions, or the proceedings generally, from that point on. The record of the proceedings shows that he answered a number of questions thoughtfully and coherently. The assertions in his Affidavit that "he thought he understood some of the questions" and tried to answer them, that "it seems now that he may have been guessing at some of the answers" and that "he may have not understood some of the questions", are simply not sufficient, in the face of the record of the proceedings, to establish a breach of his section 14 rights on a balance of probabilities.

R. v. Potvin, 2004 CanLII 22752 (ON CA)

[32] If it were enough for the judge and prosecutor to understand French, without it being necessary for them to use it during the proceeding, there would be little difference between, on the one hand, the right to a unilingual trial in the official language of one's choice, and on the other, the right to the assistance of an interpreter already provided for in s. 14 of the *Canadian Charter of Rights and Freedoms*. The right to the assistance of an interpreter ensures that the accused will be able to understand his or her trial and make himself or herself understood, and that the trial will thus be fair: see *R. v. Beaulac*, at para. 41.

However, as noted by the Supreme Court in *Beaulac*, at paras. 25 and 41, "language rights are . . . distinct from the principles of fundamental justice. . . . Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English."

[33] The more limiting interpretation suggested by the respondent might indeed ensure that the accused was understood by the prosecutor, the judge and the jury in his or her original language, without the intermediary of translation; however, in the context of linguistic equality, it seems to the court just as important for the accused to be able to understand what the judge and prosecutor say in the original language used by them during the hearing. There is no question that the requirement for the judge and Crown prosecutor not only to understand French but to use it may give rise to inconvenience in certain situations, but that fact is not relevant.[…]

Mohammadian v. Canada (Minister of Citizenship and Immigration), [2001] 4 F.C.R. 85, 2001 FCA 191 (CanLII)

[5] The major issue raised on this appeal boils down to whether the test for waiver of the section 14 right to the assistance of an interpreter [before the Refugee Division] is that which was articulated in *R. v. Tran*, supra, or some other test. […]

[17] While these views were made in a criminal law context, I can see no reason why they should not be applied in the present case. It is well to remember that the Refugee Division is but a part of the largest administrative tribunal in Canada. Since its creation in 1989, the Refugee Division has seen its case load increase exponentially to the point where in 1999-2000 alone it was facing a fresh case load addition of some 31,000 refugee claims, a phenomenon apparently not limited to Canada. If the appellant's belated complaint about the quality of the interpretation is accepted, the important work of the Refugee Division in hearing and disposing of Convention refugee claims in a timely fashion would become rather more difficult. The Refugee Division is called upon yearly to dispose of an increasing volume of Convention refugee claims, a high percentage of which are of individuals whose native language is neither of Canada's official languages. It must surely be in the interests of the individual and of the public that refugee claims be processed as soon as is practicable. Neither the individual nor the public interest is served when the refugee determination process is unnecessarily delayed, provided acceptable safeguards are adhered to in order to prevent a breach of the section 14 right.

[18] As Pelletier J. observed, if the appellant's argument is correct a claimant experiencing difficulty with the quality of the interpretation at a hearing could do nothing throughout the entire hearing and yet be able to successfully attack the determination at some later date. Indeed, where a claimant choses to do nothing despite his or her concern with the quality of the interpretation, the Refugee Division would itself have no way of knowing that the interpretation was in any respect deficient. The claimant is always in the best position to know whether the interpretation is accurate and to make any concern with respect to accuracy known to the Refugee Division during the course of the hearing, unless there are exceptional circumstances for not doing so.

[19] As I have indicated, in light of his experience at the very first sitting of the Refugee Division the appellant appears to have been well aware of his right to the assistance of a qualified interpreter. When his conduct during the whole of the third sitting and for some time afterward is weighed with his undoubted knowledge of his right, it is difficult to construe that conduct as other than a clear indication that the quality of interpretation was satisfactory to him during the hearing itself. In my view, therefore, Pelletier J. did not err in determining that the appellant had waived his right under section 14 of the *Charter* by failing to object to the quality of the interpretation at the first opportunity during the hearing into his claim for refugee status.

R. v. Johal, 2001 BCCA 436 (CanLII)

[15] As with any breach of a *Charter* right, the onus is on the accused under s. 14 to establish, on a balance of probabilities, that his or her rights have been breached. In the case of s. 14, the first

requirement which the accused must satisfy is that he or she was in need of interpretive assistance. It is this requirement which is at issue in this appeal.

[…]

[18] The court in *Tran* concluded that the question must always be "whether there is a possibility that the accused may not have understood a part of the proceedings by virtue of his or her difficulty with the language being used in court." (p. 250.) Further, the right to interpreter assistance should not be denied unless "there is 'cogent and compelling' evidence that an accused's request for an interpreter is not made in good faith, but rather from an oblique motive." (p. 245.) In this case, there is no suggestion that Mr. Johal's request was not made in good faith.

[19] Finally, in determining whether an accused's *Charter* rights under s. 14 have been breached, the court should not speculate as to whether the lack of, or lapse in, interpretation in a specific instance made any difference to the outcome of the case. In other words, it is not necessary for the accused to establish prejudice in order to establish a breach of his or her s. 14 rights. […]

[20] Bearing in mind the legal principles to which I have referred, I now turn to the circumstances giving rise to Mr. Johal's claim that his rights under s. 14 were breached during the course of the trial. In that regard, it is important to emphasize that the Crown is not alleging that Mr. Johal waived his right to an interpreter. Rather, the real issue on this appeal is whether Mr. Johal met the "need" requirement.

[…]

[28] I do not find it necessary or useful to review the numerous transcript references referred to by Mr. Johal's counsel. Suffice it to say that a reading of Mr. Johal's evidence as a whole indicates that he had some difficulty both in understanding the questions asked of him and in communicating his answers. While some of these difficulties may have stemmed from the manner in which the questions were framed, I do not find it useful to speculate in that regard. That is because the critical question is not whether the court, or counsel, could understand Mr. Johal, but whether Mr. Johal could both understand, and effectively respond to, the questions put to him during the course of his testimony.

[29] As earlier noted, the trial judge was alerted at the outset of the trial to the possibility that Mr. Johal might require interpreter assistance. In the passage quoted at para. 23 of these reasons, Mr. Johal clearly indicated that he needed the assistance of an interpreter, both to understand the questions asked of him and to ensure that he was able to accurately communicate his responses. There is no suggestion, or finding, that his request for assistance was motivated by any ulterior purpose, for example, to stall for time, or to enable him to fabricate a response.

[30] In my view, it is apparent from the concluding portion of the extract quoted at para. 25 of these reasons, that Mr. Johal's counsel dissuaded Mr. Johal from pursuing his request for assistance, apparently because counsel thought that Mr. Johal had done well without an interpreter to that point in the proceeding. With respect, once Mr. Johal offered a reasonable explanation for his request for an interpreter, and absent any suggestion of ulterior purpose, Mr. Johal's determination that he needed the assistance of an interpreter should have governed. It was for Mr. Johal to determine the nature and extent of his need for assistance, not for his counsel to do so. Although both counsel and the court indicated to Mr. Johal that he could pursue his request for assistance if he needed an interpreter in the future, I am satisfied that the clear signal to him was that both counsel and the court preferred that he proceed without interpreter assistance.

[31] In the result, I am satisfied that Mr. Johal clearly demonstrated and communicated his need for interpreter assistance and that he was effectively denied the assistance he sought, contrary to s. 14 of the *Charter*. I would, therefore, allow the appeal and order a new trial.

Cross v. Teasdale, 1998 CanLII 13063 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[37] I agree with the position of the Attorney General of Canada that s. 530.1 [of the *Criminal Code*] imposes, in a case such as the one before us, an obligation on the Attorney General of Quebec to choose a prosecutor who is capable of and amenable to conducting the proceedings in the official language of the accused. However, I do not agree with the appellants' proposition that the right to a fair trial requires it. Section 14 of the *Charter*, which guarantees the right to the assistance of an interpreter where a party cannot follow the proceedings because he or she does not understand or speak the language used, provides for this, as Beetz J. wrote in *Macdonald*, on behalf of the majority of the Court, at pp. 499 and 500.

R. v. Simard, [1995] O.J. No. 3989, 27 O.R. (3d) 116 (ON CA) [hyperlink not available]

[38] I believe that in the present case, the information complied with the requirements of ss. 530, 530.1 and s. 841(3) of the *Criminal Code* which constitute a legislative advancement towards equality of status or use of the official languages. I have already mentioned that the language provisions of the *Charter*, especially s. 15 and ss. 16 to 22, are not applicable here. However, the language component of the legal guarantees entrenched in ss. 7 and 14 and s. 11(a) of the *Charter* constitute one aspect to the right to a fair trial. In the present case, have the language dimensions of these guarantees been respected by the oral interpretation of the information? There is nothing in the record which indicates that the appellant or his counsel had requested a written translation of the information, which undoubtedly would have been supplied by the prosecutor.

[45] Nothing less would suffice to ensure that the information which triggers the trial is understood. Before the advancement of the official languages to a status of equality, s. 14 was deemed to be adequate to guarantee a fair trial to an accused. The constitutional protection of s. 14 is now reinforced with respect to the translation of an information in the official language of the trial. The inconvenience and expense are minimal, since in any case, this document must be interpreted orally at the time of the arraignment. This conclusion is not incompatible or at variance with *Rodrigue* and *Breton*, *supra*, decisions which were not concerned with an originating process and where the written translation with respect to pre-trial disclosure of documentary evidence would have created a heavy burden.

R. v. Butcher, 1990 CanLII 2909 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[12] If the appellant has any reason to complain, it is on s. 14 of the *Canadian Charter of Rights and Freedoms* that he should rely. The provision it contains, which stems from the right to a "fair trial" (s. 11(d) of the *Charter*), reads as follows:

> 14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

[13] "To have the right" means being able to demand "to be entitled to receive". In my opinion, this phrase cannot be given any meaning other than the one that logically follows from how Parliament chose to put its thoughts into words. In my view, if Parliament had wanted to give these words a broader scope and make the presence of an interpreter an absolute requirement in all circumstances where a party to a trial does not understand the language used, it would have used much more imperative language, such as "must be assisted by an interpreter".

[14] Where a piece of legislation grants a right, it confers upon its beneficiary the option to exercise it, or not, as he or she sees fit. The beneficiary may even be presumed to have waived this right through his or her conduct or attitude.

[15] Given that the rule in s. 14 of the *Charter* is intimately linked to the concept of a fair trial and that the presiding judge must take the steps required to ensure a trial's fairness, I am of the opinion that, in a situation where it is clear or eminently likely that the party involved does not understand the language used, the judge has a duty to either order *proprio motu* that an interpreter assist the party in understanding what is being said or at least draw the party's attention to his or her right to demand an interpreter.

[…]

[17] I therefore conclude that, from this point forward, apart from this specific situation where it appears that the accused clearly does not understand the language used, it is up to the accused to take the initiative to alert the Court to this fact and demand assistance. If the accused does not do so, he or she must be considered to have elected not to exercise this right or, where appropriate, to have waived this right.

[…]

[22] In the case before us, the evidence discloses the following:

— although all the conversations between him and his counsel were in English, the appellant never told him, in any circumstances, that he did not understand French, nor did he instruct him to speak only in English during the trial;

— at no time did he reveal to the judge his total ignorance of the language;

— on successive occasions where French was used, he never spoke up to raise any protest whatsoever or to request that what was being said be translated for him;

— it was counsel for the appellant who started speaking French at the trial. In the absence of any objection from him, the judge had every reason to assume that his client understood what he was saying;

— the appellant cannot claim that this use of a language that is foreign to him caused him prejudice on this occasion, since the objection made by his counsel was allowed by the judge and he was allowed to explain an event prior to the one that was the subject of the charge;

— immediately after the judgment and sentence were delivered, the appellant did not in any way raise the argument that he relies on today, as his counsel attests (examination on affidavit, A.F., p. 74): […]

[25] Before concluding, I will make the following brief comment. In Quebec, where this trial was heard, and particularly in such a cosmopolitan city as its biggest urban centre, Montréal, at a time when it is a matter of judicial notice that bilingualism is becoming more widespread, a judge cannot be required to rely solely on how a family name sounds and rule that the person bearing that name understands only one language. Just because someone is named Johnson or Ryan does not mean that he or she is necessarily a unilingual Anglophone (contemporary history dictates the contrary), just as the name "Butcher" could also be a corruption of "Boucher". Section 14 of the *Charter* should not be conceived as applying *in abstracto*, without regard for the prevailing reality in the community where it must be used.

[26] In the circumstances of the case before us, I therefore find that, through his attitude and his actions, the appellant demonstrated at least that he did not intend to exercise the right to which he was entitled and that he cannot now, after the fact, rely on his abstention to obtain the remedy he seeks. I would therefore dismiss his appeal.

Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings, 1987 CanLII 204 (SK CA)

[37] In the interests of clarity, it might also be noted that it is incumbent upon the government, not by reason of s. 110 [of the *Northwest Territories Act*], but by virtue of the accused's right to a fair hearing, to ensure that he understands what is going on in court and is understood by all those whose understanding of him is essential to a fair hearing. This may be accomplished by such means of translation from French to English, and if need be from English to French, as are accurate and effective. It should not be thought, however, that the right to a fair hearing enjoyed by an accused, who, pursuant to s. 110, opts to use French, is any more extensive than is the right of an accused whose language, let us say, is Ukrainian; the scope of the right to a fair hearing, and the duty it imposes upon the state are the same for all accused, whatever their language.

Roy v. Hackett (Ont. C.A.), 1987 CanLII 4212 (ON CA)

[34] In my view, the opposing party has the right to challenge the basis for a request for the assistance of an interpreter by means of cross-examination. I am, however, of the opinion that such a cross-examination should take place at the time of the objection. At that time, in the context of a voir dire, the party who raised the objection can call witnesses to testify as to the linguistic competence of the subject without violating the rule of evidence which prohibits contradiction of answers by the person being cross-examined on collateral issues. The advantage of the voir dire is that it takes place outside the main proceedings. If the judge decides to allow a witness -- or the party who requests it -- the assistance of an interpreter, the decision is final, at least at trial, and a party who objected cannot then raise the issue of competence in order to attack the credibility of the party who made the request in the first place: see *R. v. Burke* (1858), 8 Cox C.C. 44 (C.C.A.) at p. 55.

[35] In the case before us, where all the proceedings, including the testimony of the respondent, were conducted in French with the exception of the anglophone witness, it cannot be argued that the request for the assistance of an interpreter was made so that the witness would have the advantage of thinking about his answers while the interpreter was translating -- unnecessarily -- the question, or with the intention of ruining the cross-examination or making it more difficult.

[36] In general, the judge or the chairman of the tribunal must come to a decision regarding the good faith of the witness or the person who has requested an interpreter before granting the request. In coming to his decision, however, he must take into account the legitimate desire of any witness to express himself in the language he knows best, usually his mother tongue. Therefore, he must avoid imputing an ulterior motive to a witness who asks for an interpreter, even if the witness has some familiarity with the language used and could, in a general way, understand the proceedings. The judge must certainly give s. 14 a broad and generous interpretation. That does not mean that the right to an interpreter is an absolute right and that cross-examination as to the linguistic competence of the person who requested such assistance is automatically oppressive and vexatious to the point of making the exercise of that right illusory.

[37] In this case, before the arbitration board, the right to an interpreter was recognized and granted without objection by the opposing party and without prior examination by the board. There was no refusal as in *R. v. Sadjade* (1983), 1 D.L.R. (4th) 384n, 7 C.C.C. (3d) 95n, [1983] 2 S.C.R. 361n (S.C.C.), and *R. v. Reale*, *supra*. The question of competence should have been raised at the point when an interpreter was requested. The cross-examination could not, at that stage in the proceedings, have been deemed oppressive and vexatious: the questions asked subsequently dealt with the experience of Yvon Roy who apparently worked in Winnipeg for 14 months as an operator responsible for anglophone employees and on his ability to write technical and administrative documents in the English language. But, in fact, the cross-examination did not take place until a few months later. Mr. Richard for the respondent claims that the subsequent cross-examination represents an indirect restriction of the right guaranteed by the Charter and makes it illusory. The consequence of that would be, in his view, to "freeze" or to "paralyze" the exercise of the guaranteed right ("chilling effect").

R. v. Thim, 2015 BCSC 1677 (CanLII)

[10] Other *Charter* rights are relevant to defining and applying s. 14, including: s. 7 (life, liberty, and security of the person), s. 15 (equality), and s. 27 (multicultural heritage) (p. 967). With respect to s. 27, preserving and enhancing Canada's multicultural society depends on linguistic minorities having real and

substantive access to justice (pp. 966-967). Section 14 must be interpreted purposively and applied in a principled manner to give effect to this constitutional guarantee (p. 977).

[11] Establishing a violation of s. 14 requires proof of three elements (pp. 979-980): (a) an accused required interpreter assistance; (b) the interpretation provided to the accused fell below the constitutionally-protected standard; and (c) the alleged lapse in interpretation occurred in the course of the proceedings when a vital interest of the accused was involved. The onus of proof is on the party asserting the violation. The standard of proof is a balance of probabilities. If the first three elements are satisfied, the onus then shifts to the Crown to prove, on a balance of probabilities, that there was a valid and effective waiver of the right (p. 980).

[12] With respect to the first element, establishing need will not normally be an onerous step (p. 979). Judges have an independent responsibility to ensure that those who are not conversant in the language being used in court understand the proceedings (p. 979). The right to interpreter assistance is not automatic or absolute but, given the elevation of the right to the level of a constitutional norm, courts should be generous and open-minded when assessing an accused's need, and approach the question with a spirit of sensitivity and understanding (pp. 980 and 983).

[13] With respect to the second element, assuming the case is not a complete denial of an interpreter, the constitutionally-guaranteed standard of interpretation is one of continuity, precision, impartiality, competency, and contemporaneity. The standard is high, but not one of perfection (p. 979). These criteria are aimed at helping ensure that persons needing interpreter assistance have the same opportunity to understand and be understood as if they were conversant in the language of the court (p. 985).

[14] With respect to the third element, s. 14 extends to every essential aspect of the proceedings (p. 992). The right to interpreter assistance applies at any part of the proceedings that bears on the procedural or substantive rights of the parties (p. 994). However, s. 14 will not extend to purely administrative or logistical aspects which could have no prejudicial effect on the proceedings (p. 993).

[15] Interpreters must be sworn by taking the interpreter's oath before beginning to interpret the proceedings, a safeguard meant to help ensure competence: *Tran*, p. 988; *R. v. Nguyen*, 2005 BCCA 221 (CanLII) at para. 18; *R. v. Titchener*, 2013 BCCA 64 (CanLII) at para. 25. And, where there is a legitimate reason to doubt the competency of an interpreter, the court ought to conduct an inquiry into the interpreter's qualifications (*Tran*, p. 988).

[…]

[19] In summary, the right of an accused to the assistance of an interpreter is a deeply and firmly embedded fundamental right. It is required for a fair trial. It protects the dignity of the accused and the legitimacy of the criminal justice system. It plays an important role in preserving and enhancing Canada's claim to be a multicultural society. The interpretation provided to the accused need not be perfect, but it must be of high quality.

[…]

[62] I find that there is an ongoing denial of the accused's s. 14 *Charter* right, as contrasted with events that lie entirely in the past. When the Crown's application for an adjournment was refused, the trial was to go on. There was no interpreter present. The accused could not be arraigned. This constitutes an ongoing s. 14 infringement. Moreover, with the history of this case in mind, if the case was further adjourned, I think it more likely than not that there would be further infringements of the accused's s. 14 right.

[63] I also find it probable that the infringements are systemic. The accused submits, and the Crown concedes, that the series of failures in this case are likely a function of a systemic shortcoming. I cannot and need not put a finer point on this finding. I do not have a body of evidence that allows me to determine the precise cause of the repeated failures to provide proper interpreter services to this accused

— for example, whether it is a question of budget insufficiency, a policy shortcoming, personnel acquisition or training issues, or a combination thereof. I need not say more. It is sufficient for the purposes of deciding this application that the Court is able to conclude that the s. 14 infringements are ongoing and systemic.

[64] The important purposes served by the s. 14 right were enumerated in *Tran* at page 977:

> 1. First and foremost, the right ensures that accused hears the case against him and is given a full opportunity to answer it.
>
> 2. The right is intimately connected to our basic notions of justice, including the appearance of fairness, and thereby touches on the very integrity of the administration of justice.
>
> 3. The right is intimately related to our society's claim to be multicultural, expressed in part through s. 27 of the *Charter*.

[65] It is readily apparent to any observer that the administration of this case has been anything but orderly. But there is another message that most observers must be receiving loudly and clearly: the courts have not taken seriously the constitutional requirement to provide the accused with the assistance of an interpreter. It is surely important for this Court at this time to dissociate itself in an effective way from this pernicious perception. (In so stating my opinion, I acknowledge that the relatively rare person that is conversant with the division of powers in the *Constitution Act, 1867*, might receive the more nuanced message that representatives of the Attorney General of British Columbia — as contrasted with the presiding judges — have not taken this constitutional requirement seriously.)

R. v. Odones, 2012 QCCS 7080 (CanLII)

[45] The Court holds that *R. v. Tran*, *supra*, does not extend the ordinary meaning of the term "proceedings" to police interrogations. The criteria outlined in Tran to ensure compliance with section 14 of the *Charter* are restricted to trials or judicial proceedings.

[46] Police interrogations have no judicial component; the interrogation of the accused Odones is no exception.

[47] Accepting the accused's argument that a police interrogation of a suspect is a "proceeding", thereby triggering the application of section 14, would have far-reaching consequences beyond an interview room at a police station.

[48] Imagine the situation where the police, on the street, speak to a suspect or to an individual who later becomes a suspect; or a situation where the police arrest a suspect and have a conversation in the police vehicle. Would this interaction constitute a "proceeding" pursuant to section 14? Should any discussion be put on hold particularly in exigent circumstances? Should the *Tran* criteria apply if an interpreter attended?

[49] The Court is of the view that the administration of justice would be better served if - in these situations where language issues arise and an interpreter is called - the interpreter assists and translates, when required or requested. The confidence of the public in the administration of criminal justice would be maintained if the weight of any statements by an accused in such situations were to be assessed by the trier of fact.

[50] The protection of the public is better maintained without strapping cumbersome procedures designed for courtrooms onto discussions taking place on the front line, on the street, in circumstances where an individual’s rights are already protected by a multitude of constitutional guarantees.

[51] A review of the jurisprudence referred to and a plain reading of section 14 makes it clear that this section applies to proceedings with a judicial component. In that context, the right to an interpreter in any

"proceedings" and the *Tran* rules, exist to ensure that the accused understands what is going on in court and to be understood in court; see *MacDonald v. City of Montreal*, 1986 CanLII 65 (SCC), [1986] 1 S.C.R. 460, pp. 499-500.

[…]

[53] The Court is of the opinion that an interview between a suspect and a police detective, whether on the street, in a police vehicle or at a police station, is not a "proceeding" and does not fall within the purview of section 14.

R. v. Dutt, 2011 ONSC 3329 (CanLII)

[52] It is well known that court interpretation between source and target languages is seldom, if ever, perfect. That is for many reasons including the inherent difficulties of language transference and the ever present prospect of natural human error in understanding and concentration. Accordingly, a non-speaker of one of Canada's official languages is generally at some disadvantage respecting linguistic understanding, more or less, when participating in a legal proceeding, even with competent interpretation as required by s. 14 of the *Canadian Charter of Rights and Freedoms*.

[53] It is therefore fundamentally crucial in seeking to avoid risking a miscarriage of justice that the courts not compound any existing disadvantage by working with a process other than fully qualified court interpreters who are competent, rested and have no distractions while working.

[54] Our courts understand that the s.14 *Charter* right guaranteeing competent interpretation to a defendant in criminal proceedings does not in and of itself demand the use of a certified or accredited interpreter: *R. v. Rybak* (2008), 2008 ONCA 354 (CanLII), 233 C.C.C. (3d) 58 (Ont. C.A.), at para. 84 (leave to appeal refused, [2008] S.C.C.A. No. 311 (QL)); R. v. R.(A.L.) (1999), 1999 CanLII 5081 (MB CA), 141 C.C.C. (3d) 151 (Man. C.A.), at p. 156 (rev'd on a different basis, [2001] 11 W.W.R. 413 (S.C.C.)). Accordingly, the words 'qualified' or 'competent' are not necessarily co-extensive with the terminology 'certified' or 'accredited'. That said, because the courtroom is not a linguistics laboratory and a unilingual trial judge is not qualified to administer language or interpretation skills tests, and without simply ceding to an interpreter's self-promoted claim of competence there necessarily is a dependency upon some objectively balanced standard of competence. Understandably, the default position of the court is often, therefore, significant though not exclusive reliance on what it hopes is a reputable external accreditation of an interpreter.

[55] As a general rule, a trial court will conduct a qualification voir dire relating to the expertise of any court interpreter presented by the Ministry of the Attorney General even where that person is represented to be certified or accredited. The Ministry's Criminal Law Division, in its quasi-judicial role prosecuting criminal cases, recognizes the importance of this procedural step – the Division's April 23, 2010 Practice Memorandum No. 1, "Competency and Accreditation of Court Interpreters", states in part:

> ...in all proceedings where an interpreter is required, Crown counsel should raise with the presiding judicial officer whether that judicial officer deems it necessary for the court to conduct an inquiry to determine if an interpreter is competent to interpret for the proceeding at bar, regardless of whether or not the interpreter has been accredited.

[56] The court looks to the nature of the accreditation and in particular whether it is founded upon objectively valid testing of language and interpreting skills. As well, the court considers the experience of the interpreter having regard to such factors as the mode(s) of interpretation required, the expected duration of the proceeding, the technical nature of the subject matter, any issues of language dialect and, in some cases, the certification test results of the interpreter. On the latter point, and by way of example, a court may exercise its discretion to proceed by way of consecutive interpretation where, on the VCC [Vancouver Community College] testing, the fully accredited interpreter scored only 71% on the simultaneous interpreting mode of the VCC test.

[57] In addition, beyond the issue of the Ministry label of 'fully accredited' interpreter, potentially involving an individual who may have failed to secure anywhere up to 30% of the available scoring on each of the three modes of interpreting, the evidence in this voir dire reveals that there are other matters a court needs to consider.

[…]

[114] Failure to provide two fully qualified Hindi/English speaking court interpreters, an interpreter late for court, hallway negotiations about an interpreter's compensation, and the court and the parties provided incomplete information on aspects of the inquiries into interpreter competency, have all impacted upon timely completion of this trial. We can surely do much better 29 years after the s.14 *Charter* right came into existence and 17 years after the *Tran* case was decided.

[115] While the complexity and challenges for government in complying with s. 14 of the *Charter* should not be underestimated, it is evident that the Province's transition to a world-class court interpreting system will be lengthy in duration and fraught with debate as to the objective validity of certain approaches being taken to accreditation under "the new model".

[116] Systemic diminishment of criminal defendants' linguistic understanding in trial proceedings cannot be tolerated in a civilized democracy. Everyone who understands the s. 14 *Charter* right believes it essential that non-English speaking defendants in criminal trials not be relegated to the status of constitutional disposables where the interpreting assistance they receive is limited to whatever quality is available as opposed to compliance with the minimum standards which the *Charter* requires.

McCullock Finney v. Canada (Attorney General), 2009 QCCS 4646 (CanLII)

[88] In *Société des Acadiens du Nouveau-Brunswick* (cited *supra*), the Supreme Court of Canada clearly indicated that a litigant had the right to have a civil trial before a judge who is capable of understanding submissions in either one of the official languages of Canada. This right was qualified as a fundamental right by opposition to a language right. But here, the situation is different: only the cost of translation or interpreter services is at issue, not the question of whether these services should be available to the Plaintiff. They are, and no one disputes this fact.

[89] Access to justice is one thing. The question of the costs involved to have access to the judicial system is another question. In a non-criminal or penal situation, there is no legal principle or rule which could allow this Court to impose upon either level of government the obligation to assume the costs of translation or interpreter services as a general principle.

[90] This situation is not unique to the province of Quebec. In *Marshall v. Gorge Vale Golf Club* it was held that the British Columbia Supreme Court had no power to order the provincial government to provide free transcription services to a deaf litigant in a civil matter. The right to an interpreter under section 14 of the *Canadian Charter of Rights and Freedoms* did not create an obligation of the Crown to pay for the services of an interpreter. […]

R. v. Sidhu, 2005 CanLII 42491 (ON SC)

[277] Fundamental fairness and equal access to the courts for linguistic minorities demands purposeful interpretation of the s.14 *Charter* right. "The right to a fair trial is universal and cannot be greater for members of official languages than for persons speaking other languages": *The Queen v. Beaulac* (1999), 1999 CanLII 684 (SCC), 134 C.C.C. (3d) 481 (S.C.C.), at para. 41. While "the right to interpreter assistance is to create a level and fair playing field, not to provide some individuals with more rights than others", a "multicultural society can only be preserved and fostered if those who speak languages other than English and French are given" full access to the justice system: *The Queen v. Tran*, *supra*, at pp. 239-41.

[278] Complementing the s. 14 *Charter* right is the constitutional mandate to provide more than mere lip service to s.27 of the *Charter* "which mandates that the *Charter* be interpreted in a manner consistent with

the preservation and enhancement of the multicultural heritage of Canadians": The *Queen v. Tran*, *supra*, at pp. 239-40. In the United States, it has been observed that: "Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores": *United States v. Si*, *supra*, at p. 1042; *United States v. Negron*, *supra*, at p. 390.

[279] Implicated in the constitutional guarantee of the assistance of an interpreter are a number of significant factors inherent in real and substantive access to justice:

(1) Denial of interpreter assistance constructively denies the defendant's constitutional, statutory and common law right to be present in every respect at his or her trial and to understand and answer the case to meet and to comprehend all proceedings which affect his or her vital interests:

> …the accused, by reason of being deprived of the assistance of the interpreter, was not present for that part of the proceedings… We are of the view he was no more present than if he were unconscious as the result of a heart attack or stroke, and was effectively denied any meaningful presence as if he had been physically removed from the courtroom during that part of the proceedings.
>
> (*R. v. Petrovic* (1984), 1984 CanLII 2003 (ON CA), 13 C.C.C. (3d) 416 (Ont. C.A.), at p. 424)
>
> See also: *The Queen v. Tran*, *supra*, at pp. 229-30, 236, 239-40.

(2) For a hearing to be fair, a party who does not understand the language of the proceeding must himself or herself be understood: *Tran v. The Queen*, *supra*, at p. 229.

(3) Exclusion of the accused in whole or in part from a criminal proceeding on account of non-compliance with the full protection of s.14 of the *Charter* compromises the appearance of fairness of the proceedings leaving the accused with a justifiable sense of injustice and diminishing respect for the administration of justice: *The Queen v. Tran*, *supra*, at pp. 236-7, 240.

(4) An accused, denied the assistance of the standard of interpretation necessary for a fair trial, "can scarcely be said to stand on the same footing or in an equal position with respect to the application of the criminal law as others who are subject to its process": *R. v. Reale* (1974), 1973 CanLII 55 (ON CA), 13 C.C.C. (2d) 345 (Ont. C.A.), at pp. 348-9 (aff'd (1974), 1974 CanLII 23 (SCC), 22 C.C.C. (2d) 571 (S.C.C.), at pp. 572-3).

(5) Denial of competent assistance of an interpreter affects "the integrity of the fact-finding process, and the potency of the adversary system": *United States v. Negron*, *supra*, at p. 389.

(6) Interpreter assistance provides a defendant "sufficient presentability to consult with his [or her] lawyer with a reasonable degree of rational understanding": *United States v. Cirrincione*, 780 F.2d 620, 633 (7th Cir. 1985); *United States v. Johnson*, 248 F.3d 655, 661 (7th Cir. 2001); *The Queen v. Tran*, *supra*, at p. 261.

(7) Section 14 *Charter* adherence gives the ability to "testify in a responsive manner go[ing] to the very "fairness" of the trial": *R. v. Cheba*, [1993] S.J. No. 17 (QL) (C.A.), at para. 3.

(c) The Constitutionally Guaranteed Standard of Court Interpretation

[280] Section 14 of the *Charter* "guarantees the right to interpreter assistance without qualification": *The Queen v. Tran*, *supra*, at p.254. The constitution does not itself describe the constitutionally guaranteed minimal standard of interpretation assistance from an interpreter. "[B]asic fairness" requires that the objective be linguistic understanding of the proceedings. The level of understanding will "necessarily be high" and, as noted in Tran at p. 240, should strive to provide the beneficiary of the assistance the degree

of comprehension he or she would enjoy if able to understand and communicate in one of the country's official languages.

[281] The "basic" standard requires that the interpretation include an acceptable level of continuity, precision, impartiality, competency and contemporaneousness – a significant "deficiency" or material departure in any of these features in the course of proceedings advancing the case or affecting "a vital interest" of the accused, without any need for prejudice assessment, threatens violation of the s. 14 *Charter* right: *The Queen v. Tran*, *supra*, at pp. 242, 253-4.

[282] The "*Tran*" criteria may be summarized as follows:

> (1) Continuous interpretation contemplates that gaps or breaks "are not to be encouraged or allowed" (pp. 246-7).
>
> (2) Precision requires "the interpretation must be, as close as can be, word-for-word and idea-for-idea" not simply summaries. Recognizing that language interpretation is an "inherently human behaviour" and that, on occasion, there exist language-to-language impediments to exact transference of meaning, the interpreter must nevertheless strive for precision. Summaries or distillations are not acceptable (pp. 247-8, 259).
>
> (3) Impartial interpretation requires "that interpretation, particularly in a criminal context, should be objective and unbiased" (p. 248).
>
> (4) There is "a right to competent interpretation" although there exist "no universally acceptable standards for assessing competency". Swearing of the interpreter's oath and judicial inquiry into interpreter qualifications facilitate this aspect of the s.14 *Charter* right (pp. 248-9).
>
> (5) Contemporaneous interpretation is essential. "[A]lthough consecutive interpretation effectively doubles the time necessary to complete the proceedings, it offers a number of advantages over simultaneous interpretation" (pp. 249-50).

[…]

[291] The ultimate issue is whether deficits in the assistance of a qualified interpreter "made the trial fundamentally unfair": *United States v. Bell*, *supra*, at p. 463; *United States v. Sanchez*, 928 F.2d 1450, 1455 (6th Cir. 1991); *United States v. Tapia*, 631 F.2d 1207, 1210 (5th Cir. 1980).

[…]

[298] There is no constitutional right to an accredited interpreter – there is however a right to a competent interpreter. Accordingly, the essential issue is not whether the court interpreter has been "formally trained" but whether the interpreter is "qualified" to proficiently discharge the duties of providing continuous, precise, impartial, competent and contemporaneous interpretation: *R. v. R.(A.L.)*, *supra*, at pp. 155-6. Where the court is presented with an accredited interpreter, the interpreter is presumptively qualified having met the objectively set external standards of a presumptively valid certification process.

[…]

[309] David J. Heller in his article "Language Bias In The Criminal Justice System", *supra*, at pp. 368-9, 376, 380-2, makes these points primarily respecting the Ontario courts:

> (1) There is minimal testing and effectively an absence of training requirements for accredited interpreters. There exists a need for more and specialized interpreter training. Budget cuts have impacted on training – "Most interpreters reported that, for the most part, they learned their profession 'on the job'".

(2) Most counsel act under the belief that court-provided interpreters are competent.

(3) There exists no systemic testing of the competency of court-room interpretation.

(4) The Ontario interpreter accreditation test, undefined by legislative standards, is a short and simplistic test.

(5) Sometimes the Ontario Ministry of the Attorney General uses unaccredited interpreters – "There is a wide variation in competency of interpreters".

(6) The "courts have no systematic means of recognizing poor interpretation".

[…]

[333] There can be no doubt that there are dedicated and highly competent court interpreters in Peel and elsewhere in the Province of Ontario. Unfortunately, with diminished confidence in the accreditation process, and the now-documented widespread and undisclosed use of unaccredited court interpreters in this jurisdiction, it has become difficult to determine who these professionals are.

[334] The reckless indifference of the Court Services Division to the s.14 *Charter* right led to the *Sidhu* mistrial. It is statistically inevitable that there exist as yet undiscovered miscarriages of justice.

[335] Turning to procedural conclusions flowing from the record in this appeal:

[…]

(10) On occasion, the s.14 *Charter* right can only be honoured with the services of two court interpreters (paras. 264, 266-267, *supra*).

(11) A self-represented litigant cannot waive the protection of s.14 of the *Charter*. A defendant, represented by counsel, may expressly waive the right. The court maintains an overriding discretion to reject the waiver (paras. 349-359, *infra*).

[…]

[352] The s.14 *Charter* right cannot be waived by a self-represented accused; where represented by counsel, waiver is possible where counsel "expresses a wish to dispense with the service and the judge is of the opinion that the accused substantially understands the nature of the evidence which is going to be given against him or her" (emphasis of original): *The Queen v. Tran*, *supra*, at p.230.

[353] The threshold for waiver of the s.14 *Charter* right "will be very high" with judicial inquiry, interpreted for the accused, including these features to ensure the accused "personally understood the scope of his [or her] right to interpreter assistance and what he [or she] was giving up":

(1) full knowledge of the rights the interpreter assistance guarantee was enacted to protect

(2) the effect or consequences waiver would have on those rights

(3) clear and unequivocal waiver personally by the accused.

(*The Queen v. Tran*, *supra*, at pp. 255-6, 263). The court maintains a discretion at all times to reject a waiver even when the constituent elements of a valid waiver are present.

[354] The threshold for waiver for the s.14 *Charter* right "is very high" and "cannot be waived by the defendant's counsel" alone: *R. v. Johal*, *supra*, at para. 26; *United States v. Osuna*, 189 F.3d 1289, 1294

(10th Cir. 1999); *United States v. Tapia*, *supra*, at p. 1209. The court itself has a duty to ensure "injustice is not done" by an accused purporting to give up the full protection of s.14 of the *Charter* simply to save time, to avoid inconvenience or where he or she is "careless in exercising" the right: *The Queen v. Tran*, *supra*, at p. 231.

[355] While it is expected that defence counsel, as an officer of the court, will adequately address with his or her client the need for an interpreter, the constitutionally minimum standard of interpretation to be afforded, and the necessity to speak up if that standard is not attained, there is no mandatory requirement for the court to itself instruct an accused respecting such matters:

> Importantly, neither the language of s. 14 of the *Charter* nor the legal-historical underpinnings of the right require courts to inform all accused appearing before them of the existence of the right to interpreter assistance. Similarly, courts are not obliged to inquire, as a matter of course, into every accused's capacity to understand the language used in the proceedings. At the same time, however, there is no absolute requirement on an accused that the right be formally asserted or invoked as a pre-condition to enjoying it. This is because courts have an independent responsibility to ensure that their proceedings are fair and in accordance with the principles of natural justice and, therefore, to protect an accused's right to interpreter assistance, irrespective of whether the right has actually been formally asserted.
>
> (*The Queen v. Tran*, *supra*, at p. 243)

[356] Gross instances of interpreter summaries, confusion and hesitation are easily identified. Subtle deficiencies, missing words and inaccurate interpretations, even few in number passing under the radar screen, risk wrongful conviction. One must be cautious before asserting that an interpreter-assisted defendant ought to have detected and complained about an interpreter skills deficiency. Where the defendant is a non-English speaker, he or she is unable to determine whether the words interpreted into his or her mother language are a true reflection of what the English speakers in the courtroom are saying. Seemingly rough or puzzling interpretations in the defendant's own language may, at times, be perceived as simply naturally occurring difficulties in language transference not error or performance deficits. Where a witness' testimony is a third language, not English or the accused's own language, again, the defendant has no reference point for evaluating the quality of the interpretation.

[357] Experience shows that in Brampton with English/Punjabi-speaking lawyers, and in many, many reported American cases with English/Spanish-speaking counsel, it is the bilingual counsel, not the accused, who frequently discovers the interpretation deficiencies.

[358] A non-English speaker may well have experienced language difference as "a source of division" eliciting "a response from others" including "distance and alienation…[r]eactions…all too often result[ing] from…racial hostility": *Hernandez v. New York*, 500 U.S. 352, 371 (1991). An accused with this experience, feeling ever so fortunate to have a support-like person in the courtroom speaking his or her language at whatever level, will often be reticent to challenge the court system to assert personal language rights.

[359] The Crown bears the burden of establishing "a valid and effective waiver of the right which accounts for the lapse in (or lack of) interpretation shown to have occurred": *The Queen v. Tran*, *supra*, at p. 242.

R. v. Ansary, 2001 BCSC 1333 (CanLII)

[66] Section 14 of the *Charter* provides that a party who does not understand or speak the language in which proceedings are conducted has the right to the assistance of an interpreter. The section does not, however, specifically extend that right to the pre-trial stage of criminal proceedings. In my view, however, the fundamental right to a fair trial protected by s. 7 of the *Charter* requires that the impact of any language difficulties faced by an accused must be considered if the state seeks to adduce evidence at trial of incriminatory statements made by an accused in the investigative stage.

[…]

[70] The role of the police in the investigative stage of a criminal proceeding is of course entirely different from that of the court in judicial proceedings and to that extent, s. 14 *Charter* issues will only be engaged if statements or actions by an accused are later sought to be introduced in criminal proceedings. It follows that the responsibility of the police to determine the ability of a witness or an accused to understand the language of investigation must be assessed having regard for the fact that a determination of guilt or innocence is not yet at stake.

[71] It seems to me that the purposive and liberal interpretation of s. 14 mandated by *Tran*, *supra*, requires consideration of the stage of the investigation during which communication difficulties arise. In my view, as the jeopardy faced by an individual increases, the duty of the police to ensure that communications are understood will also increase if it is intended that conscriptive evidence will be adduced at trial.

[…]

[81] In this case, in addition to the unfairness which arises from the accused not having been given the opportunity to give a full explanation with the benefit of an interpreter, there is also the fact that in many respects the taped conversations are virtually unintelligible due to Mr. Ansary's language difficulties.

[82] The result is that the police officer's interpretation of what they believed Mr. Ansary said to them when they reframed his responses becomes the more intelligible statement. At issue, however, remains the question of whether the officers did fully understand Mr. Ansary and properly reformulated. If the tapes were to be admitted into evidence, rather than being engaged in a search for the truth, the jury would almost inevitably be drawn into a determination of whether Mr. Ansary truly understood the questions, whether the police truly understood his answers, and whether Mr. Ansary really "needed" an interpreter.

[83] That is precisely the type of inquiry that a judge should not undertake in determining whether an accused "needs" an interpreter at trial under s. 14 of the *Charter*: See *Tran*, *supra*, and *Johal*, *supra*. It would be anomalous if the jury as the finder of fact in this case were invited to embark upon that inquiry in circumstances where I have determined that the accused is in need of and entitled to the assistance of an interpreter at trial. At best, the jury would be diverted from its task and, at worst, the accused would be severely prejudiced by his linguistic difficulties.

[84] I am also satisfied that the admission of any gestures made by Mr. Ansary before the Justice of the Peace would constitute a breach not only of his s. 7 *Charter* rights but also of his s. 14 entitlement to the assistance of an interpreter in judicial proceedings. In *R. v. Huy Duc Tran*, [1999] B.C.J. No. 2208, 1999 BCCA 535 (CanLII), Finch J.A. (as he then was) determined that a proceeding before a Justice of the Peace is a judicial proceeding. As such, s. 14 of the *Charter* is directly applicable and Mr. Ansary's requests for an interpreter should have been addressed by the police or the Justice of the Peace. The evidence cannot be saved by s. 24(2) since its admission would detrimentally impact upon the fairness of the trial and the repute of the administration of justice.

Wyllie v. Wyllie, 1987 CanLII 2877 (BC SC)

[3] Pre-Charter decisions suggest that in civil proceedings it is not appropriate that such an order be made: see *Hartley et al. v. Fuld et al.*, [1965] 1 W.L.R. 1336; *Brochu v. Tanguay* (1982), 1982 CanLII 2344 (SK QB), 20 Sask. R. 119, 29 R.F.L. (2d) 462. Section 14 refers to a party in any proceeding. It is not possible to interpret those words so as to confine the application of the section to criminal proceedings; indeed, the words “party” and “proceeding” indicate an intention that it be applied in civil proceedings. However, no case was cited wherein it has been so applied.

[4] Section 14 is not a clear and unambiguous declaration that, under the proper circumstances, a litigant in a civil proceeding has the right to an order compelling the Crown to pay the interpreter’s fee. A possible

interpretation is that it merely codifies the right of a deaf person to have an interpreter assist him at trial, a right which it appears inconceivable that any court would have ever denied. See *Re Roy et al*. and *Hackett et al.* (1985), 31 A.C.W.S. (2d) 279, wherein this is the approach taken.

[…]

[8] The question then posed is, has the enactment of the *Charter* and specifically s. 14 created a right to a civil litigant to have his or her interpreter's fees paid by the Crown?

[9] I am of the view that under s. 14 of the *Charter*, a litigant in a civil proceeding "has the right to the assistance of an interpreter". I am of the further view that the initial responsibility of the litigant requiring the services of an interpreter is to pay that interpreter's fee, and I therefore decline the order sought by the plaintiff.

[10] The question that remains unanswered is, is there an obligation upon the court or the Crown in civil proceedings to pay an interpreter's fee upon the court being satisfied that the litigant requiring an interpreter is unable to pay the necessary fee? The wording of s. 14 is bold and unequivocal and it might well be that upon the basis of impecuniosity that a court would so order.

Labrie v. Machineries Kraft du Québec inc., [1983] J.Q. no 464, [1984] C.S. 263 (QC SC) [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[112] As this section [s. 14 of the *Canadian Charter of Rights and Freedoms*] applies to all proceedings, including civil proceedings, the Court acquiesced to the party's request.

[113] However, who should have to bear the costs of the interpreter: the losing party or the party that requested the interpreter's services, in this case, the plaintiff?

[114] Section 14 of *Canadian Charter of Rights and Freedoms* makes no provision for the costs.

[…]

[130] In this case, the defendant had the right to speak English, in accordance with s. 133 of the *Constitution Act, 1867*. The plaintiff had the right to understand his testimony, in accordance with s. 14 of the *Canadian Charter of Rights and Freedoms*. Counsel for the plaintiff therefore had to ask the question in French so that the plaintiff could understand. The role of the interpreter was essential to translate the question into English for the witness, who had the right to understand the question before answering it. The translation of his answer, given in English, then had to be translated to take into account the plaintiff's right. The interpreter therefore played an essential role at each step.

[131] Article 305 C.P. [Quebec *Code of Civil Procedure*] does not make a distinction in terms of the language in which the interpreter's costs are requested. There is therefore no reason to limit it to cases where the language is not one of the official languages of the Court.

[132] But that is not all. There are two equal constitutional rights at play here: that of the plaintiff and that of the defence witness. There can be no other choice: the costs of the interpreter are awarded in the cause.

[133] It is up to the judge in each case to decide whether an interpreter is needed, as the Court of Appeal established in *Ferncraft*, cited above. Awarding costs in the cause should prevent possible abuses, since each party, never being sure of the outcome of the proceeding, has an interest in minimizing the costs of a case.

[134] This judgment should not be interpreted as being specific to Quebec because of art. 305 C.P. Absent specific legislation or a government directive declaring that the costs shall be borne by the state, the presence of two equal constitutional language rights can only result in the costs of the interpreter being awarded in the cause.

R. v. Ashini, 2015 CanLII 3045 (NL PC)

[182] She [counsel for the accused] also referred to the fact, and fact it is, that the court is often unable to provide an Aboriginal interpreter for in-custody court proceeding. This leads to delays in the conduct of in-custody proceedings. I note that this circumstance is particularly true concerning Innu-aimun interpreters. The court is often unable to provide an Innu-aimun interpreter at all and quite often is unable to provide an interpreter at all familiar with the Mushuau Innu dialect of Natuashish when the accused comes from that community. The attendance of an interpreter, of course, does not necessarily guarantee competence. The court has taken very few steps to ensure training, supervision and assessment of competence of interpreters, not to mention the proper interaction of interpreters, lawyers, clerks and judges. These are clear breaches of a citizen's right to the assistance of an interpreter (section 14 of the *Charter*) as set out in *R. v. Tran*, 1994 CanLII 56 (SCC), [1994] 2 S.C.R. 951, *R. v. Sidhu*, [2005] CanLII 42491 (ONSC), and other cases.

SEE ALSO:

Yamba v. Canada (Minister of Justice), 2016 BCCA 219 (CanLII)

R. v. Rottiers, 1995 CanLII 4003 (SK CA) [judgment available in French only]

Hatzidoyannakis v. R., 2005 QCCA 326 (CanLII) [judgment available in French only]

R. v. Tsang, 1985 CanLII 667 (BC CA)

R. v. Petrovic (1984), 1984 CanLII 2003 (ON CA)

R. v. Adeagbo, 2016 CanLII 89402 (NL SCTD)

R. v. Dutt, 2011 ONSC 5358 (CanLII)

Yoon v. Canada (Citizenship and Immigration), 2012 FC 193 (CanLII)

Sherpa v. Canada (Citizenship and Immigration), 2009 FC 267 (CanLII)

Iantbelidze v. Canada (Minister of Citizenship and Immigration), 2002 FCT 932 (CanLII)

R. v. Xu, 2000 ABQB 982 (CanLII)

R. v. Le, [2000] O.J. No. 246 (ON SCJ) [hyperlink not available]

R. v. Chagnon, [1995] J.Q. no. 2242 (QC SC) [hyperlink not available]

R. v. Valencia, 1998 CanLII 14761 (ON SC)

Garcia v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No. 1451, 70 F.T.R. 211 (FC TD) [hyperlink not available]

R. v. R.T., 2016 QCCQ 689 (CanLII) [judgment available in French only]

R. v. Hunlin, [1994] B.C.J. No. 1733 (BC PC) [hyperlink not available]

Ictensev v. Canada (Minister of Employment and Immigration), [1988] O.J. No. 1842, 43 C.R.R. 147 (ON SC) [hyperlink not available]

R. v. K.M., 2016 ONSC 5638 (CanLII)

R. v. Douglas and Bryan, 2014 ONSC 2573 (CanLII)

Canada (Attorney General) on behalf of the United States of America v. Muhammad'Isa, 2012 ABQB 641 (CanLII)

R. v. Dunsford, 2010 SKQB 164 (CanLII)

Lawal v. Canada (Citizenship and Immigration), 2008 FC 861 (CanLII)

Caron v. Alberta (Human Rights and Citizenship Commission), 2007 ABQB 525 (CanLII)

Caron v. Alberta (Human Rights and Citizenship Commission), 2007 ABQB 200 (CanLII)

N.B. – This list is not exhaustive due to the great volume of decisions relating to s. 14 of the *Canadian Charter* and issues of linguistic comprehension.

Equality rights (section 15)

15. (1) Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

15. (2) Affirmative action programs

15. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[LAST UPDATE: MAY 2017]

ANNOTATIONS

Gosselin (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 238, 2005 SCC 15 (CanLII)

[1] In this appeal, the Court is asked to measure the constitutional right to minority language education against the right to equality. The appellants claim that the *Charter of the French language*, R.S.Q., c. C-11, which provides access to English language schools in Quebec only to children who have received or are receiving English language instruction in Canada or whose parents studied in English in Canada at the primary level, discriminates between children who qualify and the majority of French-speaking Quebec children, who do not. The result, the appellants argue, violates the right to equality guaranteed at ss. 10 and 12 of the *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. Equality requires, the appellants argue, that all children in Quebec be given access to publicly funded English language education.

[2] If adopted, the practical effect of the appellants' equality argument would be to read out of the Constitution the carefully crafted compromise contained in s. 23 of the *Canadian Charter of Rights and Freedoms*. This is impermissible. As the Court has stated on numerous occasions, there is no hierarchy amongst constitutional provisions, and equality guarantees cannot therefore be used to invalidate other rights expressly conferred by the Constitution. All parts of the Constitution must be read together. It cannot be said, therefore, that in implementing s. 23, the Quebec legislature has violated either s. 15(1) of the *Canadian Charter* or ss. 10 and 12 of the *Quebec Charter*. The appeal should therefore be dismissed.

[…]

[10] The appellants are in a position no different from the majority of Quebec residents who receive or have received their primary and secondary instruction in French. Nonetheless, they claim that the categories of rights holders implemented by the *Charter of the French language* are discriminatory and should be reformed to permit them to enrol their children in English language instruction in Quebec. As members of the French language majority in Quebec, they seek to use the right to equality to access a right guaranteed in Quebec only to the English language minority.

[…]

[12] Section 15(1) of the *Canadian Charter* does not expressly enumerate language as a prohibited ground of discrimination. However, we agree with the observations of the Saskatchewan Court of Appeal in *Reference re Use of French in Criminal Proceedings in Saskatchewan* (1987), 1987 CanLII 204 (SK CA), 36 C.C.C. (3d) 353, at p. 373, that:

> Nor, in our view, does the presence in the *Charter* of the language provisions of ss. 16 to 20, or the deletion from an earlier draft of s. 15(1) of the word "language", have the effect necessarily of excluding from the reach of s. 15 the form of distinction at issue in this case.

In *Québec (Procureure générale) v. Entreprises W.F.H. Ltée*, [2000] R.J.Q. 1222, at p. 1250, the Quebec Superior Court held that [translation] "maternal language" was an analogous ground. It is not necessary to explore this point further on this appeal because the principal issue is not the content of the equality rights under the *Canadian Charter* but, assuming the appellants have an arguable case to bring themselves within s. 15(1) of the *Canadian Charter*, the issue at the root of this appeal is the relationship of equality rights in both the *Canadian Charter* and the *Quebec Charter* to the positive language guarantees given to minorities under the *Constitution of Canada* and the *Charter of the French language*.

[…]

[16] The appellants misconceive the objective of s. 73 of the *Charter* of the French language when they submit that "[t]he stated purpose and effect of the provisions of the CFL is to first distinguish and then exclude entire categories of children from a public service" (appellants' factum, at para. 48 (emphasis in original)). The purpose of s. 73 is not to "exclude" but rather to implement the positive constitutional responsibility incumbent upon all provinces to offer minority language instruction to its minority language community. It is from this perspective that the present appeal must be considered.

[…]

C. The Right to Equality Is Not Opposable to Section 23 of the *Canadian Charter*

[21] […] As noted earlier, s. 23 could also be viewed not as an "exception" to equality guarantees but as their fulfilment in the case of linguistic minorities to make available an education according to their particular circumstances and needs equivalent to the education provided to the majority (*Arsenault-Cameron*, at para. 31).

[22] The appellants in this case are attempting to accomplish precisely that which *Mahe* said was prohibited, namely the use of equality guarantees to modify the categories of rights holders under s. 23. The attempt was rejected in *Mahe*, albeit in different circumstances, and should be rejected again in this appeal.

Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14 (CanLII)

[20] Section 23 provides a comprehensive code of minority language education rights which afford special status to minority English- or French-language communities. The Court in *Mahe*, at p. 369, recognized that this special status would create inequalities between linguistic groups. See also *Adler v. Ontario*, 1996 CanLII 148 (SCC), [1996] 3 S.C.R. 609, at para. 32. Specifically, English speakers living in Quebec and French speakers living in the territories and other provinces would enjoy rights denied to other linguistic groups. Section 23 has been described as an exception to ss. 15 and 27 of the *Canadian Charter*; it is rather an example of the means to achieve substantive equality in the specific context of minority language communities. […]

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, 1997 CanLII 327 (SCC)

[54] In the case of s. 15(1), this Court has stressed that it serves two distinct but related purposes. First, it expresses a commitment -- deeply ingrained in our social, political and legal culture -- to the equal worth and human dignity of all persons. As McIntyre J. remarked in *Andrews*, at p. 171, s. 15(1) "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration". Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups "suffering social, political and legal disadvantage in our society"; see *R. v. Turpin*, 1989 CanLII 98 (SCC), [1989] 1 S.C.R. 1296, at p. 1333 (per Wilson J.); see also Beverley McLachlin, "The Evolution of Equality" (1996), 54 *Advocate* 559, at p. 564. While this Court has confirmed that it is not necessary to show membership in a historically disadvantaged group in order to establish a s. 15(1) violation, the fact that a law draws a distinction on such a ground is an important indicium of discrimination; see *Miron v. Trudel*, 1995 CanLII 97 (SCC), [1995] 2 S.C.R. 418, at para. 15 (per Gonthier J.) and at paras. 148-149 (per McLachlin J.), and *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513, at paras. 59-61 (per L'Heureux-Dubé J.).

[…]

[57] Deaf persons have not escaped this general predicament. Although many of them resist the notion that deafness is an impairment and identify themselves as members of a distinct community with its own language and culture, this does not justify their compelled exclusion from the opportunities and services designed for and otherwise available to the hearing population. For many hearing persons, the dominant perception of deafness is one of silence. This perception has perpetuated ignorance of the needs of deaf persons and has resulted in a society that is for the most part organized as though everyone can hear; see generally Oliver Sacks, *Seeing Voices: A Journey Into the World of the Deaf* (1989). Not surprisingly, therefore, the disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population.

[…]

[60] The only question in this case, then, is whether the appellants have been afforded "equal benefit of the law without discrimination" within the meaning of s. 15(1) of the *Charter*. On its face, the medicare system in British Columbia applies equally to the deaf and hearing populations. It does not make an explicit "distinction" based on disability by singling out deaf persons for different treatment. Both deaf and hearing persons are entitled to receive certain medical services free of charge. The appellants nevertheless contend that the lack of funding for sign language interpreters renders them unable to benefit from this legislation to the same extent as hearing persons. Their claim, in other words, is one of "adverse effects" discrimination.

[61] This Court has consistently held that s. 15(1) of the *Charter* protects against this type of discrimination. In *Andrews*, supra, McIntyre J. found that facially neutral laws may be discriminatory. "It

must be recognized at once", he commented, at p. 164, ". . . that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality"; see also *Big M Drug Mart Ltd*., *supra*, at p. 347. Section 15(1), the Court held, was intended to ensure a measure of substantive, and not merely formal equality.

[62] As a corollary to this principle, this Court has also concluded that a discriminatory purpose or intention is not a necessary condition of a s. 15(1) violation; see *Andrews*, at pp. 173-74, and *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at pp. 544-49 (per Lamer C.J.); see also *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, at p. 547. A legal distinction need not be motivated by a desire to disadvantage an individual or group in order to violate s. 15(1). It is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law. As McIntyre J. stated in *Andrews*, at p. 165, "[t]o approach the ideal of full equality before and under the law . . . the main consideration must be the impact of the law on the individual or the group concerned". In this the Court has staked out a different path than the United States Supreme Court, which requires a discriminatory intent in order to ground an equal protection claim under the Fourteenth Amendment of the Constitution; see *Washington, Mayor of Washington, D.C. v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

[…]

[71] If there are circumstances in which deaf patients cannot communicate effectively with their doctors without an interpreter, how can it be said that they receive the same level of medical care as hearing persons? Those who hear do not receive communication as a distinct service. For them, an effective means of communication is routinely available, free of charge, as part of every health care service. In order to receive the same quality of care, deaf persons must bear the burden of paying for the means to communicate with their health care providers, despite the fact that the system is intended to make ability to pay irrelevant. Where it is necessary for effective communication, sign language interpretation should not therefore be viewed as an "ancillary" service. On the contrary, it is the means by which deaf persons may receive the same quality of medical care as the hearing population.

[…]

[80] In my view, therefore, the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of the s. 15(1) rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons.

[…]

[88] The respondents argue, however, that the situation of deaf persons cannot be meaningfully distinguished from that of other non-official language speakers. If they are compelled to provide interpreters for the former, they submit, they will also have to do so for the latter, thereby increasing the expense of the program dramatically and placing severe strain on the fiscal sustainability of the health care system. In this context, they contend, it was reasonable for the government to conclude that they impaired the rights of deaf persons as little as possible.

[89] This argument, in my view, is purely speculative. It is by no means clear that deaf persons and non-official language speakers are in a similar position, either in terms of their constitutional status or their practical access to adequate health care. From the perspective of a patient, there is no real difference between sign language and oral language if there is no ability to communicate with a physician. But from the perspective of the state's obligations, there may very well be. In the present case, the only relevant constitutional provisions are ss. 15(1) and 1 of the *Charter*. In a case involving a claim for medical interpretation for hearing patients, in contrast, the analysis would be more complicated. In such a case, it

would be necessary to consider the interaction between s. 15(1) and other provisions of the Constitution, specifically those related to the language obligations of governments. Moreover, the respondents have presented no evidence as to the potential scope or cost of an oral language medical interpretation program. It is possible that the nature and extent of any reasonable accommodation required for hearing persons under s. 1 would differ from that required for deaf persons. Thus, any claim for the provision of such a program, whether based on national origin or language as an analogous ground, would proceed on markedly different constitutional terrain than a claim grounded on disability.

Reference re Public Schools Act (Man.), s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, 1993 CanLII 119 (SCC)

Question (c)(i) Do section 23 and section 15 of the *Charter* grant any right of management or control in connection with section 23's guarantees of French language instruction and facilities?

[30] This issue has, for the most part, been disposed of by *Mahe*. The respondent concedes that the majority of the Court of Appeal's ruling has now been superseded and seeks an order allowing the appeal without costs. The key dispute remaining is how precise the Court should be in setting out the parameters of the management and control of language instruction and facilities required under s. 23 of the *Charter*.

[31] With respect to other *Charter* rights, the Court considered in *Mahe* the argument that s. 23 should be interpreted in light of ss. 15 and 27 and concluded the following (at p. 369):

> Section 23 provides a comprehensive code for minority language educational rights; it has its own internal qualifications and its own method of internal balancing. A notion of equality between Canada's official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada.

I see no reason to depart from this position. Therefore, it follows that the finding of Monnin C.J. of the Manitoba Court of Appeal on the application of ss. 15 and 23 is, with respect, incorrect.

Mahe v. Alberta, [1990] 1 S.C.R. 342, 1990 CanLII 133 (SCC)

[45] […] While I agree that it is often useful to consider the relationship between different sections of the *Charter*, in the interpretation of s. 23 I do not think it helpful in the present context to refer to either s. 15 or s. 27. Section 23 provides a comprehensive code for minority language educational rights; it has its own internal qualifications and its own method of internal balancing. A notion of equality between Canada's official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada. As the Attorney General for Ontario observes, it would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to "every individual".

Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790, 1988 CanLII 20 (SCC)

[31] This leaves the question as to whether s. 57 is contrary to ss. 15 and 1 of the *Canadian Charter*. Section 15 of the *Canadian Charter* was invoked by the appellant only before this Court, although the Attorney General of Quebec did agree that constitutional questions be stated and that s. 15 should be in issue. Nevertheless, we do not have the benefit of reasons from the Court of Appeal or from the Superior Court interpreting the application of s. 15 to s. 57. Nor has this Court yet rendered any judgment interpreting the meaning of s. 15. It is not necessary in this case to discuss whether s. 57 is *prima facie* in breach of s. 15. We have already determined that it is prima facie in breach of s. 2(b). The only question that remains to be answered is whether the application of s. 1 would be any different if there were a prima facie breach of s. 15 in this case. More specifically, the question becomes whether the proportionality test laid down in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, and restated by Dickson C.J. in *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, would yield a different result

in this case if the *prima facie* breach in issue were a breach of the rights guaranteed under s. 15. We have already determined that the requirement of joint use of French is rationally connected to the legislature's pressing and substantial concern to ensure that the "*visage linguistique*" of Quebec reflects the predominance of the French language. Does this requirement impair as little as possible the right to equality before and under the law and the right to equal protection and benefit of the law without discrimination? Is it designed not to trench on that right so severely that the legislative objective is nevertheless outweighed by the abridgment of rights? By ensuring that non-francophones can draw up application forms for employment, order forms, invoices, receipts and quittances in any language of their choice along with French, s. 57, read together with s. 89, creates, at most, a minimal impairment of equality rights. Although, as the appellant contended, the requirement of joint use of French might create an additional burden for non-francophone merchants and shopkeepers, there is nothing which impairs their ability to use another language equally. Thus, the conclusion we have reached with respect to the operation of s. 1 stands even if the prima facie breach of the *Canadian Charter* at issue is a breach of s. 15.

[32] As it is our view that the equality guarantees in s. 15 of the *Canadian Charter* and s. 10 of the *Quebec Charter* were not infringed, it is unnecessary in this case to decide whether corporations are entitled to the direct benefit of these protections. It is further unnecessary to decide whether the appellant corporation was entitled to challenge s. 57 as inconsistent with s. 15 of the *Canadian Charter*.

R. v. MacKenzie, 2004 NSCA 10 (CanLII)

[31] “Language” is not a listed category of discrimination under s. 15(1). Section 15(1) could only apply if “language” was an analogous ground of discrimination. The Supreme Court has outlined the approach to determining whether an alleged ground of discrimination is “analogous” *eg. Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513; *Law*, above; *M. v. H.*, above, at para. 63.

[32] Neither in the decision under appeal, nor in *Deveau*, did the SCAC consider whether “language” is an analogous category under s. 15(1).

[33] Appellate courts repeatedly have stated that “language” is not an analogous ground of s. 15(1). The reason is that ss. 16-23 of the *Charter* deal specifically with language rights. If “language” also was subject to the over-arching coverage of s. 15(1), then the ambit of the protections in ss. 16-23 would have little meaning. See: *Lalonde v. Ontario (Commission de Restructuration des Services de Santé) (2001)*, 2001 CanLII 21164 (ON CA), 208 D.L.R. (4th) 577 (OCA) at 621-622; *MacDonnell v. Federation de Franco-Columbiens* (1986), 1986 CanLII 927 (BC CA), 31 D.L.R. (4th) 296 (BCCA); *R. v. Paquette* (1987), 1987 ABCA 228 (CanLII), 46 D.L.R. (4th) 81 (ACA); *Ringuette v. Canada* (A.G.) (1987), 53 Nfld. & P.E.I.R. 126 (NCA); *R. v. Simard* (1995) 27 O.R. (3rd) 116 (OCA) at 126 and 131; *R. v. Crête*, (1994), 64 O.A.C. 399 (OCS); *Seaway Trust v. Kilderkin Investments Limited* (1986), 1986 CanLII 2580 (ON SC), 29 D.L.R. (4th) 456 (OHCJ); *R. v. Rodrigue* (1994), 1994 CanLII 5249 (YK SC), 91 C.C.C. (3rd) 455 (YSC) at pp. 472 - 4, appeal dismissed on jurisdictional grounds, (1995), 95 C.C.C. (3rd) 129 (YTCA), leave to appeal denied by the Supreme Court of Canada, [1995] 3 S.C.R. vii.

Entreprises W.F.H. Ltée v. Québec (Procureure Générale du), 2001 CanLII 17598 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[4] The appellant was convicted of violating s. 58 of the Quebec *Charter of the French Language*, R.S.Q., c. C-11, which requires the marked predominance of French in commercial signage, and was ordered to pay the minimum fine provided for under s. 205 of the same Act. It is seeking a declaration from the Court that these sections are inoperative and of no force and effect on the grounds that s. 58 violates its right to freedom of expression guaranteed by subs. 2(b) of the *Canadian Charter of Rights and Freedoms* and s. 3 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, and its right to equality guaranteed by s. 15 of the *Canadian Charter* and s. 10 of the Quebec *Charter.*

[…]

[91] Its answers appear to be accurate, in my opinion. Section 58 of the *Charter of the French Language* clearly imposes different treatments for Francophones and persons with a different mother tongue. A Francophone can advertise only in French, whereas a person with a mother tongue other than French must add to the text in his or her language a markedly predominant French version. However, the decision in *Law* clearly establishes that a different treatment is not necessarily synonymous with prohibited discrimination. As established at para 83 of *Law*, the first question to be asked by the court in every case will be whether a violation of human dignity has been established, in light of the historical, social, political and legal context of the claim.

[92] It is recognized in *Ford*, at p. 778, that the aim of the language policy underlying the *Charter of the French Language* was a serious and legitimate one. This objective is described in the preamble: to assure the quality and influence of the French language. At p. 777 of *Ford*, the Supreme Court found that the material entered into the record amply established the importance of the legislative purpose reflected in the *Charter of the French Language* and that it is a response to a substantial and pressing need.

[93] Non-Francophone merchants are free to give their advertising the form and content they desire. They are simply asked to add a markedly predominant French version. Like the judge from the Superior Court, I do not see any violation of the appellant's dignity or any discrimination.

Westmount (ville de) v. Québec (Procureur général), 2001 CanLII 13655 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[149] It is far from certain that s. 15 of the *Canadian Charter* can be used to support the protection of language rights provided under the Constitution. As we have already pointed out, language rights cannot be confused with the fundamental guarantees of the *Charter*. Moreover, the Supreme Court has clearly stated that it is inappropriate to use ss. 15 and 27 to determine the scope of language rights.

[150] Through s. 15, a portion of the Anglophone minority of Montreal claims the right to control (monitor) a local government entrusted with all the powers and competencies that the legislator cannot change without its consent. These rights would be conferred on local communities that are distinguished by their language, culture and religion. In so doing, as the respondent points out in his plea, the appellants are claiming a collective right which would impose a positive obligation on the Government, while the protection afforded by s. 15 is mainly of an individual nature.

[151] Nevertheless, even when agreeing to review the issue from the angle proposed by the appellants, their claims must still be dismissed.

[…]

[161] In any case, it is not even necessary to dispose of this issue since, even if the appellants could meet the first test developed in *Law*, they obviously cannot meet the second test (distinction based on an analogous ground). Although the three tests in this decision are distinct, they are nevertheless cumulative.

[162] The appellants are wrong to argue that the alleged difference in treatment arises from language, whereas in reality, it simply flows from their place of residence, a ground which is not analogous within the meaning of section 15.

[…]

[169] It must therefore be concluded that the difference in treatment pleaded by the appellants is not based on one of the enumerated or analogous grounds in section 15 of the *Canadian Charter* and the right to equality under this section has therefore not been violated.

Lalonde v. Ontario (Commission de restructuration des services de santé), 2001 CanLII 21164 (ON CA)

[96] Montfort cross-appeals the Divisional Court's dismissal of the claim that the Commission's directions violate their equality rights protected by s. 15 of the *Charter*. This issue was not pressed in oral argument, but is fully developed in Montfort's *factum*. In our view, the Divisional Court was correct in rejecting this submission on the ground, at p. 79 O.R., that "s. 15 of the *Charter* may not be used as a back door to enhance language rights beyond what is specifically provided for elsewhere in the *Charter*." Assuming, without deciding, that the respondents otherwise satisfy the test for a violation of s. 15, we agree with the Divisional Court that, in view of the very specific and detailed provisions of ss. 16-23 of the *Charter* dealing with the special status of English and French, any differential treatment to francophones resulting from the Commission's directions is not based upon an enumerated or analogous ground. As the Divisional Court stated at p. 80 O.R.: "Section 15 itself . . . cannot be invoked to supplement language rights which the *Charter* has not expressly conferred."

[…]

[101] It has been held in other contexts that where the Constitution accords special rights to special groups, those specific guarantees must be respected and other *Charter* rights cannot be used to expand or diminish the rights so granted. In *Reference Re Bill 30*, *supra*, Wilson J. stated at pp. 1196-97 S.C.R. that although the special minority religion education rights conferred by s. 93 of the *Constitution Act, 1867* "[sit] uncomfortably with the concept of equality embodied in the *Charter*", s. 15 can be used neither to nullify the specific rights of the protected group nor to extend those rights to other religious groups. This position was affirmed in *Adler v. Ontario*, 1996 CanLII 148 (SCC), [1996] 3 S.C.R. 609, 140 D.L.R. (4th) 385. There, the court dismissed a claim for funding health services for religious schools falling outside the ambit of s. 93 based on the guarantee of freedom of religion in s. 2(a) and on the right to equality in s. 15.

[102] Accordingly, we would dismiss Montfort's cross-appeal from the dismissal of the s. 15 claim.

Gingras v. Canada, [1994] 2 F.C.R. 734, 1994 CanLII 3475 (FCA)

[60] The allegation of discrimination is so tenuous that it does not merit close scrutiny. The respondent did not say what kind of discrimination was involved and submitted no evidence other than superficial and unsupported statistics. If it is discrimination based on language the claim would probably have to be dismissed as language is not one of the grounds described in section 15: it seems unlikely to me that a person could by means of so-called discrimination based on use of the official languages obtain more under subsection 15(1) of the *Charter* than what he would be entitled to under the language guarantee as defined in sections 16 to 22; and if there was discrimination it would not be discrimination based on language or, strictly speaking, national or ethnic origin, but discrimination based on the fact that bilingual employees perform administrative duties and other employees policing duties. That does not *prima facia* provide any basis for intervention under the *Charter*. In any case, the lack of serious evidence of discrimination is such that the claim based on the *Charte*r is clearly frivolous in the case at bar.

[61] In his capacity as a former member of the RCMP the respondent was entitled to be paid the [Bilingualism] bonus by CSIS from July 16, 1984 to March 5, 1985, but not after that.

R. v. Crete, 1993 CarswellOnt 1145, 20 W.C.B. (2d) 233, 64 O.A.C. 399 (ON CA) [hyperlink not available]

[1] The appellant has limited his argument to s. 15(1) of the *Charter* and says that there was discrimination in serving him with a notice in English which he, as a Francophone, could not read. This is not a language issue; it is an argument that such notices must be capable of being read and understood by all recipients. Persons who are illiterate or unilingual in any one of a multitude of languages, other than English, are put to more trouble than an English-speaking person when receiving such a document. However, this is a difference which falls short of s.15 discrimination: *Andrews v. Law Society of B.C.* (1989), 56 D.L.R. (4) 1. All government documents will inevitably be unreadable by some group of

persons. It would be trivializing s. 15 to declare them all discriminatory and then, as the appellant would have it, turning to s.1 to justify all except those which affect French-speaking unilinguals.

Re Headley and Public Service Commission appeal board, [1987] 2 FCR 235, 1987 CanLII 5362 (FCA)

[14] The facts are simple. The employer advertised a closed competition for the position of "CR-4, Reception Information Clerk" for the Toronto West Canada Immigration Centre. The applicant was screened out because she did not have proficiency in the use of one of the six languages (Vietnamese, Chinese, Polish, Portuguese, Italian, Spanish) the employer had specified as a basic requirement in the statement of qualifications for the position.

[15] It is common ground that the merit principle enshrined in section 10 of the *Public Service Employment Act* [R.S.C. 1970, c. P-32] ("the Act") was fully observed by the selection board in its actual assessment of candidates and that the applicant has no complaint vis-à-vis the treatment of the other candidates. Her allegation of unequal treatment is essentially in relation to the two other incumbents of CR-4, Reception Information Clerk positions in the Toronto West Canada Immigration Centre, neither of whom is required to possess proficiency in any of the six languages. In fact, one speaks German in addition to English; the other, in a designated bilingual imperative position, speaks Vietnamese and Chinese in addition to English and French. However, the Board determined that neither was required to speak any language beyond English in the first instance or English and French in the second.

[…]

[17] The applicant alleges that she has been deprived of equality before and under the law and that she has been deprived for her right to the equal protection and equal benefit of the law under section 15 by being subject to a language requirement in her application for the CR-4 position where the two incumbents presently holding that position were not subject to that requirement and are not now subject to it.

[…]

[24] To put it more exactly, I find the internal limit "discrimination" to be required in all cases, but in some cases, viz. those based on the enumerated grounds, the drafters have already made the fundamental determination that pejorative distinctions based on those grounds constitute discrimination, whereas in other cases the complainant has to prove that discrimination results. In all cases, however, the discrimination has to be more than trivial. In result, then, though not in concept, this analysis resembles the distinction drawn by American courts between strict scrutiny and minimal scrutiny. In Canada I believe the distinction is not made on the authority of the courts but on that of the Constitution itself.

[25] The Constitution itself, I believe, compels this distinction between enumerated and non-enumerated grounds. In particular, the fact that the drafters spelled out as grounds the principal natural and unalterable facts about human beings -- race, national or ethnic origin, colour, religion (admittedly, not wholly a natural and unalterable fact), and sex -- can only mean, I believe, that non-trivial pejorative distinctions based on such categories are intended to be justified by governments under section 1 rather than to be proved as infringements by complainants under section 15. In sum, some grounds of distinction are so presumptively pejorative that they are deemed to be inherently discriminatory.

[26] In the instant case the applicant initially proposed a blood theory of language and ethnicity which would have equated the preferential language requirement here with preferential treatment for the national or ethnic groups which normally spoke the six languages in question. This unhappy argument was not proceeded with in oral argument.

[27] The applicant was therefore left with the necessity of proving discrimination on the basis of language without the benefit of an enumerated ground of discrimination. This was a burden she was not able to meet. Management's right to establish qualifications for public service positions has been regarded as

"inherent", at least since the decision of this Court in *Bauer v. Public Service Appeal Board*, [1973] F.C. 626 (C.A.), at page 630, per Jackett C.J. […]

[…]

[30] If the criterion of discrimination is whether or not management has some rational basis for its action, as is urged by the applicant herself, also on the authority of the U.S. cases (although she might equally well have based it on the language of McIntyre J. in *MacKay v. The Queen*, [1980] 2 S.C.R. 370, at page 406), that criterion has been met, as the Board decision shows.

Ringuette v. Canada (Attorney General), 1987 CanLII 3953 (NL CA)

[pp. 520-521] Certainly, in so far as the Province of Newfoundland is concerned, when one considers the findings of fact by the trial judge, already referred to, it cannot seriously be contended that the failure to proclaim Part XIV.1 [of the *Criminal Code*] in effect in Newfoundland results in the infringement or abrogation of the constitutional rights of the Appellant under the *Constitution Act, 1982*, and specifically s. 15 thereof.

Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings, 1987 CanLII 204 (SK CA)

[71] The Attorney General submitted (i) that s. 15(1) is concerned only with distinctions or classifications based on the enumerated grounds (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability), each of which concerns some personal characteristic irrelevant to the law, or on such other grounds, so similar to these, as to be comprehended by the subsection's concept of "discrimination"; (ii) that the distinction between a francophone accused in Saskatchewan and his counterpart in those provinces in which Pt. XIV.1 of the [*Criminal*] *Code* is in effect is based either on "official language" or on "locus of proceedings", neither of which is an enumerated ground (indeed "language", it was said, is an expressly excluded ground) and neither of which has anything in common with the enumerated grounds, since neither involves any irrelevant personal characteristic; and (iii) that for these reasons, alone, the state of affairs disclosed by the question is beyond the ambit of s. 15.

[72] In our respectful view this submission is without merit. To begin with, the listing in s. 15(1) of the bases for discrimination is not exhaustive; the language of the subsection makes that very clear. Nor in our opinion is an ejusdem generis construction appropriate in this instance. This and other similar maxims evolved in the context of statutory interpretation, whose end it is to discover the intention of the legislator. *Charter* construction is quite a different matter: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 156-57, [1984] 6 W.W.R. 577 (sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*), 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 9 C.R.R. 355, 2 C.P.R. (3d) 1, 84 D.T.C. 6467, 55 A.R. 291, 55 N.R. 241; *R. v. Big M Drug Mart Ltd.*, supra. Thus these aids (which are just that in any event and do not pre-ordain conclusions) are not of the same value in relation to *Charter* construction as they are in respect of purely statutory interpretation. Moreover, as was said in *Big M Drug Mart*, the provisions of the *Charter* are to be accorded a generous rather than a legalistic interpretation.

[73] This is not to say that the listing of certain grounds and not others is wholly immaterial — the basis upon which a distinction rests may well bear upon whether, and the ease with which, that distinction may be justified, another matter altogether — but in our opinion s. 15(1) is not to be construed in the narrow fashion contended for.

[74] It is therefore immaterial that "official language" or "locus of proceedings", assuming either of these is the basis for the distinction at issue, are not included among the enumerated grounds, or that the enumerated grounds may enjoy a genus or common character not shared by "official language" or "locus of proceedings". Nor, in our view, does the presence in the *Charter* of the language provisions of ss. 16 to 20, or the deletion from an earlier draft of s. 15(1) of the word "language", have the effect necessarily of excluding from the reach of s. 15 the form of distinction at issue in this case.

[…]

[109] Assuming, for the purposes of dealing with the issue at hand, that the nature, scope and aspect of the form of equality in the law with which we are concerned requires a determination of whether the impugned measures treat likes alike, the answer must be they do not. A francophone accused in Saskatchewan does not enjoy the right, accorded by federal law, to his or her counterpart in, let us say, Manitoba and Ontario to be tried in his or her own official language; so the measures cannot be said to treat similarly those similarly situated.

[110] Nor should it be necessary so to decide (that is, if the opening clause of s. 15(1) does not, in combination with ss. 1 and 24(1) found individual rights and remedies), has an accused in Saskatchewan, whose language is French, been extended the same protection or benefit of law as has his counterpart elsewhere in the country. While no doubt embracing more than this, it is our view that one or the other of the concepts of equality in relation to the protections and benefits of the law is sufficiently wide, in this event, to include the condition at issue.

[111] Thus, there exists within the state of affairs disclosed by the question a form of inequality falling within s. 15(1), and non-proclamation in Saskatchewan clearly has the effect of nullifying or impairing the enjoyment by a francophone accused in Saskatchewan of his or her constitutional right to equality in the law.

[112] We have no difficulty, therefore, in concluding that the s. 15(1) rights of an accused in Saskatchewan whose language is French are, in the circumstances, infringed, and that he is entitled, unless justifica tion for this state of affairs can be found in s. 1, to apply for and obtain an appropriate and just remedy pursuant to s. 24(1) of the *Charter*.

McDonnell v. Fed. des Franco-Colombiens, 1986 CanLII 927 (BC CA)

[7] In referring to "the Act", he means the Act passed by the British Parliament in 1731 which required all court proceedings to be in the English language. The courts have held this Act to be in force in British Columbia, but I do not intend to deal with it because the same arguments apply to it as apply to Rule 4(2) [of the *Supreme Court Rules*]. He submits, also, that the chambers judge erred in concluding that the object of R. 4(2) has the same object as the rules generally (that is, the just, speedy and inexpensive determination of every proceeding on its merits), contending that the rule has a much narrower purpose, namely, “understand-ability and convenience for judges, counsel and litigants”. He submits that permitting a person whose first language is French to file pleadings in French would advance, rather than inhibit, this object. He submits that, relying on the tests for discrimination which this court enunciated in *Andrews v. Law Soc*. and which Macfarlane J.A. enunciated in *Rebic v. Collver Prov. J.* (1986), 1986 CanLII 1052 (BC CA), 2 B.C.L.R. (2d) 364, [1986] 4 W.W.R. 401 (C.A.), R. 4(2) is clearly discriminatory and cannot be justified under s. 1 of the Charter.

[8] On the other hand, counsel for the Attorney General, relying on the *expressio unius* maxim submits that ss. 16 to 22 are exhaustive of the subject of language rights, that there is nothing in any of these sections which would affect the power of B.C. to pass Rule 4(2) and that, therefore, the Federation cannot rely on s. 15. He contends, too, that the majority judgments of the Supreme Court in *MacDonald* and in *Société des Acadiens* clearly refute counsel's submissions and contentions.

[9] Generally, I agree with the submissions of the Attorney General. […]

[10] I start first with the role of s. 15, captioned "Equality Rights". It guarantees the right to the equal protection and equal benefit of the law without discrimination and specifies several areas of discrimination. While stating that specified areas of discrimination are not exhaustive, this court emphasized in *Andrews v. Law Society* that a court must interpret s. 15 in relation to the other sections of the *Charter* and cautioned against according paramountcy to s. 15. In giving the judgment of the court, McLachlin J.A. said at p. 50:

> No one section should be regarded as paramount or as encompassing all of the other sections. That, however, may be what will become of s. 15 if it is interpreted as being violated by any distinction or unequal treatment. Section 15, like the 14th Amendment in the United States Constitution will dwarf the other provisions of the *Charter* and be the central issue in virtually all *Charter* litigation. Laws which do not violate any other fundamental right or freedom will almost always (if the United States experience is any guide) be alleged to violate s. 15 because the legislature classified or failed to classify. Even though legislation does not violate any other sections, it will always be required to run the gauntlet of ss. 15 and 1. In my view, this cannot have been the intention of the enactors of the *Charter*.

[…]

[18] Section 15 is a guarantee against discrimination and is a legal right. While discrimination based purely on language may be within s. 15, our concern is whether the concept of "official language" comes within it. Having regard to the provisions of ss. 16 to 22 and the other sections dealing with languages and the judgments of the majority in *MacDonald* and *Societe des Acadiens*, I do not think that it does.

[19] Because of this conclusion it is unnecessary to deal with s. 15. Accordingly, I would dismiss the appeal.

Sojourner v. Conseil de la justice administrative, 2016 QCCS 3743 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[10] Another particularity of the hearing was that it was conducted in two languages with the Commissioner addressing Ms. Sojourner in English and the owner's representative in French. At no time during the hearing did Ms. Sojourner indicate that she did not understand what was going on or require the presence of an interpreter or a translation of what had been said in French. There was no reference at any time to her race or sexual orientation.

[…]

[56] The notion of discrimination found in s. 15 of the *Canadian Charter*, also invoked by Ms. Sojourner, in so far as it applies here, also requires evidence of a violation that creates a disadvantage by perpetuating prejudice or stereotyping.

[57] […] Language-related elements should also be analyzed. If the Committee were satisfied, for example, that what was said in both languages made it possible to understand the basic message without systematic translation from French to English and English to French, it could be a relevant fact. If the other arguments presented were not based on any facts, at least no objective facts, it would have been welcome to say so.

156158 Canada inc. v. Québec (Attorney General), 2016 QCCS 1676 (CanLII)

[65] The Appellants also contended that the legislation infringed on their right to equality contrary to Section 15 of the *Canadian Charter* and Section 10 of the Québec *Charter*:

3.1 The Court of Québec judgment

[66] The trial judge first summarized the Supreme Court of Canada's analysis concerning equality rights in the *Ford* and *Devine* decisions.

[67] In *Ford*, the Supreme Court, having decided the legislation constituted a violation of freedom of expression, did not need to address the equality issue.

[68] In *Devine*, on the contrary, having concluded the legislation constituted a reasonable limit to freedom of expression, the Supreme Court had to address the equality issue. It held that the Section 1 analysis was equally applicable to Section 15 of the *Canadian Charter*, *i.e.* if the legislation was a reasonable limit to the freedom of expression, it was also a reasonable limit to the equality provisions. As for Section 10 of the Québec *Charter*, the Supreme Court decided that the equality right had to be linked to another right or freedom, in this case, the freedom of expression. Since the Supreme Court had already concluded the limitation of the freedom of expression was justifiable, the same conclusion followed, regarding the right to equality.

[69] In the present case, applying the same principle and after having concluded that the violation of the freedom of expression was justifiable under Section 1 of the *Canadian Charter* and under Sections 3 and 9.1 of the Québec *Charter*, the trial judge dismissed the equality challenge.

[70] Nonetheless, Mascia J., proceeded to examine the possible infringement on the equality rights, as did the the Court of Appeal in *Entreprises W.H.F.*

[71] *Entreprises W.H.F.* was rendered in 2001, using the Supreme Court analysis of equality rights developed in *Law v. Canada (Minister of Employment and Immigration)*.

[72] The trial judge, in the present case, analysed the case law developments on the equality rights since 2001 and applied it to the evidence heard. Specifically, he used the test later developed in *R. v. Kapp*:

- Does the law create a distinction based on an enumerated or analogous ground?

- Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[73] The trial judge answered the first question in the affirmative: language is not an enumerated ground of prohibited discrimination in Section 15 of the *Canadian Charter* but can be considered an analogous ground, particularly since it is an enumerated ground in Section 10 of the Québec *Charter*.

[74] The trial judge answered the second question in the negative. He concluded the legislation did not violate the rights to equality because the distinction did not create a disadvantage by perpetuating prejudice or stereotyping:

> [257] […] There is nothing in the stated purpose of the law – the protection and promotion of the French language – that perpetuates disadvantage and stereotyping. In promoting the French language via the signs legislation, the law does not promote prejudice or a negative image of the English community. The English merchant is allowed to advertise in his or her own language; the only constraint or obligation imposed by the law is to include in his or her commercial sign a French version that is markedly predominant – or, if we are talking about business forms, catalogues and brochures (s. 52 [of the *Charter of the French language*]), a French version which is at least equivalent to the English one. This added burden does not perpetuate a demeaning stereotype.

[75] The trial judge felt the evidence did not justify a departure from the precedent in *Entreprises W.H.F.*, even applying the more recent case law.

3.2 The ground of appeal

[76] The Appellants disagree with the trial judge because they consider the *CFL* demeans their human dignity by demanding the use of French in a joint or markedly predominant manner in commercial advertising, packaging or other publications. If the francophone population can advertise in French only, the anglophone population should be allowed to advertise in English only.

[77] This Court found no error in the trial judge's extensive analysis of the law and in the application of the principles of law to the facts of the case. There is nothing in the *CFL*, whether one analyses the purpose

or the effect of the provisions – that demeans the human dignity of the English speaking population. In any case, even if there was a violation of the equality rights, it would be justified under Section 1 of the *Canadian Charter* as already decided in the freedom of expression discussion.

[78] As for the violation of the Québec *Charter*, the right to equality must be linked to another right or freedom, in this case the freedom of expression, and the Court already concluded the limitation imposed in the *CFL* is a justifiable limitation on the freedom of expression.

[79] This ground of appeal is dismissed.

N.B. – This judgment is currently under appeal before the Quebec Court of Appeal. See also the trial judgment: Quebec (Attorney General) c. 156158 Canada Inc. (Boulangerie Maxie's), 2015 QCCQ 354 (CanLII).

R. v. Ejigu, 2016 BCSC 1487 (CanLII)

[179] I am, however, far more troubled by the evidence adduced concerning the effect of the language and cultural difficulties arising from Ms. Ejigu's ethnic background as a member of a cultural minority on her ability to meet the evidentiary burden imposed upon her under ss. 16(2) and (3) of the *Code* to establish the defence of NCRMD [Not Criminally Responsible on Account of Mental Disorder].

[180] The evidence of the three psychiatrists to which I have referred gives rise to serious concerns about the ability of a non-Amharic speaking psychiatrist to fully comprehend Ms. Ejigu's mental state at the time of the killing of Ms. Hagos because of the linguistic and cultural problems identified by each of them.

[181] The question is, however, not whether those identified obstacles to meeting the onerous burden of proof to establish NCRMD are more difficult for Ms. Ejigu than for others charged with a serious criminal offence.

[182] The question is: does that onerous burden of proof have a disproportionate effect upon her as a member of an ethnic minority who must interact with first responders, medical professionals and counsel as well as the Court through an interpreter?

[183] The issues identified by Ms. Ejigu are not uncommon in a diverse multicultural society. Courts in Canada are regularly faced with the challenges of assessing evidence that can only be received with the benefit of an interpreter.

[184] Cultural differences can also often be difficult to fully comprehend and may not be appreciated by either counsel or the Court who may also not be in a position to identify the significance of any such cultural differences in assessing evidence.

[185] The fact that linguistic and cultural differences may negatively impact a litigant's ability to present his or her case in civil matters or establish the foundation for a defence in criminal matters does not in and of itself give rise to the need for constitutional scrutiny under s. 15(1) of the *Charter*.

[186] It is only when an enactment has a disproportionate effect upon a claimant (or in the context of the criminal law — an accused person) based on his or her membership in an enumerated or analogous group that a prima facie case of a violation of s. 15(1) of the *Charter* is made out.

[187] It is, in my view obvious, that the difficulty faced by any litigant in overcoming pervasive linguistic and cultural difficulties will increase with the burden of proof they must meet to succeed on the matter in issue.

[188] That increasing difficulty does not, however, arise from disproportionate effects upon Ms. Ejigu as a member of a distinct linguistic and ethnic group.

[189] Ms. Ejigu or others like her who share the same or similar characteristics may, as a consequence of their linguistic limitations and cultural differences, face disadvantages in meeting whatever burden of proof the law may require.

[190] The fact that such disadvantage may increase with an elevated burden, as in the case with the impugned NCRMD provisions, does not arise because the law targets them directly or indirectly as members of a *Charter* protected enumerated or analogous group by increasing the burden on them as members of such a group. It arises because of the increased burden on all accused who seek to establish the defence of NCRMD.

[…]

[194] While Ms. Ejigu's linguistic difficulties and cultural idiosyncrasies may make the burden of proof under s. 16 of the *Code* more difficult for her than for another accused, I am satisfied that such increased difficulty does not elevate those personal circumstances to a violation of s. 15(1) *Charter* rights.

[195] To rule otherwise would be to call into question the fairness of virtually every criminal trial in Canada where the accused is faced with linguistic limitations or a cultural idiosyncrasy.

[196] Ms. Ejigu's submissions concerning the alleged violation of her s. 15(1) *Charter* rights arising from her linguistic and cultural disadvantages in meeting the burden of proof under s. 16 of the *Code*, also fail because the evidence relied upon by her to support those arguments does not sufficiently establish such a violation.

[…]

[206] In short, I find that while the burden upon Ms. Ejigu may be difficult to meet, neither s. 15(1) of the *Charter*, nor the fundamental principles of trial fairness support the granting of a constitutional remedy because of her linguistic difficulties or cultural idiosyncrasies.

Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764 (CanLII)

[990] Less has been said about the reasons why s. 15 claims are so rarely justified. It appears that the dearth of cases where the right to equality has been justified pursuant to s. 1 does not occur because there is any higher standard placed on governments. Rather, these cases have proven exceptionally challenging to justify on the facts of the cases due to the fundamental human interests that are engaged and the competing interests at play.

N.B. – This decision is currently under appeal before the British Columbia Court of Appeal.

Galganov v. Russell (Township), 2010 ONSC 4566 (CanLII)

[189] The applicant alleges that Russell has breached his rights to equality as guaranteed by section 15(1) of the *Charter*:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[190] Subsection 15(1) of the *Charter* is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in subsection 15(1) and analogous grounds. (*R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 S.C.R. 483 at paragraph 16)

[191] There are two reasons why the applicant's submission has no merit:

(1) language is not a prohibited enumerated or analogous ground; and

(2) subsection 16(3) of the *Charter*, which sets out:

(3) Nothing in this *Charter* limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

[192] Subsection 16(3) of the *Charter* therefore shields the By-law [which required that all new exterior commercial signs be in English and French] from attack under subsection 15(1) of the *Charter*.

[…]

[194] Subsection 15(2) of the *Charter* provides:

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[195] Subsections 15(1) and 15(2) of the *Charter* work together to promote the vision of substantive equality that underlies section 15 as a whole. (*R. v. Kapp*, *supra*, at paragraph 16). The Supreme Court of Canada explains that subsection 15(2) of the *Charter*:

... is more than a hortatory admonition. It tells us, in simple clear language, that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s. 15.

[196] Still in *Kapp*, *supra*, it is said that a by-law does not violate subsection 15(1) of the *Charter* if:

(a) it has an ameliorative or remedial purpose; and

(b) it targets a disadvantaged group identified by the enumerated or analogous grounds.

[197] The purpose of the By-law is to advance linguistic equality in Russell where a linguistically vulnerable Francophone population resides. It is ameliorative in its purpose.

[198] I conclude there is no breach of section 15(1).

Lavigne v. Quebec (Attorney General), 2000 CanLII 30033 (QC SC)

[27] Petitioner also submits that Respondent's administrative decision not to assign an English speaking attorney is discriminatory on the basis of both s. 10 of the Quebec *Charter* and s. 15 of the Canadian *Charter*. His motion does not specify which rights might be affected by this decision, but from Mr. Lavigne's pleadings we conclude that he believes himself to be discriminated against on the basis of language in the exercise of his freedom of expression.

[…]

[31] Moreover, if s. 15 of the Canadian *Charter* is to apply to the present case, a conclusion that this Court does not endorse, the analysis proposed by the Supreme Court in *Law*[17] would have to be performed and the following questions answered:

Does the impugned law impose differential treatment?

Is this difference based on one or more enumerated or analogous grounds?

> Does the law have the purpose or effect of affecting the essential dignity of the person?

[32] It is impossible to conclude that the French and English languages have a different status. Their equality is guaranteed by s. 133 of the *Constitution Act of 1867* and this Court has already concluded that these linguistic rights have been respected by relying, among others, on the words of the Honourable Beetz in *Société des Acadiens*:

> The guarantee of language equality is not, however, a guarantee that the official language used will be understood by the person to whom the pleading or process is addressed.

[33] A person speaking language (sic) other than one of the official languages of Canada could not successfully argue that he is being discriminated against before the Courts because he can't express himself in his own language. Section 15 of the *Canadian Charter* does not add to the linguistic rights recognised by s. 133.

[34] Would Mr. Lavigne be subjected to different treatment under the law because the services of an interpreter are required to ensure that his linguistic rights are protected? The Supreme Court has answered this question negatively in *Mercure* by relying on the majority's opinion in *Société des Acadiens du Nouveau-Brunswick*.

R. v. Rodrigue, 1994 CanLII 5249 (YK SC)

[36] […] In my opinion, the fact that counsel for the accused cannot obtain a French language version of the disclosed evidence does not constitute a violation of section 15. Section 15 should not be used to establish a legal right in judicial proceedings to favour the use of one or the other official language, particularly when one considers the specific and limited content of section 19 of the *Charter*, which specifically addresses linguistic rights in legal proceedings. […]

N.B. – The appeal of this judgment was dismissed on other grounds by the Yukon Court of Appeal and the application for leave to appeal to the Supreme Court of Canada was dismissed.

Commission des Ecoles Fransaskoises Inc. et al. v. Saskatchewan, 1988 CanLII 5128 (SK QB)

[45] A final argument mounted on behalf of the plaintiffs evolves from section 15(1) of the *Charter*. It is said that the equality provisions of that section are being transgressed because the children of section 23 parents are not receiving the same educational services as are available to the majority. In my opinion, section 15(1) has no practical application in the context of this action. The question here is whether section 23 parents residing in the Province of Saskatchewan are being afforded their full complement of guaranteed rights. If they are, then no issue involving section 15(1) arises. If they are not, any available remedy would flow from a breach of section 23, not section 15(1).

Cockburn v. YMCAs Across Southwestern Ontario, 2017 HRTO 267 (CanLII)

[3] The Tribunal found that the Respondent did not discriminate against the Applicant, who is Deaf, when it refused his request to provide an ASL [American Sign Language] interpreter at its own expense for a meeting between the Applicant and a YMCA Wellness Coordinator. The purpose of the meeting was to discuss a revised exercise plan for the Applicant following surgery to his shoulder.

[…]

[21] In *Eldridge*, the Supreme Court of Canada considered whether or not the failure of the B.C. government to provide funding for sign language interpreters for Deaf persons receiving medical services violated s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The Court concluded that where sign language interpretation was necessary for effective communication to access health care services that the denial of such funding was a violation of the Charter.

[22] The Applicant argues that his efforts to meet with the Respondent's Wellness Coordinator to discuss a revised exercise plan was equivalent to accessing health services.

[23] The decision in *Eldridge* involves the application of the *Charter* to a Government entity and the rights of Deaf persons to an interpreter when assessing services provided by such entity. I do not believe this decision stands for the proposition that similar *Charter* rights and obligations apply to private organizations such as the YMCA.

[24] Moreover, it is important to note that the decision in *Eldridge* does not provide an absolute right to sign language services. As stated at paragraph 82 of that decision, the Court held:

> This is not to say that sign language interpretation will have to be provided in every medical situation. The "effective communication" standard is a flexible one, and will take into consideration such factors as the complexity and importance of the information to be communicated, the context in which the communications will take place and the number of people involved; see 28 C.F.R. § 35.160 (1997). For deaf persons with limited literacy skills, however, it is probably fair to surmise that sign language interpretation will be required in most cases…

[25] There was no evidence put forward at the Tribunal hearing to suggest that the Applicant had limited literacy skills. To the contrary, an evidentiary finding was made in the Tribunal's Decision that the Applicant was able to effectively communicate in written form, as evidenced by his previous correspondence with the Respondent.

[26] I respectfully disagree with the proposition that the Applicant's request to meet with a Wellness Coordinator was tantamount to accessing health care services. The YMCA is not a health care provider. The role of the Wellness Coordinator is to assist clients meet their exercise goals. They are not health care practitioners.

SEE ALSO:

Reference re Public Schools Act (Man.), s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, 1993 CanLII 119 (SCC)

R. v. Turpin, [1989] 1 S.C.R. 1296, 1989 CanLII 98 (SCC)

Ford v. Québec (Attorney General), [1988] 2 S.C.R. 712, 1988 CanLII 19 (SCC)

Forget v. Quebec (Attorney General), [1988] 2 S.C.R. 90, 1988 CanLII 51 (SCC)

R. v. Schneider, 2004 NSCA 151 (CanLII)

R. v. Simard, [1995] O.J. No. 3989, 27 O.R. (3d) 116 (ON CA) [hyperlink not available]

Paquette v. Canada, 1987 ABCA 228 (CanLII)

Poulin v. Canada (Attorney General), 2004 FC 1132 (CanLII)

Berezoutskaia v. British Columbia Human Rights Tribunal, 2005 BCSC 1170 (CanLII)

R. v. Pare, 1986 CanLII 1189 (BC SC)

R. c. Tremblay, 1985 CanLII 2711 (SK QB)

R. v. Breton (1995), 28 W.C.B (2nd) 525 (YK TC) [hyperlink not available]

Fretz v. BDO Canada LLP, 2015 HRTO 194 (CanLII)

Ndem v. General Accident Assurance Co. of Canada, [2000] O.F.S.C.I.D. No. 83 [hyperlink not available]

N.B. – This list is not exhaustive due to the great volume of decisions relating to s. 15 of the *Canadian Charter* and linguistic issues.

Official Languages of Canada (sections 16-22)

16. (1) Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

16. (2) Official languages of New Brunswick

16. (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

16. (3) Advancement of status and use

16. (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

[LAST UPDATE: JUNE 2017]

ANNOTATIONS – GENERAL

R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

[22] The *Official Languages Act* of 1988 and s. 530.1 of the *Criminal Code*, which was adopted as a related amendment by s. 94 of the same *Official Languages Act*, constitute an example of the advancement of language rights through legislative means provided for in s. 16(3) of the *Charter*; see *Simard*, *supra*, at pp. 124-25. The principle of advancement does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada. It does not limit the scope of s. 2 of the *Official Languages Act*. Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. Parliament and the provincial legislatures were well aware of this when they reacted to the trilogy (*House of Commons Debates*, vol. IX, 1st sess., 33rd Parl., May 6, 1986, at p. 12999) and accepted that the 1988 provisions would be promulgated through transitional mechanisms and accompanied by financial assistance directed at providing the required institutional services.

[…]

[24] […] The idea that s. 16(3) of the *Charter*, which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the *Jones* case, supra, limits the scope of s.

16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time. Section 2 of the *Official Languages Act* has the same effect with regard to rights recognized under that Act. […]

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

[123] As discussed at para. 60, official language statutes are interpreted by using *Charter* principles. The underlying principle is the protection of minorities: see *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 2001 CanLII 21164 (ON CA), 56 O.R. (3d) 505, 208 D.L.R. (4th) 577 at para. 125 (C.A.) ("*Lalonde*") and *Kilrich Industries Ltd. v. Halotier*, 2007 YKCA 12 (CanLII), 161 C.R.R. (2d) 331 at para. 53 ("*Halotier*"). The trial judge applied principles from language rights jurisprudence, especially Beaulac where the Supreme Court confirmed, at para. 22, that substantive equality is the correct norm. We agree with the COLC [Commissioner of Official Languages for Canada] that substantive equality is the result envisaged by the legislature in enacting s. 16 of the *Charter* and ss. 4 and 5 of the *OLA*. Accordingly, the trial judge's use of the expression "obligations of result", was appropriate and supported by *Beaulac*.

R. v. Schneider, 2004 NSCA 151 (CanLII)

[19] The conclusion reached in *MacKenzie* was that a breach of s. 530 of the [*Criminal*] *Code* did not violate either s. 15 or s. 16 of the *Charter*. Language is neither a listed category nor an analogous ground of discrimination in Section 15. Section 16 only applies to "institutions of the Parliament and government of Canada" which does not include the Provincial Court of Nova Scotia. The language guarantees of s. 16(1) of the *Charter* do not apply to proceedings in the Provincial Court and s. 16(3) has not constitutionalized s. 530 of the *Code*. It is not necessary to repeat the analysis here. For the reasons given in MacKenzie, this ground of the Crown's appeal is allowed. There was no breach of Ms. Schneider's constitutional rights.

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[69] As can be seen, prior to *Beaulac*, the members of the Supreme Court mainly attempted to articulate the principles of interpretation applicable to section 16 of the *Charter* and its purpose, but did not really discuss to any extent its content and scope. However, it must be acknowledged that these same issues relating, first, to the equality of official languages declared in section 2 of the *Official Languages Act* (Canada), R.S.C. 1970, c. O-2, which would be the forerunner of section 16, and then, to the scope of section 16 itself, have been hotly debated in several books and law reviews. Two main theories have been debated: Are the provisions of section 16 declaratory or mandatory? Do they have an independent content that by itself would give rise to a remedy on the ground that equality has not been attained and do they impose obligations on governments? Given the significant new direction in the jurisprudence set out in Beaulac, I do not think it is necessary to revisit the debate. (See B. Pelletier, "Bilan des droits linguistiques au Canada" (1995) 55: 4 *R. du B.* 611; Tremblay, "Language Rights" in Beaudoin and Tarnopolsky (ed.), *Canadian Charter of Rights and Freedoms* (1982), Montreal, Wilson & Lafleur, 559; A. Braën, "Language Rights" in M. Bastarache (ed.), *Language Rights in Canada*, Yvon Blais, Montreal, 1986; and M. Bastarache, "The Principle of Equality of the Official Languages" in M. Bastarache (ed.) *Language Rights in Canada*, Yvon Blais, Montreal, 1986, page 519, particularly at page 524.) In my opinion, the Supreme Court has answered most of these questions by fleshing out the content of the principle of equality provided for in section 16 setting substantive equality as the applicable constitutional norm, and by recognizing the binding effect of this provision according to which language rights that are institutionally based require government action for their implementation and therefore create obligations for the State.

LaRoque v. Société Radio-Canada, 2009 CanLII 35736 (ON SC)

[1] Representatives from two of the then most powerful countries in the world landed on the shores of Canada and moved inland to settle. The ethos, language and perspective of these two countries, France and England, exist even today intermingled with each other and the ever-increasing introduction of other cultures, languages and perspectives of immigrants from all over the world. And therein lies the strength

of this country -- the voluntary acceptance of its obligation to strengthen the foundation of tolerance and respect and support for the cultural and linguistic diversity of its people upon which it was originally built.

[2] The significance of the two founding cultures of which language is only a part has been enshrined in the *Canadian Charter of Rights and Freedoms*, s. 16, wherein English and French are declared to be the official languages of Canada that have equality of status, rights and privileges with respect to their use in all institutions of the Canadian Parliament and the Government of Canada.

R. v. Larcher (September 19 2002), Ontario (ON SC) Lalonde J. [hyperlink not available]

[62] Section 16 of the *Charter* does not apply to the Crown's duty to disclose, as this obligation originated in the *common law* and not as a form of legislative intervention. I agree with Crown counsel that language equality rights protected by s. 16 are to be read in legislative intent and not in the principles of the *common law*. […]

ANNOTATIONS – SUBSECTION 16(1)

R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

[24] […] The idea that s. 16(3) of the *Charter*, which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the *Jones* case, *supra*, limits the scope of s. 16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time. Section 2 of the *Official Languages Act* has the same effect with regard to rights recognized under that Act. This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State; see *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229, at p. 412; *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at p. 1038; *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, at para. 73; *Mahe*, *supra*, at p. 365. It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation. This being said, I note that this case is not concerned with the possibility that constitutionally based language rights may conflict with some specific statutory rights.

R. v. Mercure, [1988] 1 S.C.R. 234, 1988 CanLII 107 (SCC)

[44] If human rights legislation can be said to be fundamental or almost constitutional, it is at least equally true of the legislation [*Saskatchewan Act*, S.C. 1905] at issue here; for many years it was entrenched, so far as the inhabitants of the area to which it applied were concerned, since it could only be removed by Parliament, not the local legislature, something, it will be remembered, Parliament had refused to do. It formed part of the basic law of a vast area of this country from the earliest days of the founding of the nation and is rooted in a deeply sensitive reality recognized in the *Canadian Charter of Rights and Freedoms*, which, among our fundamental constitutional values, sets forth that English and French are the official languages of this country (s. 16(1)).

Yamba v. Canada (Minister of Justice), 2016 BCCA 219 (CanLII)

[18] Mr. Yamba takes the position that the right to a French trial provided for in s. 530 of the *Criminal Code*, combined with the official language rights in s. 16 of the *Charter*, elevates the right to a French trial in Canada to the equivalent of a constitutional right. Mr. Yamba argues that the Minister's conclusion that access to a certified translator will address concerns regarding trial fairness in the United States does not give "due consideration" to the language rights Mr. Yamba has in Canada.

[…]

[21] To begin, it is not at all clear that the right to a trial in one of our two official languages, provided for in s. 530 of the *Criminal Code*, is the equivalent of a constitutional right. Although, by virtue of s. 16(1) of

the Charter, English and French are the "official languages of Canada", the *Charter* right to use either language in court proceedings extends only to the courts of New Brunswick and those established by Parliament (Charter, s. 19). In *R. v. MacKenzie*, 2004 NSCA 10 (CanLII), 181 C.C.C. (3d) 485, leave to appeal ref'd [2005] 1 S.C.R. xii, the court held that a breach of the rights established under s. 530 did not give rise to a constitutional remedy. Mr. Justice Fichaud said:

> [60] The quasi-constitutional status of s. 530 invokes a broad and purposive interpretation of the statutory language. But s. 530 is not entrenched as a provision of the *Charter*. Its breach does not invoke s. 24(1) of the *Charter*.

See also: *R. v. Schneider*, 2004 NSCA 151 (CanLII) at para. 19, 192 C.C.C. (3d) 1, leave to appeal ref'd [2005] 2 S.C.R. xi.

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

[39] Briefly, s. 16(1) of the *Charter* is reflected in ss. 4 and 5 of the *OLA* [Northwest Territories *Official Languages Act*]. Presumably, the reason the *OLA* has two sections, whereas the *Charter* only has one, is the limiting language of s. 5 of the *OLA*: "to the extent and in the manner provided in this Act". This phrase permits the *OLA* to treat Aboriginal languages differently than English and French.

[…]

[123] As discussed at para. 60, official language statutes are interpreted by using *Charter* principles. The underlying principle is the protection of minorities: see *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 2001 CanLII 21164 (ON CA), 56 O.R. (3d) 505, 208 D.L.R. (4th) 577 at para. 125 (C.A.) ("*Lalonde*") and *Kilrich Industries Ltd. v. Halotier*, 2007 YKCA 12 (CanLII), 161 C.R.R. (2d) 331 at para. 53 ("*Halotier*"). The trial judge applied principles from language rights jurisprudence, especially *Beaulac* where the Supreme Court confirmed, at para. 22, that substantive equality is the correct norm. We agree with the COLC [Commissioner of Official Languages of Canada] that substantive equality is the result envisaged by the legislature in enacting s. 16 of the *Charter* and ss. 4 and 5 of the *OLA*. Accordingly, the trial judge's use of the expression "obligations of result", was appropriate and supported by *Beaulac*.

R. v. MacKenzie, 2004 NSCA 10 (CanLII)

[42] Section 16(1) applies only to "institutions of the Parliament and government of Canada."

[43] The provincial Court of Nova Scotia is not an institution of Parliament. It is established by the Nova Scotia Legislature as discussed above. That the Provincial Court applies the *Criminal Code* does not change this conclusion. The provincial Court also applies legislation creating provincial offences.

[…]

[46] The express reference to the institutions of New Brunswick in s. 16(2) confirms that "institutions of the Parliament and government of Canada" in ss. 16(1) excludes provincial institutions: see *Moncton (City) v. Charlebois*, [2001] N.B.J. No. 480 (QL) (NBCA) at para 59. There is no constitutional reference to Nova Scotia institutions equivalent to s. 16(2).

[…]

[48] Justice Bastarache stated [in *Beaulac*] that s. 16(1) affirms the substantive equality of "constitutional language rights". The constitutional language rights guaranteed by s. 16(1) apply to "institutions of Parliament and Government of Canada". The Provincial Court of Nova Scotia is not such an institution.

[49] In my view, the language guarantees of s. 16(1) did not apply to the Provincial Court's arraignment and trial of Ms. MacKenzie. There was no breach of s. 16(1).

Canada v. Viola, 1990 CarswellNat 118F, 1990 CarswellNat 118, [1990] F.C.J. No. 1052 (FCA) [hyperlink not available]

The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in s. 16(1) and (3) of the *Canadian Charter of Rights and Freedoms*, it follows the rules of interpretation of that *Charter* as they have been defined by the Supreme Court of Canada. […]

Ringuette v. Canada (Attorney General), 1987 CanLII 3953 (NL CA)

[31] There can be no doubt as to the importance of English and French language rights in Canada. The legislative scheme for the progressive implementation of English and French language rights in criminal proceedings in the provinces of Canada, as set out in Part XIV.1 of the *Criminal Code* and s. 6 of the *Criminal Law Amendment Act*, 1985, advances the equality of status or use of English and French in Canada and is the type of program contemplated, and one might say, encouraged by s. 16 (3) of the *Charter*: […]

Association des Gens de L'Air du Quebec Inc. et al. v. Lang et al., 1978 CanLII 2029 (FCA)

[p. 499] Appellants argue that the [*Aeronautical Communications Standards and Procedures*] Order issued by the Minister of Transport is illegal because it is contrary to the *Official Languages Act* [of 1969], which came into force on September 7, 1969. The main thrust of their argument on this point is easily summarized. Section 2 of the *Official Languages Act* states that the French and English languages possess and enjoy equality of status in Canada; the Order contradicts this principle by prohibiting the use of French in certain cases and not prohibiting the use of English. The two languages do not possess and enjoy equality of status, say appellants, if one of them may be spoken in situations where use of the other constitutes a criminal offence.

[…]

[p. 500] […] The concept of an "official language" is rather a vague one. It refers to the language used by the Government in its relations with the public. To say that French and English are official languages is simply to state that these two languages are those which are normally used in communications between the government and its citizens. In my view the impugned Order does not contradict the first part of section 2 of the *Official Languages Act* because, as I have already said, a language may be an official language in a country even though, for safety reasons, its use is prohibited in certain exceptional circumstances. […] In this connection it should be noted that the equality proclaimed by s. 2 cannot be an absolute equality, since this would imply, among other things, that the two languages were used with equal frequency. The equality referred to is, as I understand it, a relative equality requiring only that, in identical circumstances, the two languages receive the same treatment. If, as some people maintain, it was more dangerous to use French than English for air communications in Canada and Quebec, it seems to me that the use of French for this type of communication could be prohibited without contradicting the principle of equality enshrined in s. 2. The fact that it was more dangerous to speak French in the air than English would be a circumstance that would justify treating the two languages differently. For these reasons, I do not think the impugned Order is contrary to s. 2 of the *Official Languages Act* solely on the grounds that it prohibits the use of French and allows the use of English.

[p.501] […] I cannot believe that in proclaiming the equality of French and English "in all the institutions of the Parliament and Government of Canada" Parliament intended to limit the power of the Minister of Transport to issue regulations that he deemed necessary to ensure the safety of air navigation.

Doucet v. Canada, [2005] 1 F.C.R. 671, 2004 FC 1444 (CanLII)

[79] It seems clear to the Court as well that equal access to services in both official languages means equal treatment. In my opinion, the procedure established by the RCMP, described by Staff Sgt. Hastey, is totally inadequate for the Fraqncophone (sic) minority driving in the Amherst area. Motorists should not have to go out of their way or use a telephone or radio when they want to address a member of the

RCMP in French. Such a service, which leaves much to be desired, absolutely fails to meet the objectives stated in section 2 of the *OLA* and is contrary to section 16 of the *Charter*, which recognizes the equality of both official languages.

Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001 FCT 239 (CanLII)

[68] This case may be summarized as follows. By an oral agreement, the federal government delegated its powers under the *CA* [*Contraventions Act*] to the Government of Ontario. In so doing, the federal government did not include a clause guaranteeing the language rights of offenders prosecuted under the *CA*. Formerly, language rights were protected by sections 530 and 530.1 of the *Criminal Code* and section 16 of the *Charter*, with respect to the "judicial" aspect of prosecutions, and by Part IV of the *OLA* and section 20 of the *Charter*, with respect to the "administrative" or "extra-judicial" aspect of prosecutions.

[112] […] Under the *Charter*, the respondents are required to ensure that language rights are respected. Before the *CA* was enacted, the respondents were required to maintain equality in respect of the language rights guaranteed by the *Charter* and provided in the *OLA* and the *Criminal Code*. The respondents cannot limit constitutional language rights by enacting legislation transferring the administration of certain prosecutions to the provinces. If the respondents fail to respect the rights guaranteed in the *Charter* in enacting and applying the *CA*, they are in violation of the *Charter*. […]

[151] With respect to the judicial processing of prosecutions for federal contraventions, the language guarantees in section 16 of the *Charter* were protected, before the amendments to the *CA*, by the effect of sections 530 and 530.1 of the *Criminal Code*.

Schreiber v. Canada, 1999 CanLII 8898 (FC TD)

[122] Given the constitutional entrenchment of the language rights in subsections 16(1) and 20(1) of the *Charter*, the amendments to the *Official Languages Act* and the recent guidance from the Supreme Court of Canada in *Beaulac v. The Queen, supra*, concerning the principles to be applied in interpreting the scope and the application of language rights, I am of the opinion that the decision of Dickson J. in *Kelso v. The Queen*, *supra* is not determinative of whether Mr. Schreiber is entitled, in today's constitutional and legislative framework, to a declaration that his rights were breached. In particular, at the time *Kelso v. The Queen*, *supra*, was decided, the languages rights in question were not constitutionally entrenched and the *Official Languages Act* did not contain a provision analogous to section 82 which asserts the primacy of certain Parts of the Act, including Parts IV and V pertaining to communications with and services to the public and the language of work, to the extent of inconsistency between them and any other Act or Regulation. […] Furthermore, his decision was rendered prior to the proclamation of the *Charter*, which guaranteed in subsections 16(1) and 20(1) the equality of English and French as the official languages of Canada and the right of members of the public to communicate with and receive services in either official language from federal institutions. In the circumstances, the constitutional and legislative changes implemented following the decision in *Kelso v. The Queen*, *supra*, are significant and, in my respectful opinion, render obsolete the interpretative approach adopted by Dickson J.

[…]

[125] From a constitutional perspective, the language rights entrenched in subsections 16(1) and 20(1) of the *Charter* are engaged in the present proceeding. With respect to the *Official Languages Act*, the language rights in issue are the section 21 right to communicate with and to receive services from a federal institution and the section 34 right that English and French are the languages of work in all federal institutions, with employees having the right to use either official language in accordance with the provisions in Part V. The language rights in sections 21 and 34 of the *Official Languages Act* mirror the rights guaranteed respectively in subsections 20(1) and 16(1) of the *Charter*. The corresponding duties imposed on federal institutions in sections 22, 35 and 36 of the *Official Languages Act* are also relevant.

N.B. – This judgment was confirmed on appeal: Schreiber v. Canada, 2000 CanLII 16703 (FCA).

St. Jean v. R., 1986 CarswellYukon 10, [1986] Y.J. No. 76, [1987] N.W.T.R. 118, 2 Y.R. 116 (NWT YK SC) [hyperlink not available]

[33] The framers of s. 16(1) and s. 18(1) of the *Charter*, as well as s. 19(1), cannot have contemplated the inclusion of the Yukon Territory, or its government or legislature, in these sections, and the purposeful silence of the *Charter* must be respected. Moreover, the *Charter* goes so far as to equate the Yukon Territory with the other provinces of Canada in s. 30, in order to specifically make operative, in the Yukon Territory, those Charter sections which apply in all provinces of Canada, even where linguistic rights do not apply.

SEE ALSO:

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 1986 CanLII 65 (SCC)

Patanguli v. Canada (Citizenship and Immigration), 2015 FCA 291 (CanLII)

McDonnell v. Fed. des Franco-Colombiens, 1986 CanLII 927 (BC CA)

R. v. Car-Fre Transport Ltd., 2015 ABPC 280 (CanLII) [judgment available in French only]

Poulin v. Canada (Attorney General), 2004 FC 1132 (CanLII)

ANNOTATIONS – SUBSECTION 16(2)

Charlebois v. Saint John (City), [2005] 3 S.C.R. 563, 2005 SCC 74 (CanLII)

[13] In its preamble, the *OLA* [New Brunswick *Official Languages Act*] proclaims the purposes of the *Act* are expressly tied to the language guarantees and obligations enshrined in the Canadian Constitution. There is no dispute that the *OLA* is the province's legislative response to its obligations under the *Canadian Charter of Rights and Freedoms* in relation to institutional bilingualism in New Brunswick. For ease of reference, I reproduce here the *Charter* provisions on official languages that specifically target the province of New Brunswick: […]

[15] Bastarache J. finds that it would have been more appropriate for the New Brunswick Court of Appeal in this case "to take a positive stance and see whether it was necessary to limit the scope of the newly defined term in light of the difficulties posed by the drafting of the *OLA*" (para. 32 (emphasis added)). I disagree. First, it is noteworthy that *Charlebois v. Moncton* dealt with s. 18(2) of the *Charter*; hence, the court's finding that municipalities are "institutions" for the purpose of s. 16(2) is *obiter dictum*. The question as to whether municipalities are institutions within the meaning of s. 16(2) has never been determined by this Court, it is not before us on this appeal, and I express no opinion on whether or not this interpretation is correct. Second, it is also noteworthy that the province's constitutional obligations, even as defined in *Charlebois v. Moncton*, do not mandate a single specific solution. As aptly noted by the court in the above-noted excerpt, there is room for flexibility. The current *OLA* is the province's legislative response to its constitutional obligations. It would be inappropriate to pre-empt the analysis with a blanket presumption of *Charter* consistency. Daigle J.A. therefore was quite correct in pursuing the analysis. This brings us back to the question of statutory interpretation that occupies us: what approach did the province of New Brunswick adopt in respect of its municipalities to meet its constitutional obligations?

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[16] As we have seen, the appellant challenges the validity of City of Moncton by-law Z-4 on the ground that the City Council did not meet its constitutional obligation under subsection 18(2) of the *Charter* to enact, print and publish its by-laws in the two official languages of the province. He relies on subsections

16(2) and 18(2) as well as section 16.1 of the *Charter* and submits that the City of Moncton's failure to comply with its constitutional obligation can only result in the invalidity of city by-law Z-4.

[17] This is the first case in which this Court is called upon to construe language rights set out in subsections 16(2) and 18(2) and section 16.1 of the *Charter*. With the exception of minority language educational rights guaranteed under section 23 of the *Charter*, the courts have rarely had to interpret language rights. The issue of invalidity raised by the appellant in this case requires a review of the content and scope of the language rights invoked, in particular, the meaning that should be given to subsection 18(2) and the determination of the larger objects of the rights which stem from subsection 16(2) and section 16.1 of the *Charter*.

[…]

[62] One cannot understand the scope of the language guarantees afforded by the *Charter* without taking into account the fundamental principle which embodies both the language policy implemented in New Brunswick and the commitment of the government to bilingualism and biculturalism. The constitutional principle of the equality of official languages and the equality of the two official linguistic communities and of their right to distinct institutions is the linchpin of New Brunswick's language guarantees regime.

[63] Indeed, subsection 16(2) constitutionalizes the principle of the equality of status of English and French and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick. Subsection 16(3) states that nothing in the *Charter* limits the authority of the Parliament of Canada or a provincial legislature to adopt measures to advance the equality of status or use of English and French. Even though this provision does not impose a positive obligation on the Parliament of Canada or the provinces, it nonetheless recognizes the possibility for the lawmaker to create language rights other than those entrenched in the *Charter*. Finally, subsection 16.1(1) declares, on the one hand, that the English linguistic community and the French linguistic community have equality of status and equal rights and privileges and, on the other hand, that they have the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities. Subsection 16.1(2) recognizes the role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection 16.1(1). In short, this section constitutionalizes the principles of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, *supra*. The equality provided under section 16.1 is based, not on the equality of the languages as provided for in subsection 16(2), but on the equality of New Brunswick's English linguistic community and French linguistic community. Unlike subsection 16(2), this provision therefore includes collective rights whose holders are the linguistic communities themselves.

[64] Before a further exploration of the content and scope of these provisions, it is useful to review how previous Supreme Court cases have interpreted the principle of the equality of official languages under section 16 of the *Charter*. It is important to remember that in this case the appellant invokes the principle of the equality of official languages provided for in subsection 16(2) not only to advocate a broad and generous interpretation of the expression “statutes of the legislature” used in subsection 18(2), but also to impose on the provincial government an obligation to legislate to give full force and effect to the obligation of municipalities to enact and publish their by-laws in the two official languages.

[…]

[69] As can be seen, prior to *Beaulac*, the members of the Supreme Court mainly attempted to articulate the principles of interpretation applicable to section 16 of the *Charter* and its purpose, but did not really discuss to any extent its content and scope. However, it must be acknowledged that these same issues relating, first, to the equality of official languages declared in section 2 of the *Official Languages Act* (Canada), R.S.C. 1970, c. O-2, which would be the forerunner of section 16, and then, to the scope of section 16 itself, have been hotly debated in several books and law reviews. Two main theories have been debated: Are the provisions of section 16 declaratory or mandatory? Do they have an independent content that by itself would give rise to a remedy on the ground that equality has not been attained and do

they impose obligations on governments? Given the significant new direction in the jurisprudence set out in Beaulac, I do not think it is necessary to revisit the debate. (See B. Pelletier, “Bilan des droits linguistiques au Canada” (1995) 55: 4 *R. du B.* 611; Tremblay, “Language Rights” in Beaudoin and Tarnopolsky (ed.), *Canadian Charter of Rights and Freedoms* (1982), Montreal, Wilson & Lafleur, 559; A. Braën, “Language Rights” in M. Bastarache (ed.), *Language Rights in Canada*, Yvon Blais, Montreal, 1986; and M. Bastarache, “The Principle of Equality of the Official Languages” in M. Bastarache (ed.) *Language Rights in Canada*, Yvon Blais, Montreal, 1986, page 519, particularly at page 524.) In my opinion, the Supreme Court has answered most of these questions by fleshing out the content of the principle of equality provided for in section 16 setting substantive equality as the applicable constitutional norm, and by recognizing the binding effect of this provision according to which language rights that are institutionally based require government action for their implementation and therefore create obligations for the State.

[…]

[76] Based on the foregoing analysis of *Beaulac* and its impact on some of the conclusions set out in the majority judgment in *Société des Acadiens*, we can make the following main observations. First, equality does not have a lesser meaning in matters of language. The principle of equality entrenched in subsection 16(2) must be interpreted according to its true meaning, *i.e.*, substantive equality is the applicable norm. Substantive equality means that language rights that are institutionally based require government action for their implementation and therefore create obligations for the government.

[77] Secondly, in re-examining certain conclusions set out in *Société des Acadiens*, the Supreme Court significantly watered down the principle that judicial restraint should be exercised due solely to the fact that language rights may result from political compromise by asserting that the existence of such political compromises is without consequence with regard to the scope of language rights. In addition, the Court flatly disavowed and rejected the idea that subsection 16(3) limits the scope of subsection 16(2) equality rights because it contemplates the advancement towards equality of official languages through the legislative process. Finally, the Supreme Court expressly rejected the notion that language rights must be interpreted restrictively if *Société des Acadiens* stands for such a proposition. On the contrary, the Court established as a rule of construction that language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.

[…]

[105] In *R. v. Gautreau* (1990), (1990), 101 N.B.R. (2d) 1, Richard, C.J. of the Court of Queen's Bench held that the provincial police force was an institution within the meaning of subsections 16(2) and 20(2) of the *Charter*. He relied on a passage from an article by Foucher and Snow in which they propose an approach and tests for determining whether an entity is an institution of the legislature or government within the meaning of subsection 16(2). Among these criteria, they suggest that the entity must be “a creation of the state and must owe its very existence to a public Act” and that “the prime factor remains the legal source of its powers”. (See: “Le régime juridique des langues dans l'administration publique au Nouveau-Brunswick” (1983), 24 *C. de D.* 81.) In my opinion, the criteria proposed by Foucher and Snow are essentially the same as those retained by La Forest, J. in *Godbout*.

[106] Based on the foregoing analysis, I conclude that New Brunswick municipalities are subject to the *Charter* and, as a result, the acts of the City of Moncton, in this case, its failure to comply with the obligation provided for in subsection 18(2), is subject to a *Charter* review. In short, municipalities in New Brunswick are creations of the province, exercise governmental powers conferred upon them by the legislature or government, and derive all their powers from statute. They must also act within the limitations imposed by their enabling statute and their functions are clearly governmental in nature.

[107] Applying the same criteria used to identify the structures or functions of governmental entities within the meaning of paragraph 32(1)(b) to the expression “institutions of the legislature and government” as used in subsection 16(2), I believe that the scope of this latter expression can be determined on the basis of these same parameters. On the basis of a broad, generous and purposive interpretation of subsection

16(2), I conclude, on the grounds already stated, that municipalities are "institutions of the legislature and government of New Brunswick" within the meaning of subsection 16(2) of the *Charter*.

N.B. – See the Supreme Court of Canada's comments in Charlebois v. Saint John (City), [2005] 3 S.C.R. 563, 2005 SCC 74 (CanLII) at para 15 on this judgment.

International Association of Fire Fighters (IAFF), Local 999 v. Moncton (City), 2017 CanLII 20335 (NB LA)

[119] The Employer's legal counsel devoted a significant amount of his argument to the proposition that the City, a municipal corporation, is an "institution" within the meaning of section 16(2) of the *Charter*, and is thus bound by this provision. An arbitration board's jurisdiction to consider such issues are no longer in doubt as a result of *Weber vs. Ontario Hydro* 1995 CanLII 108 (SCC), [1995] 2 SCR 929 (see also *Brown & Beatty*, par 2:2051)

[…]

[121] If it is determined that the City is bound by section 16(2), is it then obligated by section 20(2) of the *Charter* to provide services in both official languages? The provision states:

> 20(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French. (emphasis added)

[122] To provide these linguistic services the City must realistically require certain employees to be bilingual. It is indeed the Employer's position that not only must an AFPO [Assistant Fire Prevention Officer] be bilingual, in fact all front line employees of the MFD [Moncton Fire Department] should be so as well.

[…]

[129] The *Mowat* interpretation of the word "institution" was distinguished by the New Brunswick Court of Appeal in the 2007 decision of *R. vs. McGraw*, 2007 NBCA 11 (CanLII), 312 NBR (2d) 142, where the Court indicated that the state of the law on this issue was unsettled.

[130] It is accepted that where a court shares jurisdiction to interpret statutes, including the *Charter*, prior judicial decisions as to the meaning of such legislation or other propositions of applicable law are accepted as binding (see *Brown & Beatty*, par 1:3000). The difficulty encountered by the Board with the Employer's submissions is that the interpretation of the word "institution", as found in the *Charter*, has been considered obiter dicta in subsequent court decisions at the same or higher level. Mr Justice Daigle in Saint John had an opportunity to explain his comments in *Mowat* but broached the issue from a different perspective.

[131] The Board finds as a result that it is not faced with an accepted and binding interpretation of the Courts of New Brunswick that municipalities are indeed institutions within the meaning of section 16(2) of the *Charter*. In addition, it does not find it a reasonable construct that all municipalities in New Brunswick, irrespective of its linguistic composition, are currently obligated to provide municipal services in both official languages by virtue of the *Charter* provisions. The decision certainly does not compel it to carve out either the MFD or its fire prevention services.

[132] We adopt the comments of Madame Justice Charron, that the *OLA* is the current response of the Province of New Brunswick to its constitutional obligations. Removing these elements from the Employer's Charter theory renders any derivative premise that the City is bound to provide both linguistic services to its residents by virtue of section 16(2) or section 20(2) of the *Charter* non-imperative. We turn now to the City's internal response. […]

SEE ALSO:

Charlebois v. Town of Riverview and Attorney General of New Brunswick, 2015 NBCA 45 (CanLII)

Charlebois v. Town of Riverview, 2014 CanLII 68479 (NB CA)

Charlebois v. Moncton (Ville), 2000 CanLII 26893 (NB CA) [judgment available in French only]

ANNOTATIONS – SUBSECTION 16(3)

Conseil scolaire francophone de la Colombie-Britannique v. British Columbia, [2013] 2 S.C.R. 774, 2013 SCC 42 (CanLII)

[55] Finally, the appellants urge this Court to adopt an approach to these issues based on *Charter* values and constitutional principles. The appellants argue that the *Charter* requires that legislation, including received legislation, be interpreted in a manner consistent with *Charter* values. The Court has of course repeatedly noted the role that *Charter* values play in the evolution of the common law and in statutory interpretation: *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573; *R. v. Zundel*, 1992 CanLII 75 (SCC), [1992] 2 S.C.R. 731; *R. v. National Post*, 2010 SCC 16 (CanLII), [2010] 1 S.C.R. 477. The *Charter* explicitly provides that English and French are the official languages of Canada: s. 16. The Court has also recognized the important role of linguistic minorities in Canada: *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 79.

[56] However, the *Charter* also reflects a recognition that Canada is a federation and that each province has a role to play in the protection and advancement of the country's official languages. This is evident from ss. 16 to 20, which require bilingualism in the federal government, in Parliament, in courts established by Parliament, and in the province of New Brunswick. The *Charter* does not require any province other than New Brunswick to provide for court proceedings in both official languages. In addition, s. 16(3) provides that the legislatures may act to advance the use of English and French. In my view, therefore, while it is true that the *Charter* reflects the importance of language rights, it also reflects the importance of respect for the constitutional powers of the provinces. Federalism is one of Canada's underlying constitutional principles: *Reference re Secession of Quebec*, at paras. 55-60. Thus, it is not inconsistent with *Charter* values for the British Columbia legislature to restrict the language of court proceedings in the province to English.

[57] This being said, in light of s. 16(3) of the *Charter*, which specifically provides that provincial legislatures may advance the equality of status of English and French, it would be open to the British Columbia legislature to enact legislation, like that proposed in 1971, to authorize civil proceedings in French. Such legislation would no doubt further the values embodied in s. 16(3), which protects legislative initiatives intended to increase the equality of the official languages but does not, as this Court has already held, confer any rights. However, given the absence of any such initiative by the British Columbia legislature, it is not possible for this Court to impose one on it.

R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

[22] The *Official Languages Act* of 1988 and s. 530.1 of the *Criminal Code*, which was adopted as a related amendment by s. 94 of the same *Official Languages Act*, constitute an example of the advancement of language rights through legislative means provided for in s. 16(3) of the *Charter*; see *Simard*, *supra*, at pp. 124-25. The principle of advancement does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada. It does not limit the scope of s. 2 of the *Official Languages Act*. Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. Parliament and the provincial legislatures were well aware of this when they reacted to the trilogy (*House of Commons Debates*, vol. IX, 1st sess., 33rd Parl., May 6, 1986,

at p. 12999) and accepted that the 1988 provisions would be promulgated through transitional mechanisms and accompanied by financial assistance directed at providing the required institutional services.

[…]

[24] Though constitutional language rights result from a political compromise, this is not a characteristic that uniquely applies to such rights. A. Riddell, in "À la recherche du temps perdu: la Cour suprême et l'interprétation des droits linguistiques constitutionnels dans les années 80" (1988), 29 *C. de D.* 829, at p. 846, underlines that a political compromise also led to the adoption of ss. 7 and 15 of the *Charter* and argues, at p. 848, that there is no basis in the constitutional history of Canada for holding that any such political compromises require a restrictive interpretation of constitutional guarantees. I agree that the existence of a political compromise is without consequence with regard to the scope of language rights. The idea that s. 16(3) of the *Charter*, which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the *Jones* case, *supra*, limits the scope of s. 16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time. Section 2 of the *Official Languages Act* has the same effect with regard to rights recognized under that Act. […]

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

[68] I think it is accurate to say that s. 16 of the *Charter* does contain a principle of advancement or progress in the equality of status or use of the two official languages. I find it highly significant however that this principle of advancement is linked with the legislative process referred to in s. 16(3), which is a codification of the rule in *Jones v. Attorney General of New Brunswick*, 1974 CanLII 164 (SCC), [1975] 2 S.C.R. 182. The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise.

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 1986 CanLII 65 (SCC)

[104] This incomplete but precise scheme [of s. 133 of the *Constitution Act, 1987*] is a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union. […] It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation, as was held in the *Jones* case. […]

Jones v. A.G. of New Brunswick, [1975] 2 S.C.R. 182, 1974 CanLII 164 (SCC)

[p. 195] Section 91(1) aside, there are no express limitations on federal legislative authority to add to the range of privileged or obligatory use of English and French in institutions or activities that are subject to federal legislative control. Necessary implication of a limitation is likewise absent because there would be nothing inconsistent or incompatible with s. 133, as it relates to the Parliament of Canada and to federal Courts, if the position of the two languages was enhanced beyond their privileged and obligatory use under s. 133. It is one thing for Parliament to lessen the protection given by s. 133; that would require a constitutional amendment. It is a different thing to extend that protection beyond its present limits.

R. v. MacKenzie, 2004 NSCA 10 (CanLII)

[51] Section 16(3) codifies the "principle of advancement" from *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182. In *Jones*, Chief Justice Laskin for the Court at pp. 189 - 90 stated that the residual power "for the peace, order and good government of Canada" under the opening words of s. 91 of the *Constitution Act, 1867* entitled Parliament to enact official languages legislation to advance usage of English and French in Federal institutions.

[…]

[55] Section 16(3) renders *intra vires* legislation of Parliament or a provincial legislature which advances the equality and status of use of English and French. Section 16(3) does not constitutionally entrench

such legislation or incorporate it into the *Charter*. Breach of such legislation does not access s. 24(1) of the *Charter*.

[…]

[57] In my view section 16(3) of the *Charter* has not constitutionalized s. 530 of the *Criminal Code*. The violation of s. 530 in this case did not constitute a violation of s. 16(3) of the *Charter*.

Lalonde v. Ontario (Commission de restructuration des services de santé), 2001 CanLII 21164 (ON CA)

[89] The *Charter* contemplates the advancement of the equality of status of English and French not only by Parliament but also by the provincial legislatures:

> 16(3) Nothing in this *Charter* limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

Section 16(3) applies to Ontario.

Issue 2: Does s. 16(3) of the *Charter* protect the status of Montfort as a francophone institution?

[90] Montfort adopts an argument based on s. 16(3) of the *Charter* advanced by two of the interveners, the Commissioner of Official Languages of Canada and La Fédération des communautés francophones et acadienne du Canada. They submit that once the province established Montfort as a homogeneous francophone institution, s. 16(3) provided a constitutional shield, limiting the right of Ontario to affect or reduce that status. Section 16(3) embodies the constitutional objective of advancing toward the substantive equality of Canada's two official languages. This objective, it is submitted, is to be achieved by means of a "ratchet" principle. It is argued that once Ontario takes a step in the direction of advancing the substantive equality of French, s. 16(3) "ratchets" that step to the level of a constitutional right, limiting any retreat from that advance. Although not constitutionally required, provincial measures advancing linguistic equality are responsive to a constitutional aspiration. Once taken, steps towards substantive linguistic equality gain constitutional protection, and advances can only be withdrawn if properly justified. It is submitted that this interpretation of s. 16(3) is supported by the principle, elaborated below, that language rights are to be given a large and liberal interpretation. Reliance is also placed upon the unwritten constitutional principle of respect for and protection of minorities as an interpretive aid.

[…]

[92] We are not persuaded that s. 16(3) includes a "ratchet" principle that clothes measures taken to advance linguistic equality with constitutional protection. Section 16(3) builds on the principle established in *Jones v. New Brunswick (A.G.)*, [1975] 2 S.C.R. 182 that the Constitution's language guarantees are a "floor" and not a "ceiling" and reflects an aspirational element of advancement toward substantive equality. The aspirational element of s. 16(3) is not without significance when it comes to interpreting legislation. However, it seems to us undeniable that the effect of this provision is to protect, not constitutionalize, measures to advance linguistic equality. The operative legal effect of s. 16(3) is determined and limited by its opening words: "Nothing in this *Charter* limits the authority of Parliament or a legislature". Section 16(3) is not a rights-conferring provision. It is, rather, a provision designed to shield from attack government action that would otherwise contravene s. 15 or exceed legislative authority. See André Tremblay and Michel Bastarache, "Language Rights" in Gérald-A. Beaudoin & Ed Ratushny eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. (1989) at 675:

> What was actually desired with this provision [s. 16(3)] was to assure that the power to provide a privileged status for French and English in a statute could not be challenged by virtue of the rights forbidding discrimination contained in section 15 of the *Charter*. Section 16(3) could thus prevent the measures designed to promote equal access to both official languages from being struck down.

[93] Nor do we find any support for the "ratchet" principle in the case law. The passage relied on from *Société des Acadiens* is found in a dissenting judgment that focuses on s. 19(2) and the specific obligations that ss. 16-20 of the *Charter* impose on New Brunswick.

[94] This argument is made on the assumption that government was under no obligation to create Montfort. This court has held in another context that in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values. In *Ferrell v. Ontario (Attorney General)* (1998), 1998 CanLII 6274 (ON CA), 42 O.R. (3d) 97, 168 D.L.R. (4th) 1 (C.A.), a case dealing with the repeal of a statute intended to combat systemic discrimination in employment, Morden A.C.J.O. stated as follows at p. 110 O.R.:

> If there is no constitutional obligation to enact the 1993 Act in the first place I think it is implicit, as far as the requirements of the constitution are concerned, that the legislature is free to return the state of the statute book to what it was before the 1993 Act, without being obligated to justify the repealing statute under s. 1 of the *Charter*.
>
> . . . . .
>
> It would be ironic, in my view, if legislative initiatives such as the 1993 Act with its costs and administrative structure should, once enacted, become frozen into provincial law and susceptible only of augmentation and immune from curtailing amendment or outright appeal without s. 1 justification.

[95] To summarize, Montfort is a public hospital that provides services in French. Section 16(3) of the *Charter* does not constitutionally enshrine Montfort because it is not a rights-conferring provision. Because Montfort is not constitutionally protected by s. 16(3), Ontario can, subject to what follows, alter the status of Montfort as a community hospital without offending s. 16(3).

[…]

[129] The *F.L.S.A.* [*French Language Services Act*] is an example of the provincial legislature of Ontario using s. 16(3) to build on the language rights contained in the *Constitution Act, 1867* and the *Charter* to advance the equality of status or use of the French language. The aspirational element contained in s. 16(3) - advancing the French language toward substantive equality with the English language in Ontario - is of significance in interpreting the *F.L.S.A*.

[…]

[140] In addition to the aspirational element of s. 16(3), the principle of respect for and protection of the francophone minority in Ontario, and the broad and purposive interpretation to be given to language rights, general principles of statutory interpretation also apply. […]

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[63] Indeed, subsection 16(2) constitutionalizes the principle of the equality of status of English and French and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick. Subsection 16(3) states that nothing in the *Charter* limits the authority of the Parliament of Canada or a provincial legislature to adopt measures to advance the equality of status or use of English and French. Even though this provision does not impose a positive obligation on the Parliament of Canada or the provinces, it nonetheless recognizes the possibility for the lawmaker to create language rights other than those entrenched in the *Charter*. […]

[…]

[77] Secondly, in re-examining certain conclusions set out in *Société des Acadiens* [in *Beaulac*], the Supreme Court significantly watered down the principle that judicial restraint should be exercised due

solely to the fact that language rights may result from political compromise by asserting that the existence of such political compromises is without consequence with regard to the scope of language rights. In addition, the Court flatly disavowed and rejected the idea that subsection 16(3) limits the scope of subsection 16(2) equality rights because it contemplates the advancement towards equality of official languages through the legislative process. Finally, the Supreme Court expressly rejected the notion that language rights must be interpreted restrictively if *Société des Acadiens* stands for such a proposition. On the contrary, the Court established as a rule of construction that language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.

Westmount (Ville de) v. Québec (Procureur Général du), 2001 CanLII 13655 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[211] She [the Commissioner of Official Languages] argues that *Bill 171* narrows the rights of the Anglophone minority and therefore violates s. 16(3) of the *Canadian Charter*, which crystalizes the language rights of minority communities.

[212] The respondent Attorney General counters that s. 16(3) of the *Canadian Charter* does not create an independent language right and at most constitutes an invitation to improve institutional bilingualism in provinces other than New Brunswick. Moreover, at the hearing, counsel for the Commissioner acknowledged that s. 16(3) of the *Canadian Charter* does not allow the creation of a new language right but is simply intended to protect those rights already conferred.

[213] In this case, the cities with [TRANSLATION] "bilingual status" have been transformed into [TRANSLATION] "bilingual boroughs". *Bill 170* expressly provides that this status cannot be revoked except upon their request.

[214] The appellants point out that the "Anglophone" cities offered much more extensive services than those expressly authorized by s. 29.1 and the other provisions of the *Charter of the French Language*, which is accurate. However, *Bill 171* in no way changes their legal status, since the bilingual boroughs retain the same rights and privileges previously belonging to the bilingual or so-called "Anglophone" cities under the *Charter of the French Language*.

[215] The appellants complain that it would be easier to revoke bilingual city status in the future. This allegation is by no means supported by the evidence. Moreover, if the government acted in this manner, it would then be possible to make the claims that the Commissioner is currently making.

[216] The legal status of the appellant cities therefore remains unchanged in terms of language rights, since the *Charter of the French Language* continues to govern the use of French and English in municipal institutions. As a side remark, we note that the same holds true for s. 1 of *Bill 170*, which has been the subject of harsh criticism from the appellants. This section declares that Montréal is a French-speaking city. However, this purely declaratory provision neither adds to nor detracts from the rules already established by the *Charter of the French Language*, which moreover prompted the trial judge to write that it was superfluous and needlessly [TRANSLATION] "provocative". In any event, it cannot be concluded from this, as some of the appellants argue, that this section shows that the government is not really trying to reform municipal structures, but is pursuing an unstated goal, that of depriving the Anglophone community of its institutions.

[217] We are therefore of the opinion, subject to the reservation already expressed with regard to the *locus standi* of the Commissioner of Official Languages, that her arguments on the merits must be dismissed, in the circumstances, without costs.

R. v. Simard, [1995] O.J. No. 3989, 27 O.R. (3d) 116 (ON CA) [hyperlink not available]

[13] These sections [sections 530 and 530.1 of the *Criminal Code*] illustrate the principle of advancement of the equality of status or use of the two official languages pursuant to s. 16(3) of the *Charter* according to which the Parliament and the legislatures have the authority to encourage such advancement. They go far beyond the minimum language requirements of the constitutional provisions by acknowledging the right of the accused to have a judge, a jury and a prosecutor who speak the official language of the accused.

Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings, 1987 CanLII 204 (SK CA)

[pp. 26-27] On the whole, therefore, the better view of the matter in our opinion is this: Parliament and the Legislatures undoubtedly, by virtue of ss. 16(3), possess the power to move official language rights beyond those entrenched in the *Charter*, but neither, when doing so, is relieved by ss. 16(3) of having to respect the fundamental rights and freedoms found elsewhere in the *Charter*. Such relief as may be available to them under ss. 1 and 33, is, of course, another matter altogether, although one might add that the existence of these sections serves to remove some of the obstacles to official language advancement which, having regard particularly to s. 15, might otherwise be encountered.

We conclude, therefore, that Parliament was competent to enact the *Criminal Law Amendment Act* pursuant to s. 91(27) of the *Constitution Act 1867*, even though the purposes of the Act include advancing the status or use of the French language beyond that provided for by ss. 16 through 20 of the *Charter*, but that in all respects the Act, remains subject to the other provisions of the *Charter*, including s. 15.

R. v. Gaudet, 2010 NBQB 27 (CanLII)

[31] Section 16(3) formalizes the principle of advancement or progression towards the equality of status or use of the two official languages of Canada. This provision protects against potential challenges to government measures that might otherwise be ruled contrary to s. 15(1). Like other provisions that guarantee language rights, s. 16 and 20 are not subject to the notwithstanding clause entrenched in s. 33. This means that neither Parliament nor the legislature of New Brunswick can exclude itself from their application.

R. v. Pare, 1986 CanLII 1189 (BC SC)

[27] I have already concluded that Part XIV.1 of the *Criminal Code* constitutes a legislative scheme which advances the equality of status or use of English or French in Canada and I have accordingly concluded that s. 16(3) of the *Charter* when read with the other language provisions of the *Charter* and the *Constitution Act, 1982*, preclude the application of s. 15 of the *Charter* in cases such as this.

[28] I am supported in the conclusion that I have reached by the judgments of Beetz J. and Craig J.A. Their judgments make it clear that the advancement of language rights is best left to the legislators who are better suited to dealing with the development of political rights than are the courts. They specifically note that this principle is reflected in s. 16(3) which links the advancement of language rights to the legislative process. As such this reasoning indicates that once a legislative scheme has been properly characterized as legislation which advances the equality of status and use of the two official languages s. 16(3) should be interpreted as establishing that such a scheme cannot offend against the provisions of s. 15 of the *Charter*. If this is not so and s. 16(3) does not operate to guard such schemes against other provisions of the *Charter* the result would be to discourage Parliament from taking action to progressively implement language rights in Canada as a whole, an approach which appears to be a realistic one having regard to the nature of the rights and the distribution of members of minority language throughout the nation.

R. v. Gaudet, 2009 NBPC 8 (CanLII)

[18] As I indicated previously, the charge under s. 253(b) which Mr. Gaudet is facing is being prosecuted under the *Criminal Code of Canada*. As a result, the remedy applied by Chief Justice Drapeau in *McGraw* is not available in the instant case. Can I, in the circumstances, invoke the provisions of s. 20(2), and therefore apply the remedies provided by s. 24(2) of the *Charter* to correct the breach of s. 31(1) in this

matter? In order to do this, in my opinion, it must be determined whether s. 20(2) of the *Charter* imposes, by implication, the informational duty explicitly recognized in s. 31(1) of the *Official Languages Act* and whether the last-mentioned provision was constitutionalized by s. 16(3) of the *Charter*.

[…]

[23] With the above in mind, it would be paradoxical, to say the least, if government authorities had more or fewer duties depending on whether the prosecution was conducted under a provincial statute or under the *Criminal Code* or, conversely, if a member of the public had more or fewer rights depending on whether he had violated a provincial statute or a federal statute. In my opinion, such a result offends the very foundation of linguistic rights and the broad interpretation of the laws controlling these rights. The conclusion that s. 20(2) of the *Charter* imposes, by implication, the informational duty explicitly recognized in s. 31(1) of the *Official Languages Act* and that the last-mentioned provision was constitutionalized by s. 16(3) is the conclusion which is in accord with a broad interpretation of lingustic rights and with the very foundation of these rights.

SEE ALSO:

R. v. Kapp, [2008] 2 S.C.R. 483, 2008 SCC 41 (CanLII)

Galganov v. Russell (Township), 2012 ONCA 409 (CanLII)

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 F.C.R. 276, 2004 FCA 263 (CanLII)

R. v. Schneider, 2004 NSCA 151 (CanLII)

City of Toronto v. Braganza, 2011 ONCJ 657 (CanLII)

R. v. Rodrigue, 1994 CanLII 5249 (YK SC), the appeal of this judgment was dismissed on other grounds by the Yukon Court of Appeal and the application for leave to appeal to the Supreme Court of Canada was dismissed.

R. c. Car-Fre Transport Ltd., 2015 ABPC 280

16.1. (1) English and French linguistic communities in New Brunswick

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.

16.1. (2) Role of the legislature and government of New Brunswick

16.1. (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.

[LAST UPDATE: JUNE 2017]

ANNOTATIONS – SUBSECTION 16.1(1)

Charlebois v. Saint John (City), [2005] 3 S.C.R. 563, 2005 SCC 74

[13] In its preamble, the *OLA* [New Brunswick *Official Languages Act*] proclaims the purposes of the Act are expressly tied to the language guarantees and obligations enshrined in the Canadian Constitution. There is no dispute that the *OLA* is the province's legislative response to its obligations under the *Canadian Charter of Rights and Freedoms* in relation to institutional bilingualism in New Brunswick. For ease of reference, I reproduce here the *Charter* provisions on official languages that specifically target the province of New Brunswick: […]

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

The Scope of Subsection 16(2) and Section 16.1 of the *Charter*

[62] One cannot understand the scope of the language guarantees afforded by the *Charter* without taking into account the fundamental principle which embodies both the language policy implemented in New Brunswick and the commitment of the government to bilingualism and biculturalism. The constitutional principle of the equality of official languages and the equality of the two official linguistic communities and of their right to distinct institutions is the linchpin of New Brunswick's language guarantees regime.

[63] Indeed, subsection 16(2) constitutionalizes the principle of the equality of status of English and French and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick. Subsection 16(3) states that nothing in the *Charter* limits the authority of the Parliament of Canada or a provincial legislature to adopt measures to advance the equality of status or use of English and French. Even though this provision does not impose a positive obligation on the Parliament of Canada or the provinces, it nonetheless recognizes the possibility for the lawmaker to create language rights other than those entrenched in the *Charter*. Finally, subsection 16.1(1) declares, on the one hand, that the English linguistic community and the French linguistic community have equality of status and equal rights and privileges and, on the other hand, that they have the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities. Subsection 16.1(2) recognizes the role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection 16.1(1). In short, this section constitutionalizes the principles of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, *supra*. The equality provided under section 16.1 is based, not on the equality of the languages as provided for in subsection 16(2), but on the equality of New Brunswick's English linguistic community and French linguistic community. Unlike subsection 16(2), this provision therefore includes collective rights whose holders are the linguistic communities themselves.

[…]

The Scope of Section 16.1 of the *Charter*

[78] Lastly, we have to consider the scope of section 16.1. To the same extent as subsection 16(2), the principle of the equality of the English linguistic community and the French linguistic community in New Brunswick entrenched in section 16.1 of the *Charter* is a telling indication of the purpose of language guarantees and a source of guidance in the interpretation of other *Charter* provisions, including subsection 18(2). By deciding in 1993 to entrench the principle of the equality of the two communities in the *Charter* as a fundamental characteristic of the province, the framers intended to show their commitment towards the equality of official language communities. This provision reaffirms and embodies the commitment made by the lawmakers of this province in 1981 when they enacted *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*. (See *Journals of the Legislative Assembly of the Province of New Brunswick*, 1992 Session, December 4, 1992, at pages 4708 to 4721.)

[79] As I have already noted, section 16.1 includes, as opposed to subsection 16(2), a collective and community component as it seeks the equality of communities. Equally, it expressly acknowledges the role of the legislature and government to preserve and promote the equality of official language communities. As a result, it is a unique set of constitutional provisions quite peculiar to New Brunswick which places the province on a unique plane among Canadian provinces.

[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.

R. v. Gaudet, 2010 NBQB 27 (CanLII)

[30] Section 16.1 of the *Charter*, adopted in 1993, recognizes the equality of status and equal rights and privileges of the French linguistic community and of the English linguistic community in New Brunswick and bears witness to the commitment of the framers to the equality of the official language communities. It is a valuable indicator of the very purpose of language guarantees as well as an interpretive aid for the other provisions of the *Charter*.

Small & Ryan v. New Brunswick (Minister of Education), 2008 NBQB 201 (CanLII)

Charter **Challenge**

[3] The applicants say that the Minister's decision infringed their rights under the *Canadian Charter of Rights and Freedoms*, sections 16 (Official Languages), 16.1 (English and French Linguistic Communities in New Brunswick) and 23 (Minority Language Educational Rights).

[4] The Supreme Court of Canada has made clear regarding section 23(2) of the *Charter* that:

> "… it would be contrary to the purpose of the provision to equate immersion with minority language education."
>
> *Solski (Tutor of) v. Québec (A.G.)*, 2005 SCC 14 (CanLII), [2005] 1 S.C.R. 201 at para. 50; see also *Gosselin (Tutor of) v. Québec (A.G.)*, [2005] S.C.R. 238 at paras 28-34.

[5] Thus in my opinion Early French Immersion for anglophones in New Brunswick, the linguistic majority in this province, is not protected by the *Charter* provision for Minority Language Educational Rights. As well, I am not convinced that the general words regarding bilingualism and linguistic communities in section 16 and 16.1 of the *Charter* provide any legal basis to challenge the decision of Minister of Education regarding Early French Immersion.

ANNOTATIONS – SUBSECTION 16.1(2)

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[63] Indeed, subsection 16(2) constitutionalizes the principle of the equality of status of English and French and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick. Subsection 16(3) states that nothing in the *Charter* limits the authority of the Parliament of Canada or a provincial legislature to adopt measures to advance the equality of status or use of English and French. Even though this provision does not impose a positive obligation on the Parliament of Canada or the provinces, it nonetheless recognizes the possibility for the lawmaker to create language rights other than those entrenched in the *Charter*. Finally, subsection 16.1(1) declares, on the one hand, that the English linguistic community and the French linguistic community have equality of status and equal rights and privileges and, on the other hand, that they have the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities. Subsection 16.1(2) recognizes the role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection 16.1(1). In short, this section constitutionalizes the principles of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, *supra*. The equality provided under section 16.1 is based, not on the equality of the languages as provided for in subsection 16(2), but on the equality of New Brunswick's English linguistic community and French linguistic community. Unlike subsection 16(2), this provision therefore includes collective rights whose holders are the linguistic communities themselves.

[…]

The Scope of Section 16.1 of the *Charter*

[78] Lastly, we have to consider the scope of section 16.1. To the same extent as subsection 16(2), the principle of the equality of the English linguistic community and the French linguistic community in New Brunswick entrenched in section 16.1 of the *Charter* is a telling indication of the purpose of language guarantees and a source of guidance in the interpretation of other *Charter* provisions, including subsection 18(2). By deciding in 1993 to entrench the principle of the equality of the two communities in the *Charter* as a fundamental characteristic of the province, the framers intended to show their commitment towards the equality of official language communities. This provision reaffirms and embodies the commitment made by the lawmakers of this province in 1981 when they enacted *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*. (See Journals of the Legislative Assembly of the Province of New Brunswick, 1992 Session, December 4, 1992, at pages 4708 to 4721.)

[79] As I have already noted, section 16.1 includes, as opposed to subsection 16(2), a collective and community component as it seeks the equality of communities. Equally, it expressly acknowledges the role of the legislature and government to preserve and promote the equality of official language communities. As a result, it is a unique set of constitutional provisions quite peculiar to New Brunswick which places the province on a unique plane among Canadian provinces.

[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.

[…]

[115] At the same time, subsection 16.1(2) of the *Charter* expressly provides that it is "the role of the legislature and government of New Brunswick to preserve and promote" the status, rights and privileges of the two official language communities. This provision encompasses, like section 23 of the *Charter*, a collective dimension and imposes on the government the obligation to act positively to ensure the respect and substantive application of these language guarantees. In addition, section 3 of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, the principles of which were entrenched in section 16.1 of the *Charter*, is more explicit about the commitment of the government and states that the government "shall, in its proposed laws, in the allocation of public resources and in its policies and programs, take positive actions to promote the cultural, economic, educational and social development of the official linguistic communities".

[116] This provision is the legislative confirmation of the obligation of the provincial government to act positively. By its legislative and constitutional commitments, New Brunswick has accepted that is has the responsibility to take all possible steps for the preservation and development of the two official language communities. By that, it recognizes that the two languages and the two cultures they transmit constitute the common heritage of all persons in New Brunswick, and they must be able to enjoy an atmosphere conducive to development. (See: Government of New Brunswick, Towards Equality of Official Languages in New Brunswick, supra, at page 413.)

SEE ALSO:

Sonier v. Ambulance New Brunswick Inc., 2016 NBQB 218 (CanLII)

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17. (1) Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

17. (2) Proceedings of New Brunswick legislature

17. (2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

[LAST UPDATE: JUNE 2017]

N.B. – See case law on section 133 of the *Constitution Act, 1867* and section 23 of the *Manitoba Act, 1870*.

ANNOTATIONS – GENERAL

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, 1993 CanLII 153 (SCC)

[75] The same may be said of ss. 17 and 18 of the *Charter*. Section 17, referring to the right to use English or French in debate, uses the word Parliament and s. 17(2), referring to the same right in the legislative assembly of New Brunswick, uses the term "legislature of New Brunswick". Section 18 uses the same language to refer to the "statutes, records and journals" of Parliament and the legislature of New Brunswick. Section 17 uses the term "legislature" to refer to the Assembly, while s. 18 uses the word "legislature" to refer to both the legislature proper (*i.e.*, the body that enacts statutes) and the Assembly (*i.e.*, the body that keeps a "journal").

[76] While these examples show that usage is not completely consistent, they by no means take away from the general rule that "legislature" in s. 32 [of the *Charter*] means the body that enacts legislation. It must be observed that there is no single meaning of the term "legislature" which can be applied to both s. 33 on the one hand, and ss. 5, 17 and 18 on the other. Indeed, there is no single interpretation of the word "legislature" that can be used with complete precision within s. 18 itself. In s. 33, "legislature" clearly means the body capable of enacting legislation, whereas in ss. 5 and 17, the context makes it clear that it is the House itself that is intended. Section 18 refers to the "statutes, records and journals" of the legislature. But, strictly speaking, the "legislature" enacts "statutes" whereas the "Assembly" keeps a "journal". This lack of perfectly consistent usage is not surprising given the nature of these documents and particularly their attempt to set out in relatively few words concepts which are historically charged with meaning. It also underlines the point that, in interpreting these provisions, very careful attention must be paid to the contextual and purposive considerations outlined earlier in these reasons.

[77] In this regard, there are particular historical and structural considerations that must be borne in mind with respect to ss. 5, 17 and 18 of the *Charter*. These sections are extensions of provisions originally found in the *British North America Act, 1867*. In the case of s. 5, it is modeled on the now repealed s. 20 of the *British North America Act, 1867*. That section referred to there being a session of the Parliament of Canada, and of course, the use of the term Parliament of Canada was convenient given the requirement to include both the Senate and the House of Commons. The use of the words "session" and "sitting" in that section also made the intention to refer only to the House and the Senate quite clear even though the word used, *i.e.*, "Parliament" was not strictly correct.

[78] With respect to ss. 17 and 18, they are modeled on the original s. 133, which rather interestingly, provided: "Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec", and further that "[t]he Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both Languages". The original section clearly distinguished between "proceedings before the House" and "enactments of the legislature", but this clarity was lost in the updated versions.

[79] Sections 5, 17 and 18 are found in areas of the *Charter* which are excluded from the override provisions of s. 33 of the *Charter*. This suggests that they are in a different category than the rights contained in ss. 2 and 7 through 15, and may explain, if not entirely excuse, the inconsistency in the use of language between these sections and other places in the *Charter* and the *Constitution Act* generally.

[80] To summarize, the language, structure and history of the constitutional text are strongly suggestive of the conclusion that the word "legislature" in s. 32 in general means the body capable of enacting legislation and not its component parts taken individually. There are certain provisions in the *Charter*, notably ss. 5, 17 and 18, in relation to which the specific context requires a different meaning. However, this case concerns whether the rights guaranteed by s. 2 of the *Charter* apply to the House of Assembly and I conclude that s. 32, properly interpreted, makes it clear that they do not.

ANNOTATIONS – SUBSECTION 17(1)

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

[50] Subject to minor variations of style, the language of ss. 17, 18 and 19 of the *Charter* has clearly and deliberately been borrowed from that of the English version of s. 133 of the *Constitution Act, 1867* of which no French version has yet been proclaimed pursuant to s. 55 of the *Constitution Act, 1982*. It would

accordingly be incorrect in my view to decide this case without considering the interpretation of s. 133 which provides:

> 133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

[51] The somewhat compressed and complicated statutory drafting exemplified in s. 133 has been shortened and simplified in ss. 17 to 19 of the *Charter*, as befits the style of a true constitutional instrument. The wording of the relevant part of s. 133 ("may be used by any Person or in any Pleading or Process in or issuing from ... all or any of the Courts of") has been changed to "may be used by any person in, or in any pleading in or process issuing from, any court of". I do not think that anything turns on this change, which is one of form only.

[…]

[53] It is my view that the rights guaranteed by s. 19(2) of the *Charter* are of the same nature and scope as those guaranteed by s. 133 of the *Constitution Act, 1867* with respect to the courts of Canada and the courts of Quebec. As was held by the majority at pp. 498 to 501 in *MacDonald*, these are essentially language rights unrelated to and not to be confused with the requirements of natural justice. These language rights are the same as those which are guaranteed by s. 17 of the *Charter* with respect to parliamentary debates. They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice.

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 1986 CanLII 65 (SCC)

[60] Hugessen A.C.J. correctly observed in *Walsh* that the essential words of s. 133 are the same with respect to the language of Parliamentary debates and to the language of court proceedings and should receive the same construction. It is clear that the rights preserved in Parliamentary debates are those of the speaker only. Those who listen to the speaker cannot have a right to be addressed in the language of their choice without defeating the speaker's own right to use the language of his choice and making the constitutional provisions nonsensical. Also, the speaker might be unilingual and find it impossible to address his listeners in the language of their choice. Furthermore, the choice of the listeners might vary, making it impossible to accommodate each of them. The use of interpreters or simultaneous translation which, in any event, has nothing to do with s. 133, would not meet the essential thrust of appellant's submission that he has the right to be addressed in the language of his choice by the very person or body who is purporting to address him.

[…]

[67] The only positive duty that I can read in s. 133 is the one imposed on the Houses of Parliament of Canada and the Legislature of Quebec to use both the English and the French languages in the respective Records and Journals of those Houses, as well as the duty to legislate in both languages, that is to enact, print and publish federal and provincial acts in both languages: *Blaikie No. 1* at p. 1022. In *Forest v. Registrar of Court of Appeal of Manitoba*, [1977] 5 W.W.R. 347 at p. 355, it seems to have been suggested by Freedman C.J.M. that s. 23 of the *Manitoba Act*, 1870, imposed a duty to provide the legislature with simultaneous translation for the purposes of parliamentary debate but, with respect for the contrary view, I fail to see the imposition of any such duty in either provision.

[68] A negative duty is also imposed by s. 133 on everyone not to infringe language rights conferred by the section with respect to the language of Parliamentary debates and court proceedings. These are constitutionally protected rights and it would be unlawful for instance to expel a member of the House of Commons or of the Quebec National Assembly on the ground that he uses either French or English in debates, or for a judge of a Quebec or a federal court to prevent the use of either language in his court. But this duty is not the positive one which the appellant invokes.

Knopf v. Canada (Speaker of the House of Commons), 2007 FCA 308 (CanLII)

[38] Subsection 4(1) of the [*Official Languages*] *Act* reiterates the right first recognized by section 133 of the *Constitution Act, 1867* and reaffirmed by subsection 17(1) of the *Charter*. These three sections recognize the right of any person participating in parliamentary proceedings "to use" (*d'employer*) English or French. Subsection 4(1) of the *Act*, as well as subsection 17(1) of the *Charter* create a scheme of unilingualism at the option of the speaker or writer, who cannot be compelled by Parliament to express himself or herself in another language than the one he or she chooses (See *MacDonald v. City of Montreal et al.*, 1986 CanLII 65 (SCC), [1986] 1 S.C.R. 460, at page 483).

[39] However, in some other language rights provisions, such as subsection 20(1) of the *Charter* and section 25 of the *Act*, the legislator chose the term "to communicate" (*communiquer*). In my opinion, this is not accidental.

[40] To "communicate" presupposes interactions, bilateral actions between the parties. The verb "to use" does not encompass such interaction. The right is unilateral: one has the right to address the House of Commons in the official language of his choice. In the case at bar, Mr. Knopf made his opinion known on particular topics of interest to the Committee and filed his documents. There stops his right under subsection 4(1) of the *Act*.

[41] I do not read into subsection 4(1) of the *Act* any requirement for a Committee to distribute documents to its members in one official language. Subsection 4(1) of the *Act* provides the appellant with a right to address the Committee in the language of his choice only. Once this right has been exercised, subsection 4(1) of the *Act* does not compel the Committee to act in a certain way with the oral or written information provided to it.

[42] Justice Layden-Stevenson was right in finding that the distribution of documents does not fall within the scope of subsection 4(1) of the *Act*. The right to use an official language of choice does not include the right to impose upon the Committee the immediate distribution and reading of documents filed to support one's testimony. The decision on how and when to treat the information received from a witness clearly belongs to the Committee. I find, therefore, that the appellant's language rights were not infringed upon.

ANNOTATIONS – SUBSECTION 17(2)

Jones v. New Brunswick (Attorney General), [1975] 2 S.C.R. 182, 1974 CanLII 164 (SCC)

[15] The words of s. 133 themselves point to its limited concern with language rights; and it is, in my view, correctly described as giving a constitutionally based right to any person to use English or French in legislative debates in the federal and Quebec Houses and in any pleading or process in or issuing from any federally established Court or any Court of Quebec, and as imposing an obligation of the use of English and French in the records and journals of the federal and Quebec legislative Houses and in the printing and publication of federal and Quebec legislation. There is no warrant for reading this provision, so limited to the federal and Quebec legislative chambers and their legislation, and to federal and Quebec Courts, as being in effect a final and legislatively unalterable determination for Canada, for Quebec and for all other Provinces, of the limits of the privileged or obligatory use of English and French in public proceedings, in public institutions and in public communications. On its face, s. 133 provides special protection in the use of English and French; there is no other provision of the *British North America Act* referable to the Parliament of Canada (apart from s. 91(1)) which deals with language as a legislative

matter or otherwise. I am unable to appreciate the submission that to extend by legislation the privileged or required public use of English and French would be violative of s. 133 when there has been no interference with the special protection which it prescribes. I refer in this respect particularly to s. 11(4) of the *Official Languages Act*, already quoted.

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[40] Several decisions of the Supreme Court of Canada have expressly acknowledged, subject to minor variations of style, the similarity between the constitutional provisions in section 133 of the *Constitution Act, 1867*, section 23 of the *Manitoba Act, 1870* and in sections 17, 18 and 19 of the *Charter*. In *Société des Acadiens*, Beetz, J. noted that sections 17, 18 and 19 of the *Charter* were borrowed from the English version of section 133. And he concluded at page 573: "It would accordingly be incorrect in my view to decide this case without considering the interpretation of s. 133. ..." With respect to the similarity between sections 23 and 133, see *Manitoba Reference No. 1*, at pages 743-44, and *Manitoba Reference No. 2*, at page 220.

[41] As I have already indicated, the respondents and the intervener, the Province of New Brunswick, have based the case they made before this Court, on the one hand, on the conclusion set out in *Blaikie No. 2* that municipal by-laws are not included in the expression "statutes of the legislature" and, on the other hand, on the principle articulated in *Société des Acadiens* that because of the similarity between subsection 18(2) (in this case) and section 133, this case which deals with these provisions cannot be properly decided without taking into account the interpretation of section 133, *i.e.*, the interpretation given in *Blaikie No. 2*.

[42] This is clearly the position adopted by the trial judge at paragraphs 12, 14 and 17 of his reasons for judgment. After quoting several relevant passages from *Société des Acadiens* and *Blaikie No. 2*, he concluded that he had to take into account the interpretation already given in *Blaikie No. 2*. According to him, this interpretation was determinative and sealed the outcome of the case before him with respect to subsection 18(2) of the *Charter*.

[43] If the upshot of this position is that a court which is called upon to decide an issue dealing with the interpretation of sections 17, 18 and 19 of the *Charter* must adhere to the interpretation already given to section 133, it is obvious that such an approach would be inconsistent with the principles of interpretation of language rights set out in *Beaulac*, *supra*.

[…]

[47] In light of these statements dealing with the principles of interpretation of constitutional rights and in light of recent decisions of the Supreme Court in *Beaulac* and *Arsenault-Cameron*, *supra*, I think that the principle set out by Beetz, J. in *Société des Acadiens* according to which the interpretation of language guarantees under section 133 must be taken into account cannot mean that the purposive analysis of rights established by the cases already cited can be ignored. As stated by the Supreme Court, "the focus on the historical context of language and culture indicates that different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province." (See *Reference re Public Schools Act (Man.)*, *supra*, at page 851.) Accordingly, I believe that the decision in *Blaikie No. 2*, while serving as a guide for the interpretation of subsections 17(2), 18(2) and 19(2) of the *Charter*, must be viewed with prudence by the courts of this province.

[…]

[61] As I have already observed, subsection 18(2) creates a regime of compulsory bilingualism applicable to statutes enacted by the legislature, regulations made by the government and court rules of practice. Moreover, the combined effect of part of subsection 18(2) and subsection 17(2) is to create a form of parliamentary bilingualism applicable to the New Brunswick legislature made up of two separate components. On the one hand, subsection 18(2) provides that the records and journals must be

published in both official languages and, on the other hand, subsection 17(2) establishes a form of optional bilingualism applicable to the debates and other proceedings of the legislature during which everyone has the right to use English or French. These two aspects of parliamentary bilingualism are not at issue in this case.

[…]

[84] In the same statute [the *Official Languages of New Brunswick Act* of 1969], section 12 (now section 11 of R.S.N.B. 1973, c. O-1) provides that "[t]he council of any municipality may declare by resolution that either or both official language(sic) may be used with regard to any matter or in any proceeding of such council".

[85] As noted by the authors of the report "Towards Equality of Official Languages in New Brunswick", 1982, at page 371, there is a difference between the two versions of this section with the French version being more restrictive; whereas the English version refers to the use of one language (or both) "with regard to any matter or in any proceeding of such council", the French version refers to their use "dans toute délibération ou à toute réunion de ce conseil". The expression "with regard to any matter" (visant toute chose) is obviously broader than the version which provides only for the use in any proceeding of the council. Choosing the English version, it is possible to conclude that municipal by-laws would be covered by the expression "with regard to any matter". Since section 11 of the current Act provides for optional bilingualism, at the choice of the municipal council, and not the publication of municipal by-laws in English and French, this provision could be found to be in conflict with the constitutional obligation of legislative bilingualism provided for in subsection 18(2). Its invalidity may thus be raised. For the purposes of this appeal, I do not think it is necessary to settle this ambiguity because even in its broader version, this section only imposes an optional legislative bilingualism, which is definitely insufficient for the purposes of subsection 18(2). However, without going into an analysis of such cross interpretation which an examination of the two versions of the *Act* warrants, suffice it to say that, in my view, this provision parallels subsection 17(2) of the *Charter* which provides for optional bilingualism in the debates and other proceedings of the legislature of New Brunswick. In the same way, section 11 of the current Act provides for optional bilingualism in the proceedings and meetings of the council of any municipality. Nothing in this provision is therefore inconsistent with the obligation that may exist under subsection 18(2) to enact and publish municipal by-laws in the two official languages.

Cormier v. Fournier, 1986 CanLII 92 (NB QB)

[19] Subsection 17(2) of the *Charter*, which governs the use of both official languages in the legislature of New Brunswick, provides the following:

> "Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick."

[20] The legislature of New Brunswick uses simultaneous interpretation so as to conform with this subsection of the *Charter*. The Court intends to use these same means so as to conform not only with the *Charter* but also with subsection 13(1) of the *Official Languages of New Brunswick Act*.

N.B. – This judgment was confirmed on appeal: Fournier v. Cormier, 1987 CanLII 110 (NB CA).

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18. (1) Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

18. (2) New Brunswick statutes and records

18. (2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

[LAST UPDATE: JUNE 2017]

N.B. – See case law on section 133 of the *Constitution Act, 1867* and section 23 of the *Manitoba Act, 1870*.

ANNOTATIONS – GENERAL

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, 1993 CanLII 153 (SCC)

[75] The same may be said of ss. 17 and 18 of the *Charter*. Section 17, referring to the right to use English or French in debate, uses the word Parliament and s. 17(2), referring to the same right in the legislative assembly of New Brunswick, uses the term "legislature of New Brunswick". Section 18 uses the same language to refer to the "statutes, records and journals" of Parliament and the legislature of New Brunswick. Section 17 uses the term "legislature" to refer to the Assembly, while s. 18 uses the word "legislature" to refer to both the legislature proper (*i.e.*, the body that enacts statutes) and the Assembly (*i.e.*, the body that keeps a "journal").

[76] While these examples show that usage is not completely consistent, they by no means take away from the general rule that "legislature" in s. 32 means the body that enacts legislation. It must be observed that there is no single meaning of the term "legislature" which can be applied to both s. 33 on the one hand, and ss. 5, 17 and 18 on the other. Indeed, there is no single interpretation of the word "legislature" that can be used with complete precision within s. 18 itself. In s. 33, "legislature" clearly means the body capable of enacting legislation, whereas in ss. 5 and 17, the context makes it clear that it is the House itself that is intended. Section 18 refers to the "statutes, records and journals" of the legislature. But, strictly speaking, the "legislature" enacts "statutes" whereas the "Assembly" keeps a "journal". This lack of perfectly consistent usage is not surprising given the nature of these documents and particularly their attempt to set out in relatively few words concepts which are historically charged with meaning. It also underlines the point that, in interpreting these provisions, very careful attention must be paid to the contextual and purposive considerations outlined earlier in these reasons.

[77] In this regard, there are particular historical and structural considerations that must be borne in mind with respect to ss. 5, 17 and 18 of the *Charter*. These sections are extensions of provisions originally found in the *British North America Act, 1867*. In the case of s. 5, it is modeled on the now repealed s. 20 of the *British North America Act, 1867*. That section referred to there being a session of the Parliament of Canada, and of course, the use of the term Parliament of Canada was convenient given the requirement to include both the Senate and the House of Commons. The use of the words "session" and "sitting" in that section also made the intention to refer only to the House and the Senate quite clear even though the word used, *i.e.*, "Parliament" was not strictly correct.

[78] With respect to ss. 17 and 18, they are modeled on the original s. 133, which rather interestingly, provided: "Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec", and further that "[t]he Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both Languages". The original section clearly distinguished between "proceedings before the House" and "enactments of the legislature", but this clarity was lost in the updated versions.

[79] Sections 5, 17 and 18 are found in areas of the *Charter* which are excluded from the override provisions of s. 33 of the *Charter*. This suggests that they are in a different category than the rights contained in ss. 2 and 7 through 15, and may explain, if not entirely excuse, the inconsistency in the use of language between these sections and other places in the *Charter* and the *Constitution Act* generally.

[80] To summarize, the language, structure and history of the constitutional text are strongly suggestive of the conclusion that the word "legislature" in s. 32 in general means the body capable of enacting legislation and not its component parts taken individually. There are certain provisions in the *Charter*, notably ss. 5, 17 and 18, in relation to which the specific context requires a different meaning. However, this case concerns whether the rights guaranteed by s. 2 of the *Charter* apply to the House of Assembly and I conclude that s. 32, properly interpreted, makes it clear that they do not.

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

[50] Subject to minor variations of style, the language of ss. 17, 18 and 19 of the *Charter* has clearly and deliberately been borrowed from that of the English version of s. 133 of the *Constitution Act, 1867* of which no French version has yet been proclaimed pursuant to s. 55 of the *Constitution Act, 1982*. It would accordingly be incorrect in my view to decide this case without considering the interpretation of s. 133 which provides:

> 133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

[51] The somewhat compressed and complicated statutory drafting exemplified in s. 133 has been shortened and simplified in ss. 17 to 19 of the *Charter*, as befits the style of a true constitutional instrument. The wording of the relevant part of s. 133 ("may be used by any Person or in any Pleading or Process in or issuing from ... all or any of the Courts of") has been changed to "may be used by any person in, or in any pleading in or process issuing from, any court of". I do not think that anything turns on this change, which is one of form only.

Kilrich Industries Ltd. v. Halotier, 2007 YKCA 12 (CanLII)

[48] In my view, the purpose of the *Languages Act* is to commit the Yukon to official bilingualism. As well as being apparent from its legislative history, this purpose is explicit in s. 1 which states that the Yukon accepts that “English and French are the official languages of Canada” and sets down as objects the “implementation of the equality of status of English and French in the Yukon” and the “recognition of French and the provision of services in French in the Yukon”. While the *Yukon Act* does not declare French an official language of the Yukon, its impact in the legislative, central government and judicial spheres is the same.

[49] The final and perhaps strongest indicator of the object and purpose of the *Languages Act* is its virtual identity with the language of the guarantees enshrined in ss. 16 to 22 of the *Charter*. […]

[…]

[63] Because the Legislative Assembly chose to use language in s. 4 of the *Languages Act* that tracks that in s. 18 of the *Charter*, s. 133 of the *Constitution Act, 1867* (*Société des Acadiens*, *supra* at 573), s. 23 of the *Manitoba Act, 1870*, and s. 110 of the *North-West Territories Act*, I am persuaded it should be read as imposing the same obligation on the Yukon government. (See *Re Manitoba Language Rights*, *supra* at 744 and *Mercure*, *supra* at 273). In my view, all enactments, including delegated legislation, are to be published in both languages; so, too, are the rules of court made by judges.

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[40] Several decisions of the Supreme Court of Canada have expressly acknowledged, subject to minor variations of style, the similarity between the constitutional provisions in section 133 of the *Constitution*

Act, *1867*, section 23 of the *Manitoba Act, 1870* and in sections 17, 18 and 19 of the *Charter*. In Société des Acadiens, Beetz, J. noted that sections 17, 18 and 19 of the Charter were borrowed from the English version of section 133. And he concluded at page 573: "It would accordingly be incorrect in my view to decide this case without considering the interpretation of s. 133. ..." With respect to the similarity between sections 23 and 133, see *Manitoba Reference No. 1*, at pages 743-44, and *Manitoba Reference No. 2*, at page 220.

Ashely v. Marlow Group Private Portfolio Management Inc., 2006 CanLII 31307 (ON SC)

[39] […] Section 18 of the *Charter of Rights and Freedoms* provides in section 18 [sic] that both the English and French language versions of a Federal statute are equally authoritative. Therefore, the court must examine both to determine Parliament's intention. Each forms "part of the context in which the other must be read". The court must therefore find a common interpretation for both equally authoritative versions.

ANNOTATIONS – SUBSECTION 18(1)

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

[272] The *OLA* uses the same English words as s. 133 of the *Constitution Act, 1867*, while the French version is marginally different (s. 133 employs "journaux" instead of "comptes rendus"). Section 18(1) of the *Charter* contains the same words as the *OLA* except for the use of the word "statutes" in s. 18(1) of the *Charter* as opposed to "Acts of the Legislature" in s. 7 *OLA*. There is no relevant authority about the meaning of s. 18(1) of the *Charter*. As the trial judge noted, the Manitoba Court of Appeal has expressed the view that the term "records and journals" in s. 23 of the *Manitoba Act, 1870* 33 Vic., Cap. 3 (Canada), (which reflects s. 133 of the *Constitution Act, 1867*), includes *Hansard: Forest v. Manitoba (Registrar of Court of Appeal)* (1977), 1977 CanLII 1635 (MB CA), 77 D.L.R. (3d) 445, [1977] 5 W.W.R. 347 (Man. C.A.). There is no analysis of this passing point in the decision, however, and it is obiter dictum. Although the Supreme Court has considered s. 133 of the *Constitution Act, 1867*, it has not opined on the meaning of "records and journals": *Manitoba Language Rights Reference*.

SEE ALSO:

The King v. Dubois, [1935] SCR 378, 1935 CanLII 1 (SCC)

Canada (Attorney General) v. Goguen, 1989 CanLII 158 (NB CA)

Canada v. Aquarius Computer & Peripherals Ltd., [1989] O.J. No. 1935 (ON SC) [hyperlink not available

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ANNOTATIONS – SUBSECTION 18(2)

Charlebois v. Saint John (City), [2005] 3 S.C.R. 563, 2005 SCC 74 (CanLII)

[14] In *Charlebois v. Moncton*, Mr. Charlebois, the same litigant as in this case, challenged the validity of a municipal by-law which was enacted only in English. The specific question before the New Brunswick Court of Appeal was whether s. 18(2) of the Charter included municipal by-laws. On a remedial and purposive reading of the Charter language guarantees, the court held that it was appropriate to include municipal by-laws in the province of New Brunswick's constitutional obligation to enact its statutes in both English and French. In the course of its analysis on this question, the court also expressed its opinion that municipalities are "institutions of the legislature and government of New Brunswick" within the meaning of s. 16(2) of the *Charter*. By way of remedy, the court declared the unilingual by-laws invalid but suspended the effect of the declaration of invalidity for one year to enable the City of Moncton and the Government of New Brunswick to comply with the constitutional obligations set out in the court's reasons. The court also provided some guidance on how the province may choose to meet its obligations. […]

[15] Bastarache J. finds that it would have been more appropriate for the New Brunswick Court of Appeal in this case "to take a positive stance and see whether it was necessary to limit the scope of the newly defined term in light of the difficulties posed by the drafting of the *OLA*" (para. 32 (emphasis added)). I disagree. First, it is noteworthy that *Charlebois v. Moncton* dealt with s. 18(2) of the *Charter*; hence, the court's finding that municipalities are "institutions" for the purpose of s. 16(2) is obiter dictum. The question as to whether municipalities are institutions within the meaning of s. 16(2) has never been determined by this Court, it is not before us on this appeal, and I express no opinion on whether or not this interpretation is correct. Second, it is also noteworthy that the province's constitutional obligations, even as defined in *Charlebois v. Moncton*, do not mandate a single specific solution. As aptly noted by the court in the above-noted excerpt, there is room for flexibility. The current *OLA* is the province's legislative response to its constitutional obligations. It would be inappropriate to pre-empt the analysis with a blanket presumption of *Charter* consistency. Daigle J.A. therefore was quite correct in pursuing the analysis. This brings us back to the question of statutory interpretation that occupies us: what approach did the province of New Brunswick adopt in respect of its municipalities to meet its constitutional obligations?

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[2] In support of his claim, the appellant relies on subsections 16(2) and 18(2) and section 16.1 of the *Canadian Charter of Rights and Freedoms*. More specifically, he submits that the expression "statutes of the legislature" used in subsection 18(2) includes municipal by-laws and that this provision imposes on municipalities of the province an obligation to enact their by-laws in the two official languages. He argues that, given the significant percentage of the Francophones in this municipality, the obligation applies to the City of Moncton. He is asking this Court to declare the impugned by-law and order invalid.

[…]

B. Interpretation of Subsection 18(2) of the *Charter*

[32] Subsection 18(2) of the *Charter* providesthat the "statutes" of the legislature of New Brunswick shall be printed and published in English and French and that both language versions are equally authoritative. The appellant relies on this constitutional guarantee in concluding that it imposes on municipalities the obligation to enact, print and publish their by-laws in the two official languages.

[33] The question therefore is whether the expression "statutes of the legislature" includes municipal by-laws. If so, municipalities will be subject to the constitutional obligation under subsection 18(2). As we shall see, the Supreme Court of Canada has already answered "no" to a similar question submitted to it in *Blaikie No. 2* concerning the interpretation of language rights under section 133 of the *Constitution Act, 1867*. The question then becomes whether this answer is determinative of this matter within the meaning of subsection 18(2), given the different historical contexts and objectives surrounding the adoption of these legal rights.

[…]

[37] In order to answer the question whether the meaning given to the term "statutes" in *Blaikie No. 1* and *Blaikie No. 2* is determinative of the meaning of the same term used in subsection 18(2), it is necessary to carefully review the reasons for judgment and the reasoning which led the Supreme Court to this conclusion. The Supreme Court held that the obligation arising from the term "statutes" as used in section 133 extended to delegated legislation because "it is apparent that it would truncate the requirement" of section 133 if account were not taken of delegated legislation. "This is a case where the greater must include the lesser." (*Blaikie No. 1*, page 1027.) Later, the Supreme Court stated at page 329 of *Blaikie No. 2* that "[I]t is because in our constitutional system the enactments of the Government should be assimilated with the enactments of the Legislature that they are governed by s. 133".

[38] As for court rules of practice, the Supreme Court found that the requirement that they be in both languages is a consequence not of their legislative nature, but of their judicial character. Given the nature

of their subject-matter, rules of practice are therefore subject to section 133. Even though section 133 does not expressly refer to rules of practice, the Court found that "the draftsmen must have thought that they were subject to the section by necessary intendment". (See *Blaikie No. 2*, at page 332.)

[39] Contrary to the reasons warranting the broadening of the meaning of the term "statutes" to delegated legislation and rules of practice, it is obvious that the Supreme Court based its conclusion that municipal by-laws were not included in the term "statutes" on the historical context which existed at the time of the enactment of section 133 in 1867. According to the reasoning of the Court, even though municipal by-laws are "legislative enactments", they constitute a separate and distinct class of regulations of a third level of government, *i.e.*, municipalities. But then, municipalities have been in existence long before Confederation and the language of municipal by-laws had been expressly regulated by the Legislature of Lower Canada. The Court cited several laws to that effect. Accordingly, since municipalities and municipal by-laws were certainly in the minds of the framers of the *Constitution* in 1867, the fact that section 133 does not refer to municipal by-laws cannot be an oversight, but rather reveals the intention of the framers of the *Constitution* to exclude them. Evidently, the historical context described by the Supreme Court is limited to the particular situation of municipalities in Quebec before 1867 as it must have been perceived by the framers of the Constitution at the time of the enactment of section 133. (*Blaikie No. 2*, at pages 321-25.)

[…]

[47] In light of these statements dealing with the principles of interpretation of constitutional rights and in light of recent decisions of the Supreme Court in *Beaulac* and *Arsenault-Cameron*, *supra*, I think that the principle set out by Beetz, J. in *Société des Acadiens* according to which the interpretation of language guarantees under section 133 must be taken into account cannot mean that the purposive analysis of rights established by the cases already cited can be ignored. As stated by the Supreme Court, "the focus on the historical context of language and culture indicates that different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province." (See *Reference re Public Schools Act (Man.)*, *supra*, at page 851.) Accordingly, I believe that the decision in *Blaikie No. 2*, while serving as a guide for the interpretation of subsections 17(2), 18(2) and 19(2) of the *Charter*, must be viewed with prudence by the courts of this province.

[48] In this case, it is immediately apparent that the historical and legislative context of the enactment of subsection 18(2) of the *Charter* in 1982 is different from the context at the time of Confederation when section 133 of the *Constitution Act, 1867* was enacted. I therefore think that, in this case, subsection 18(2) should be interpreted according to the analysis made in *R. v. Big M Drug Mart Ltd.*, *supra*. The effect of that part of subsection 18(2) of the *Charter* which is of interest to us in this case is that the printing and publication of the "statutes of the legislature of New Brunswick" must be made in the two official languages, both language versions being equally authoritative. It should be added here that the Supreme Court has already stated that if the *Constitution* requires that "statutes" be printed and published in both languages, by implication, they must be enacted in the two languages, inasmuch as a text does not become an "act" without enactment. This requirement of enactment in both languages is therefore implicit under the wording of subsection 18(2). (See *Blaikie No. 1*, at page 1022.)

[…]

(i) The larger objects of the Charter

[50] Having clarified the effect of the language guarantee under subsection 18(2), its scope must now be determined based on a large, dynamic and purposive interpretation of this guarantee. First, we have to examine the larger objects of the *Charter* itself. […]

(ii) The Meaning and Purpose of the Other Charter Rights

[59] The second branch of the analysis of the language rights provided for in subsection 18(2) concerns the meaning and purpose of the other related specific *Charter* rights and freedoms. Subsection 18(2) is part of a series of provisions in the *Charter* which, since 1982, have entrenched in the Constitution the concept of linguistic duality and the notion of equality of official languages for Canada and New Brunswick. Indeed, the effect of subsections 16(2) to 20(2), which specifically apply to New Brunswick institutions, whereas subsections 16(1) to 20(1) apply to federal institutions, is to ensure the protection of language rights in a number of public institutions such as legislative institutions, courts and offices of the institutions of the legislature and government. These provisions therefore entrench the language guarantees of citizens vis-à-vis the government of New Brunswick. They are individual language rights guaranteed to Francophones and Anglophones alike. The establishment of official bilingualism which results from the combined effect of these provisions is in fact complemented in this province by section 23 of the *Charter* which, at the national level, guarantees the right to instruction in the language of the minority.

[60] According to the principles of interpretation discussed previously, the provisions of the *Charter* that I have just referred to which establish a scheme of language guarantees applicable in New Brunswick must be read together to determine the meaning and purpose of subsection 18(2) of the *Charter*. Consequently, this provision does not operate in a vacuum, and it would be useful to review its interaction with other related provisions.

[61] As I have already observed, subsection 18(2) creates a regime of compulsory bilingualism applicable to statutes enacted by the legislature, regulations made by the government and court rules of practice. Moreover, the combined effect of part of subsection 18(2) and subsection 17(2) is to create a form of parliamentary bilingualism applicable to the New Brunswick legislature made up of two separate components. On the one hand, subsection 18(2) provides that the records and journals must be published in both official languages and, on the other hand, subsection 17(2) establishes a form of optional bilingualism applicable to the debates and other proceedings of the legislature during which everyone has the right to use English or French. These two aspects of parliamentary bilingualism are not at issue in this case.

[…]

(iii) The Language Chosen to Articulate the Right in Subsection 18(2) of the Charter

[81] After discussing the larger objects of the *Charter* and the purposes of the other language guarantees entrenched therein, the third and final element of the purposive analysis of a right as set out in *R. v. Big M Drug Mart Ltd.*, *supra*, requires that this Court determine whether the language chosen to articulate the right provided for in subsection 18(2) is compatible with the objects of the *Charter* and the other language guarantees that were identified in the preceding analysis.

[82] In this case, the words used in subsection 18(2) are “statutes of the legislature”. This subsection requires that the statutes be printed and published in English and French. As such, it constitutionalizes the right to the enactment, printing and publication of the statutes of New Brunswick in the two official languages. I have already noted that the Supreme Court had extended the meaning of the term “statutes” in *Blaikie No. 2* to include regulations made by the government of Quebec and court rules of practice, but not municipal by-laws. In that case, the Court recognized that municipal by-laws are “legislative enactments”, but that given the particular history of section 133 of the *Constitution Act, 1867*, they could not be covered by the expression “statutes of the legislature”. As will be seen below, the historical and legislative context of subsection 18(2) is very different from that of 1867 which the Supreme Court took into consideration. The issue now before this Court is whether the term “statutes” may be compatible with the objects of the language guarantees previously discussed.

[83] Before the enactment of the *Official Languages of New Brunswick Act* in 1969, no law required that the statutes of the province be published in English and French. Three provisions of the Act (S.N.B. 1969, c. 14), notably subsection 6(1) and sections 7 and 8, refer to the bilingual versions of statutes. In short, these provisions provide that bills as well as the next and succeeding revisions of the statutes are to be

printed in the official languages. Those are the only provisions that dealt with the publication of statutes in both languages before the enactment of subsection 18(2) of the *Charter*. To my knowledge, the courts have never interpreted these provisions.

[84] In the same statute, section 12 (now section 11 of R.S.N.B. 1973, c. O-1) provides that "[t]he council of any municipality may declare by resolution that either or both official language(sic) may be used with regard to any matter or in any proceeding of such council".

[85] As noted by the authors of the report "Towards Equality of Official Languages in New Brunswick", 1982, at page 371, there is a difference between the two versions of this section with the French version being more restrictive; whereas the English version refers to the use of one language (or both) "with regard to any matter or in any proceeding of such council", the French version refers to their use "dans toute délibération ou à toute réunion de ce conseil". The expression "with regard to any matter" (visant toute chose) is obviously broader than the version which provides only for the use in any proceeding of the council. Choosing the English version, it is possible to conclude that municipal by-laws would be covered by the expression "with regard to any matter". Since section 11 of the current Act provides for optional bilingualism, at the choice of the municipal council, and not the publication of municipal by-laws in English and French, this provision could be found to be in conflict with the constitutional obligation of legislative bilingualism provided for in subsection 18(2). Its invalidity may thus be raised. For the purposes of this appeal, I do not think it is necessary to settle this ambiguity because even in its broader version, this section only imposes an optional legislative bilingualism, which is definitely insufficient for the purposes of subsection 18(2). However, without going into an analysis of such cross interpretation which an examination of the two versions of the Act warrants, suffice it to say that, in my view, this provision parallels subsection 17(2) of the *Charter* which provides for optional bilingualism in the debates and other proceedings of the legislature of New Brunswick. In the same way, section 11 of the current Act provides for optional bilingualism in the proceedings and meetings of the council of any municipality. Nothing in this provision is therefore inconsistent with the obligation that may exist under subsection 18(2) to enact and publish municipal by-laws in the two official languages.

[86] In *Manitoba Reference No. 2*, the Supreme Court dealt with whether various orders and instruments made by the Manitoba government were of a "legislative nature". To answer the question, the Court established some criteria by which legislative instruments can be distinguished from other types of instruments. In short, the criteria of form, content and effect have to be applied non-cumulatively. Thus, at pages 224-25 and 233, it was determined that an instrument of a "legislative nature" includes a rule of conduct which applies to an undetermined number of persons and which has the force of law, i.e., the rule must be unilateral and have binding legal effect.

[87] Obviously, a municipal by-law is of a "legislative nature" as it meets the criteria mentioned above. As will be seen below in the cases dealing with the application of the *Charter* to municipalities, the latter have the power to establish rules of law which have the force of law and to enforce them within the limits of a defined territory. It can therefore be concluded that municipal by-laws are legislative instruments that may be included in the expression "statutes of the legislature".

[88] It remains to be determined whether the expression "statutes of the legislature" as used in subsection 18(2) includes municipal by-laws. To construe this language guarantee, it is necessary, according to the principles of interpretation set out in *Beaulac*, that subsection 18(2) be interpreted purposively, in a manner consistent with the preservation and development of official language communities in New Brunswick.

[89] In conclusion, in light of the foregoing analysis, the restrictive interpretation previously given to the expression "statutes of the legislature" as used in section 133 needs to be reviewed. The issue therefore is whether this interpretation is determinative in this case. It will be recalled that the extension of this expression to municipal by-laws had been rejected on the ground that, given the historical context, this provision reflected a historical compromise.

[90] In my view, the historical context in which section 133 was enacted in 1867 is fundamentally different from the context of 1982 when subsection 18(2) of the *Charter* was enacted. With respect to the historical context of 1867, it must be remembered that the ambit of section 133 was limited to federal institutions and the institutions of the province of Quebec. The purpose of section 133 was to impose minimum language guarantees and maintain the pre-Confederation status quo. It is "a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union". (See *MacDonald v. City of Montreal*, at page 496; *Blaikie No. 1*, at pages 1025-26; and *Jones v. Attorney General of New Brunswick*, at pages 192-93.) In *Manitoba Reference No. 2*, at page 222, the Supreme Court summarized the "constitutional minimum" of section 133 in these terms: "In so determining the scope of s. 23 [of the *Manitoba Act, 1870*], it is important to place the section within the proper historical context. It, like ss. 93 and 133 of the *Constitution Act, 1867*, is an embodiment of a political compromise. It is not a sweeping guarantee designed to achieve complete linguistic equality [...]."

[91] To determine the meaning of subsection 18(2), it is equally important to place this provision within its historical and legislative context, *i.e.*, the 1982 entrenchment of language guarantees in the *Charter*. In my view, this context reflects, to borrow the words of Lamer, C.J. in *Reference re Public Schools Act (Man.)*, a "unique blend of linguistic dynamics" in New Brunswick. […]

[92] The historical foundation of subsection 18(2) starts before the 1969 enactment of the *Official Languages of New Brunswick Act* culminating in the constitutionalization of language rights in the *Charter* in 1982 and 1993. The impetus behind the legal recognition of language rights in this province and at the federal level came from the *Report of the Royal Commission on Bilingualism and Biculturalism* published in 1967. The main recommendation of the Commission aimed at ensuring the equality of the two founding peoples as well as the equality of their respective languages and cultures. The Commission proposed that federal authorities expand the scope of section 133 to equip the country with the means likely to achieve true bilingualism and biculturalism. In enacting the *Official Languages of New Brunswick Act* on April 18, 1969, New Brunswick conferred an official character and an equal status to the French and English languages. The language rights recognized by the Act included the obligation to print laws in English and French. Prior to that time, this province used only English in its statutes and regulations. The evolution of compulsory legislative bilingualism would evolve at a relatively fast pace with the enactment and publication of the revised statutes in English and French followed by the adoption of consolidated regulations and new rules of court, also in bilingual format. It was on the basis of the evolution of the legislative and political history of this province and in recognition of the cultural heritage of the two official language communities of this province that the elected representatives felt it was time to constitutionalize these language guarantees by entrenching subsections 16(2) to 20(2) in the *Charter* in 1982 and section 16.1 in 1993.

[93] In light of the recent Supreme Court decisions already discussed concerning the larger objects of the *Charter* and the purposes of the provisions of subsection 16(2) and section 16.1, which have no equivalent in the *Constitution Act, 1867*, I believe that the historical and legislative context of the enactment of subsection 18(2) reflects a linguistic dynamic much more fertile in nature than the context which might have inspired the framers of section 133 at the time of Confederation. The principle of substantive equality of official languages and of the two official language communities entrenched in sections 16 and 16.1 and the corollary that language rights based thereon require government action for their implementation and therefore create obligations for the government has nothing to do with the minimum language guarantees provided for in section 133. Even if the right guaranteed under subsection 18(2) of the *Charter* results from a political compromise arrived at in 1982 between the elected representatives of this province, on behalf of the general public, the Supreme Court stated in *Beaulac* that the existence of a political compromise is without consequence with regard to the scope of the resulting language rights. Moreover, as Wilson, J. stated in *Reference re Bill 30*, *supra*, at page 1176, it is open to the Court "to breathe life into a compromise that is clearly expressed". In my view, the interpretation of the expression "statutes of the legislature" in *Blaikie No. 2* is not determinative in this matter.

[94] The purpose of subsection 18(2) is clear: to ensure equal access to Anglophones and Francophones to the statutes of this province. This provision was not enacted and confirmed in the *Charter* in a vacuum. The framers obviously had in mind the history of legislative unilingualism which existed in New Brunswick

prior to 1969 and the deficiencies which persisted. They sought to remedy the deficiencies in the language regime by constitutionalizing a compulsory legislative bilingualism regime backed by remedies provided for in subsection 24(1) of the *Charter* and subsection 52(1) of the *Constitution Act, 1982*. The remedial purpose of this provision is one of the objects of the language rights guaranteed in the *Charter*.

[95] […] Given the stated objective of the language right provided for in subsection 18(2), the requirement of substantive equality of status of the official languages and of the two official language communities, and the remedial character of this provision, excluding municipal by-laws from the expression “statutes of the legislature” used in subsection 18(2) would, in my view, be incompatible with the preservation and development of official language communities. Depriving members of the minority language community of equal access would impede the attainment of the objective of substantive equality. In addition, this conclusion is supported by the governing principle of the respect for minority rights stated in *Reference re Secession of Quebec*, *supra*. The Supreme Court stated that this principle underlies our constitutional order and continues to exercise influence in the operation and interpretation of our Constitution.

[96] By interpreting subsection 18(2) purposively and in a manner consistent with the preservation and development of official language communities, I think that it is necessary to extend the meaning of the term “statutes” used in subsection 18(2) to include municipal by-laws. In my view, any other interpretation would frustrate the remedial purposes of this language right and be inconsistent with a liberal, dynamic and purposive construction of this right.

[…]

[106] Based on the foregoing analysis, I conclude that New Brunswick municipalities are subject to the *Charter* and, as a result, the acts of the City of Moncton, in this case, its failure to comply with the obligation provided for in subsection 18(2), is subject to a *Charter* review. In short, municipalities in New Brunswick are creations of the province, exercise governmental powers conferred upon them by the legislature or government, and derive all their powers from statute. They must also act within the limitations imposed by their enabling statute and their functions are clearly governmental in nature.

[…]

[127] In the context of this case, I believe that a declaration of invalidity subject to a temporary suspension of the effect of the declaration provides the City of Moncton and the provincial government with the flexibility necessary to develop an appropriate solution that will ensure that the appellant's rights under subsection 18(2) are realized. In this regard, this Court would be loathe to interfere with and impose standards on the legislature. It is obvious that the government has a choice in the institutional means by which its obligations can be met. For example, the exhaustive inquiry of the task force on official languages in New Brunswick (Towards Equality of Official Languages in New Brunswick, at pages 337-84) dealt with the linguistic composition of the population of New Brunswick municipalities. The report acknowledged that a possible approach that would meet the constitutional obligation of the principle of equality of official languages might be to implement a language policy whereby municipal services would be available in both official languages only where numbers warrant. This is a quantitative approach in which certain municipalities might be declared bilingual on the basis of a percentage of the population representing an official language minority. The percentage would have to be determined by the legislature.

[128] In this connection, it should be remembered that section 1 of the *Charter* allows restrictions of *Charter* rights only by such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Under this general limitation, the legislature can strike a balance or achieve a compromise between the exercise of a guaranteed right and the safeguarding of society's best interests. However, while certain limits imposed on the exercise of the right guaranteed under subsection 18(2) may be justifiable, this provision creates a requirement of legislative bilingualism that cannot be reduced to unilingualism or a bilingualism that is left to the discretion of municipal councils. This would amount to a denial of the constitutional language right guaranteed by subsection 18(2). Moreover, by implication, the bilingualism requirement in regard to municipal by-laws extends to the process of enactment.

[…]

[132] In the end, I find, for the reasons set out above, that by failing to enact, print and publish its by-laws, including by-law Z-4, in the two official languages of New Brunswick, the City of Moncton, a municipality which includes a sizeable Francophone minority, has failed to comply with the constitutional obligation provided for by subsection 18(2) of the *Charter*.

[133] I also find that the City of Moncton's failure is an infringement of subsection 18(2) of the *Charter*. In such a case, the failure results in the invalidity of all the unilingual by-laws of the City of Moncton. I think that a just and appropriate subsection 52(1) remedy is a declaration of invalidity of the by-laws. The effect of the declaration of invalidity should however be suspended for a period of one year as from the date of this judgment to enable the City of Moncton and the government of New Brunswick to comply with the constitutional obligations set out in these reasons.

R. v. Butler, 2002 NBQB 325 (CanLII)

[180] The obvious intention of the framers of the *Charter* to constitutionalize linguistic duality in New Brunswick is evident in ss. 16(2), 18(2) and 20(2) as well as s. 19(2). Section 20(2), when compared with s. 20(1), may be seen as indicating greater expectations for achieving the goal of bilingualism in the public service of New Brunswick than has been achieved in the federal public service generally.

SEE ALSO:

Town of Riverview v. Charlebois, 2014 NBQB 154 (CanLII)

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19. (1) Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

19. (2) Proceedings in New Brunswick courts

19. (2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

[LAST UPDATE: MAY 2017]

N.B. – See case law on section 133 of the *Constitution Act, 1867* and section 23 of the *Manitoba Act, 1870*.

ANNOTATIONS – GENERAL

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[40] Several decisions of the Supreme Court of Canada have expressly acknowledged, subject to minor variations of style, the similarity between the constitutional provisions in section 133 of the *Constitution Act, 1867*, section 23 of the *Manitoba Act, 1870* and in sections 17, 18 and 19 of the *Charter*. In *Société des Acadiens*, Beetz, J. noted that sections 17, 18 and 19 of the *Charter* were borrowed from the English version of section 133. And he concluded at page 573: “It would accordingly be incorrect in my view to decide this case without considering the interpretation of s. 133. ...” With respect to the similarity between sections 23 and 133, see *Manitoba Reference No. 1*, at pages 743-44, and *Manitoba Reference No. 2*, at page 220.

[…]

[43] If the upshot of this position is that a court which is called upon to decide an issue dealing with the interpretation of sections 17, 18 and 19 of the *Charter* must adhere to the interpretation already given to section 133, it is obvious that such an approach would be inconsistent with the principles of interpretation of language rights set out in *Beaulac*, *supra*.

[44] In this regard, it is important to remember the words of Dickson, C.J. who, dissenting on the constitutional issue, stated in *Société des Acadiens*, at page 561 that despite the similarity between section 133 and subsection 19(2) "we are dealing with different constitutional provisions enacted in different contexts. In my view, the interpretation of s. 133 of the *Constitution Act, 1867* is not determinative of the interpretation of the *Charter*".

[45] Equally important are the following comments made by Dickson, J. who expressed the same point of view in *R. v. Big M Drug Mart Ltd.*, at page 343:

> ... it is certain that the *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the *Charter*'s entrenchment. The language of the *Charter* is imperative. It avoids any reference to existing or continuing rights ... .

[46] Finally, in *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613, the Supreme Court held, at page 638, that notwithstanding the similarity in the wording of paragraph 2(c) of the *Canadian Bill of Rights* and section 10 of the *Charter*, the premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted "is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts".

[47] In light of these statements dealing with the principles of interpretation of constitutional rights and in light of recent decisions of the Supreme Court in *Beaulac* and *Arsenault-Cameron*, *supra*, I think that the principle set out by Beetz, J. in *Société des Acadiens* according to which the interpretation of language guarantees under section 133 must be taken into account cannot mean that the purposive analysis of rights established by the cases already cited can be ignored. As stated by the Supreme Court, "the focus on the historical context of language and culture indicates that different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province." (See *Reference re Public Schools Act (Man.)*, *supra*, at page 851.) Accordingly, I believe that the decision in *Blaikie No. 2*, while serving as a guide for the interpretation of subsections 17(2), 18(2) and 19(2) of the *Charter*, must be viewed with prudence by the courts of this province.

Ochapowace Indian Band v. Saskatchewan (Minister of Justice), 2004 SKQB 486 (CanLII)

[9] Neither the Cree nor Saulteaux language is constitutionally protected under s. 19 of the *Charter*. But even if such languages were, a witness or party testifying in either such language would nevertheless still have no constitutional right to be understood without translation. This is made abundantly clear by Beetz J. in *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch* 1986 CanLII 66 (SCC), [1986] 1 S.C.R. 549 at pp. 574-575 where he states:

> These language rights are the same as those which are guaranteed by s. 17 of the Charter with respect to parliamentary debates. They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be

heard or understood, or that he has the right to be heard or understood in the language of his choice. [Emphasis added] [pp. 574-575]

N.B. – The appeal of this judgment was dismissed: Ochapowace First Nation v. Canada (National Revenue), 2007 SKCA 88 (CanLII).

R. v. Deveaux, 1999 CanLII 3182 (NS SC)

[p. 6] The failure by the Trial Judge to advise the Appellant in accordance with Section 530(3) of the [*Criminal*] *Code* constitutes a breach of the Appellant's rights under Sections 15, 16 and 19 of the *Canadian Charter of Rights and Freedoms*.

Cormier v. Fournier, 1986 CanLII 92 (NB QB)

[9] Section 19 of the *Charter* may not be invoked in support of a right to an interpreter as that question has been dealt with as a separate issue in section 14:

> 14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

SEE ALSO:

R. v. Car-Fre Transport Ltd., 2015 ABPC 280 (CanLII) [judgment available in French only]

ANNOTATIONS – SUBSECTION 19(1)

R. v. Mercure, [1988] 1 S.C.R. 234, 1988 CanLII 107 (SCC)

[97] The issue raised in question 6 has already been resolved in principle in the event that s. 110 of *The North-West Territories Act* is found to apply in Saskatchewan. This Court in *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, held (at pp. 574-75) that "there is no language guarantee, either under s. 133 of the *Constitution Act*, 1867, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice" (per Beetz J.) This reasoning with respect to s. 133 of the *Constitution Act, 1867* and s. 19 of the *Charter* is equally applicable to s. 110 of *The North-West Territories Act* if it be now in effect in Saskatchewan as asserted by the appellant.

Industrielle Alliance, Assurance et services financiers inc. v. Mazraani, 2017 FCA 80 (CanLII)

[8] It is trite law that English and French are the official languages of Canada and have equality of status and equal rights and privileges in courts established by Parliament, including the TCC [Tax Court of Canada]. Hence, any person who appears before or submits written pleadings to a federal court has the constitutional right to use the official language of his or her choice: see section 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. This constitutional right is also reflected and confirmed in sections 16 and 19 of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

[9] The Supreme Court of Canada in *MacDonald v. City of Montreal*, 1986 CanLII 65 (SCC), [1986] 1 S.C.R. 460 at 483, 27 D.L.R. (4th) 321 recalled that the constitutional right to use the official language of one's choice in courts covered by section 133 of the *Constitution Act, 1867* applies broadly to "litigants, counsel, witnesses, judges and other judicial officers".

[10] Significantly, a person's ability to express him or herself in both official languages does not impact such person's constitutional right to choose either French or English in the context of court proceedings. One's ability to speak both official languages is "irrelevant". In the words of the Supreme Court of Canada

in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 at paragraph 45 [*Beaulac*]:

> In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity.

[…]

[18] Upon being informed by counsel Turgeon that the witness Mr. Michaud wanted to testify in French and that one of the parties, being Mr. Mazraani, needed an interpreter, it was incumbent upon the Judge to adjourn the hearing in order to arrange for interpretation services. It was his duty to respect Mr. Michaud's choice to testify in French and Mr. Mazraani's request for an interpreter (*OLA*, subsections 15(1), (2)).

[19] Instead, the Judge granted a break for counsel Turgeon to devise a compromise. Counsel Turgeon proposed that Mr. Michaud testify in English but that he be permitted to express himself in French on technical issues, which could then be translated into English. The Judge accepted this "pragmatic" compromise. In doing so, the Judge failed to uphold his positive duty to ensure that witnesses are heard in the official language of their choice.

[…]

[21] During the course of the proceedings before the TCC [Tax Court of Canada], counsel Turgeon and other witnesses were treated similarly and were denied their right to choose to speak in French because of their English language skills (see for example: Transcript, vol. 2 at p. 555 (Ms. Lambert) and Transcript, vol. 4 at pp. 1256, 1336-1337 (counsel Turgeon)). In turn, each request to speak in the official language of their choice was treated by the Judge as a request for accommodation, as opposed to the exercise of protected official language rights.

[22] In each instance, the Judge coaxed counsel and the witnesses to use English. In conducting the proceedings, the Judge favoured English over French in order to accommodate Mr. Mazraani's limited understanding of French. This resulted in a violation of counsel Turgeon and the witnesses' official language rights. The Judge exerted subtle pressure on counsel Turgeon and the witnesses to forego their right to speak in the official language of their choice, in this case French (*Chiasson v. Chiasson*, 222 N.B.R. (2d) 233 (C.A.); [1999] N.B.J. No. 621 (QL)). Mr. Mazraani contends that the witnesses and counsel Turgeon freely consented to speak in English and that Industrielle Alliance's reliance on language rights is merely strategic. The transcript of the proceedings simply does not support such a conclusion.

[23] Mr. Mazraani also argues that no prejudice is suffered where an individual is capable of expressing him or herself in both official languages. This argument is ill-founded. A person appearing before a federal court has the constitutional right to express him or herself in the official language of his or her choice regardless of whether he or she is bilingual. In other words, the fact of being bilingual does not extinguish one's right to speak the official language of his or her choice: *Beaulac* at paragraph 45.

[24] Moreover, despite the efforts of the Judge to have the witnesses testify in English, a significant portion of the testimony was in French due to the difficulty some witnesses had expressing themselves in English. Of particular note is the testimony of Éric Leclerc, whose testimony had significant French portions (see for example: Transcript, vol. 4 at pp. 1206, 1207 1222, 1228, 1266, 1323, 1324, 1332). Although the Judge translated some of the witnesses' French testimony into English for Mr. Mazraani, many exchanges were left untranslated. At times, Mr. Mazraani expressed his inability to understand what was happening, saying "I have to understand" (Transcript, vol. 4 at pp. 1249, 1320). Given Mr. Mazraani's earlier request for interpretation services should there be testimony in French, it follows that the fact that witnesses and counsel Turgeon addressed the Judge in French with little to no translation

constituted a violation of Mr. Mazraani's official language rights (*Minister's Memorandum of Fact and Law* at para. 59).

[…]

[26] In the end, the efforts of the Judge to be "pragmatic" in finding ways around adjourning and securing interpretation services resulted not only in the violation of the official language rights of counsel Turgeon and witnesses, but also the violation of Mr. Mazraani's official language rights. It simply was not open to the Judge to seek a shortcut around the official language rights of all those involved in the proceedings. The Judge's failure to exercise his duty to ensure that the official language rights at issue were protected not only resulted in their violation, but further resulted in delays that could have otherwise been avoided by an adjournment to secure proper interpretation services. Pragmatism does not trump the duty to respect the official language rights of all in the course of judicial proceedings.

Yamba v. Canada (Minister of Justice), 2016 BCCA 219 (CanLII)

[21] To begin, it is not at all clear that the right to a trial in one of our two official languages, provided for in s. 530 of the *Criminal Code*, is the equivalent of a constitutional right. Although, by virtue of s. 16(1) of the *Charter*, English and French are the "official languages of Canada", the Charter right to use either language in court proceedings extends only to the courts of New Brunswick and those established by Parliament (Charter, s. 19). In *R. v. MacKenzie*, 2004 NSCA 10 (CanLII), 181 C.C.C. (3d) 485, leave to appeal ref'd [2005] 1 S.C.R. xii, the court held that a breach of the rights established under s. 530 did not give rise to a constitutional remedy. Mr. Justice Fichaud said:

> [60] The quasi-constitutional status of s. 530 invokes a broad and purposive interpretation of the statutory language. But s. 530 is not entrenched as a provision of the *Charter*. Its breach does not invoke s. 24(1) of the *Charter*.

See also: *R. v. Schneider*, 2004 NSCA 151 (CanLII) at para. 19, 192 C.C.C. (3d) 1, leave to appeal ref'd [2005] 2 S.C.R. xi.

R. v. T.D.M., 2008 YKCA 16 (CanLII)

[26] The English version of s. 5 [of the *Languages Act*, R.S.Y. 2002, c. 133] uses the expression "may be used", which could be interpreted as permissive only. However, when read together with the French version -- "chacun a le droit d'employer" -- it is clear that the legislature intended to confer, amongst other things, a "right" to testify in either official language. Although in *Kilrich Industries Ltd.*, Huddart J.A. does not discuss interpreting bilingual legislation, it is evident that she concluded that s. 5 of the *Languages Act* confers certain rights with respect to the use of English and French: paras. 71, 72. Also of note is the fact that the words used in both versions of s. 5 are identical to those used in s. 19 of the *Charter*, which deals with the right to use English and French in courts established by Parliament and by New Brunswick.

Kilrich Industries Ltd. v. Halotier, 2007 YKCA 12 (CanLII)

[35] Section 5 [of the *Languages Act*] deals with proceedings and processes in court and parallels the language of s. 19 of the *Charter*:

> 5 Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by the Legislative Assembly.
>
> 5 Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux établis par l'Assemblée législative et dans tous les actes de procédure qui en découlent.

[…]

[71] The appellant next asserts that s. 5 of the *Languages Act* imposes positive obligations on the government to communicate and understand M. Halotier in either official language. Section 5 permits

"any person" to use English or French "in any pleading in or process issuing from" the Yukon Supreme Court—a court established by the Legislative Assembly in the *Supreme Court Act*, R.S.Y. 2002, c. 211.

[72] Consideration of some of the claimed rights is straight-forward. The right to file documents with the registry in French and the right to use French in communicating orally or in writing with the registry flow naturally from the language of s. 5 of the *Languages Act*. When proceedings are required by law to be recorded, a person using either French or English has the right to have his words recorded in that language (*Mercure*, supra at 275-6). It follows that any transcript of such a proceeding should include testimony in the language (if French or English) in which it was given. Otherwise, as La Forest J. noted in *Mercure*, the right to use one's chosen language would be seriously truncated, particularly if the proceedings continued on to the Court of Appeal. And consistent with my view of s. 4, for the right to use English or French in a court proceeding to have any meaning, the court must make its rules (including forms and practice) available to the public in French in the same way it does in English.

[73] The other rights the appellant claims are more difficult of analysis, particularly those that imply a positive obligation on the court, such as the obligation to provide a bilingual judge, clerk or officer of the court, or an interpreter. However desirable these services may be, I am not persuaded s. 5 imposes an obligation to provide them.

[…]

[75] Counsel for the appellant acknowledged his claims clash with *Société des Acadiens* and *MacDonald*, *supra*, but suggests that these decisions have been over-taken by more recent decisions, particularly *Beaulac*, supra, and that on its purposive approach to language rights, positive obligations should be imposed as necessary to give meaning to his statutory right to use French in court proceedings. The appellant also says that this interpretation of s. 5 recognizes not only his language rights, but also with the aspirations of the Yukon francophone community to develop and expand.

[76] I am not prepared on the record in this case to attempt to distinguish considered decisions of the Supreme Court of Canada. Furthermore, there are good reasons to support the view that s. 19 of the *Charter* and s. 5 of the *Languages Act* impose few positive obligations on the court or government.

[77] First, s. 6 of the *Languages Act*, like the parallel provisions of s. 20 of the *Charter*, provides for the "right to communicate with, and to receive available services from … the central office of an institution of the Legislative Assembly or of the Government of the Yukon in English or French", and the same right with respect to any other office of any such institution when certain numerical or qualitative conditions are met. While I appreciate that this provision is not determinative of the scope of s. 5, it does provide strong support for a more limited reading than that suggested by the appellant. So does the absence of a provision comparable to those found in other legislative schemes that specifically address the language capacities of a judge (See s. 19(2) of the *New Brunswick Official Languages Act*; s. 16 of the federal *Official Languages Act*; and s. 530 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46).

[78] Second, s. 5 of the *Languages Act*, like s. 19 of the *Charter*, uses the presumptively permissive term "may". This term does not normally connote a positive obligation to act and contrasts with the mandatory "shall" used in s. 4 (*Re Manitoba Language Rights*, *supra* at 742).

[79] A third reason to reject an interpretation that requires a bilingual judge or interpreter, or imposes some other positive obligation is that it may have constitutional implications as Beetz, J. suggested in *Société des Acadiens*, when he explained (for the majority) at 580:

> Before I leave this question of equality however, I wish to indicate that if one should hold that the right to be understood in the official language used in court is a language right governed by the equality provision of s. 16, one would have gone a considerable distance towards the adoption of a constitutional requirement which could not be met except by a bilingual judiciary. Such a requirement would have far reaching consequences and would constitute a surprisingly roundabout and implicit way of amending the judicature provisions of the Constitution of Canada.

[80] Almost inevitably, the implication of construing s. 5 as including positive obligations would be to pre-empt constitutional review and the opportunity for the government to justify its decision under s. 1 of the *Charter*—something which Charron J. warned against in *Charlebois*, *supra*.

[81] A final reason for rejecting a more expansive interpretation of s. 5 is that courts have unequivocally recognized that the right to speak and be understood is protected by the requirements of natural justice and the right to a fair hearing. Important for the Yukon, in particular, is the explanation offered by Bastarache J. at para. 41 of *Beaulac*:

> …The right to full answer and defence is linked with linguistic abilities only in the sense that the accused must be able to understand and must be understood at his trial. But this is already guaranteed by s. 14 of the *Charter*, a section providing for the right to an interpreter. The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English. This Court has already tried to dissipate this confusion on several occasions. Thus, in *MacDonald v. City of Montreal*, supra, Beetz J., at pp. 500-501, states that:
>
> > It would constitute an error either to import the requirements of natural justice into . . . language rights . . . or vice versa, or to relate one type of right to the other. . . . Both types of rights are conceptually different. . . . To link these two types of rights is to risk distorting both rather than reenforcing either.

[82] On this point, reference can also be made to the recent dissenting reasons of Bastarache J. in *Charlebois*, *supra*, where he wrote (at para. 54):

> Although the quasi-constitutional status of the *OLA* requires a purposeful and generous interpretation, there is here no basis for imputing to the Legislature the intention to extend the definition of the terms used in furtherance of s. 16(3) of the *Charter*. On the contrary, there is every reason to believe that the Legislature was conscious of the distinction between language rights and the right to a fair trial, and the distinction noted earlier in these reasons between the use of one's official language in pleadings on one part, and communications with government offices under s. 20(1) of the *Charter* on the other. ...

[83] In summary, as I see it, the right to registry services in French and English is to be considered under s. 6 of the *Languages Act*. The right to be understood directly or through an interpreter, and the right to a transcript that includes interpretation of the original French or English voices are left to the discretion of the trial judge who is obliged to conduct a fair trial, with full regard for the right of every person in a Yukon court to speak and produce documents in French or English and to other rights guaranteed by the *Charter*, including the right to an interpreter under s. 14, and the need to give “true meaning” to the principle of equality which Bastarache J. noted in *Beaulac* (at para. 22).

R. v. MacKenzie, 2004 NSCA 10 (CanLII)

[36] Section 19(1) applies only to courts "established by Parliament". It is similar to s. 133 of the *Constitution Act, 1867* which states that English or French "may be used by any person in any pleading or process in or issuing from any court of Canada established under this Act, and in or from all or any of the courts of Quebec." The words "any court of Canada" in s. 133 have been interpreted to apply only to courts established by federal legislation: *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182 at 193 per Chief Justice Laskin; *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016 at pp. 1025 - 6 and 1028 - 30; *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549 at pp. 561 and 574.

[37] Hogg, *Constitutional Law of Canada* (looseleaf, vol. 2) at para. 53.5(A) states:

> With respect to the courts, s. 133 of the *Constitution Act, 1867* requires that either French or English "may be used by any person in any pleading or process in or issuing from any Court of Canada

established under this Act, and in or from all or any of the courts of Quebec". This gives a choice of either French or English to litigants and the Federal courts and the courts of Quebec. Section 23 of the *Manitoba Act, 1870* imposes a similar requirement on the courts of Manitoba. Section 19(2) of the *Charter of Rights* imposes a similar requirement on the courts of New Brunswick. The courts of the other seven provinces are under no similar constitutional obligation. [emphasis added]

[38] The Provincial Court which arraigned and tried Ms. MacKenzie is not "established by Parliament". It is established under the *Provincial Court Act*, R.S.N.S. 1989, c. 238, as am., s. 2A(1):

> There is hereby established a court of record to be known as the Provincial Court of Nova Scotia.

[39] There was no breach of s. 19 of the *Charter*.

Lavigne v. Canada (Human Resources Development), 1995 CarswellNat 1272, [1995] F.C.J. No. 1629, 106 F.T.R. 308 (FC TD) [hyperlink not available]

[6] Subsection 19(1) of the *Canadian Charter of Rights and Freedoms* provides that either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament. The Federal Court is a court established by Parliament. The right embodies at a minimum the right to speak and make written submissions in the language of one's choice. It includes the right to be understood by the judge or judges hearing the case. However, this guarantee of language equality is not a guarantee that the official language used by any person will be understood by the person to whom the pleading or process is addressed. This entitlement is derived from the principles of natural justice and from subsection 15(2) of the *Official Languages Act*.

Lavigne v. Canada (Human Resources Development), 1995 CarswellNat 239, [1995] F.C.J. No. 737, 55 A.C.W.S. (3d) 735 (FC TD) [hyperlink not available]

[8] This conclusion otherwise derived from the clear and unambiguous wording of section 18 is entirely consistent with the constitutional linguistic guarantees pertaining to the use of either official languages in judicial proceedings. Section 133 of the *Constitution Act, 1867*, and subsection 19(1) of the *Charter* both guarantee the right of a litigant to use either official languages in proceedings in any courts established by Parliament. As was stated by Beetz J. in *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549, at p. 574, both these guarantees:

> (...) vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice.

[9] In the further words of Beetz J. in *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, at p. 483:

> (...) the language rights then protected are those of litigants, counsel, witnesses, judges and other judicial officers who actually speak, not those of parties or others who are spoken to; and they are those of the writers or issuers of written pleadings and processes, not those of the recipients or readers thereof.

[11] I should also add that construing the *Official Languages Act* so as to compel Crown to adduce evidence in the official language chosen by the other party would give rise to a construction that is inconsistent with the rights of witnesses who also have the constitutionally guaranteed right to testify in the official language of their choice under both section 133 of the *Constitution Act, 1867*, and section 19 of the *Charter*. This right is reiterated and supplemented by subsection 15(1) of the *Official Languages Act*, and it seems clear that the legislator would not have given witnesses the right to testify in the official language of their choice while, at the same time, providing for the right of litigants to have this same testimony uttered in the official language of their choice.

R. v. Rodrigue, 1994 CanLII 5249 (YK SC)

[p. 14-15] Counsel for the accused relies in paragraph 13 of his memorandum of argument on sections 21 and 24 of the *Official Languages Act*, *supra*, and on subsection 9(d) of the *Official Languages (Communications with and Services to the Public) Regulations* (*Canada Gazette*, Part II, Vol. 126, No. 1, SOR/92-48). It should be pointed out that sections 21 and 24 of the *Official Languages Act* are included in Part IV of this Act, which deals with services and communications with the public and which is derived directly from section 20(1) of the *Canadian Charter*, as opposed to Part III of the Act, which deals with the administration of justice and which flows from section 19(1) of the *Canadian Charter*. These two types of provisions are in two separate fields, since section 19(1) of the *Charter* and Part III of the *Official Languages Act* concern the arguments and written pleadings of federal institutions in legal cases, whereas section 20(1) of the *Charter* and Part IV of the Act and its Regulations are concerned more directly with communications unrelated to legal proceedings. This distinction is also evident from the following passage of the judgment of Mr. Justice Beetz of the Supreme Court of Canada in *Société des Acadiens*, *supra*, at pp. 574-575:

> And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice.
>
> I am reinforced in this view by the contrasting wording of s. 20 of the *Charter*. Here, the *Charter* has expressly provided for the right to communicate in either official language with some offices of an institution of the Parliament or Government of Canada and with any office of an institution of the Legislature or Government of New Brunswick. The right to communicate in either language postulates the right to be heard or understood in either language. (Emphasis added.)

[p. 15-16] Consequently, subsection 20(1) of the *Charter* and Part IV of the *Official Languages Act* and the Regulations made under this Act do not apply to disclosure of evidence in judicial cases, since the very structure of sections 16 to 20 of the *Charter* illustrates that each of these sections covers a different, water-tight subject matter, distinct from parliamentary, governmental and judicial activities. It would therefore be inappropriate to install communicating tubes between these provisions. Indeed, if section 20(1) were to apply to communications in a judicial context, then the Supreme Court would have come to a very different conclusion in *Société des Acadiens*, *supra*. […]

N.B. – The appeal of this judgment was dismissed on other grounds by the Yukon Court of Appeal and the application for leave to appeal to the Supreme Court of Canada was dismissed.

St. Jean v. R., 1986 CarswellYukon 10, [1986] Y.J. No. 76, [1987] N.W.T.R. 118, 2 Y.R. 116 (NWT YK SC) [hyperlink not available]

[25] The framers of s. 16(1) and s. 18(1) of the *Charter*, as well as s. 19(1), cannot have contemplated the inclusion of the Yukon Territory, or its government or legislature, in these sections, and the purposeful silence of the *Charter* must be respected. Moreover, the *Charter* goes so far as to equate the Yukon Territory with the other provinces of Canada in s. 30, in order to specifically make operative, in the Yukon Territory, those *Charter* sections which apply in all provinces of Canada, even where linguistic rights do not apply.

[…]

[28] I do not think that ss. 17(1), 18(1) and 19(1) of the *Charter* confer any additional rights which would be relevant for the purposes of the present case, in relation to the Parliament of Canada and the Courts established by it, beyond those already found in s. 133 of the *Constitution Act*. As to s. 16(1) of the *Charter*, I conclude that the Commissioner in Council, for the reasons already given, is not an institution of the Government or of the parliament of Canada within the meaning of the *Charter*. Insofar as institutions of the parliament of Canada are concerned, I should note that, in my view, this category is a restrictive one, to which it is even clearer that the Commissioner in Council does not belong.

[…]

[30] I believe the ticket to be, in effect, a pleading or process in or issuing from a Court of the Yukon Territory, and the Courts of the Yukon Territory are clearly not Courts established by Parliament and coming within s. 19(1) of the *Charter*, but rather Courts established by the Commissioner in Council. However, even if they were Courts coming within s. 19(1) of the *Charter*, the ticket would be valid in any event, in virtue of the decisions in *Bilodeau* and *MacDonald*.

[31] Thirdly, even if the *Charter* did apply I do not believe it was the intention of the framers of s. 20(1) of the *Charter*, to include a ticket or summons, for having committed a traffic violation, within the ambit of the rights therein described, namely, the right of any person to communicate with or receive services from an institution of the government or parliament of Canada. I think that what was contemplated was the provision of services to a person, at his request, or desired by him, or to his advantage, and that communications were not intended to cover pleadings or processes in or issuing from a Court, since these were already contemplated by s. 19 of the *Charter*, and by s. 133 of the *Constitution Act 1867*. In the present instance, there is no question of services being rendered to Appellant, nor is there any question raised of Appellant's right to communicate himself in the French language, or to receive replies in the French language, assuming such a right exists. Thus, I do not find that any of Appellant's rights under s. 20 of the *Charter* have been infringed in the present instance by the issuance of a ticket in the English language only.

Thibeault J.R.N.J. (Captain), R. v., 2014 CM 3022 (CanLII)

[10] Throughout the proceedings concerning this application, I have expressed many concerns over many situations resulting in many exchanges with both counsel who shared different perspectives and different ideas concerning this fundamental matter as a matter of proceedings. First, in his application, it was suggested by Captain Thibeault that section 530 of the *Criminal Code* would apply in a court martial context. I would disagree with him. I do not see this provision and others related in the *Criminal Code* concerning the language of trial as having any application to this trial.

[11] My understanding of the situation is through the *Official Languages Act*, which is a federal act and would apply to this tribunal, a court martial, because my understanding is that the court martial is a federal tribunal, a federal court in the sense that it's a court enacted by a federal act. So, provisions of the *Official Languages Act* would apply and, also as a matter of fact, the Constitution would find application to the court martial especially sections 19, 14, and 7 of the *Canadian Charter of Rights and Freedoms*.

SEE ALSO:

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 1986 CanLII 65 (SCC)

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

Ewonde v. Canada, 2017 FCA 112 (CanLII)

Noiseux v. Belval, 1999 CanLII 13667 (QC CA)

Cross v. Teasdale, 1998 CanLII 13063 (QC CA) [judgment available in French only]

Beaudoin v. Canada (Minister of National Health and Welfare), [1993] 3 FCR 518, 1993 CanLII 2961 (FCA)

ANNOTATIONS – SUBSECTION 19(2)

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

[45] The constitutional question stated by the Chief Justice reads as follows:

Does s. 19(2) of the *Canadian Charter of Rights and Freedoms* entitle a party pleading in a court of New Brunswick to be heard by a court, the member or members of which are capable of understanding the proceedings, the evidence and the arguments, written and oral, regardless of the official language used by the parties?

[46] The issue raised by this question has to do with the content of the constitutional right to use either English or French in any court of New Brunswick: does this right comprise the right to be heard and understood by the court regardless of the official language used?

[…]

[49] Section 19(2) of the *Charter* should be read in the context of that part of the *Charter* that is entitled "Official languages of Canada" and comprises ss. 16 to 22: […]

[50] Subject to minor variations of style, the language of ss. 17, 18 and 19 of the *Charter* has clearly and deliberately been borrowed from that of the English version of s. 133 of the *Constitution Act, 1867* of which no French version has yet been proclaimed pursuant to s. 55 of the *Constitution Act, 1982*. It would accordingly be incorrect in my view to decide this case without considering the interpretation of s. 133 which provides:

> 133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

[51] The somewhat compressed and complicated statutory drafting exemplified in s. 133 has been shortened and simplified in ss. 17 to 19 of the *Charter*, as befits the style of a true constitutional instrument. The wording of the relevant part of s. 133 ("may be used by any Person or in any Pleading or Process in or issuing from ... all or any of the Courts of") has been changed to "may be used by any person in, or in any pleading in or process issuing from, any court of". I do not think that anything turns on this change, which is one of form only.

[52] Furthermore, in my opinion, s. 19(2) of the *Charter* does not, anymore than s. 133 of the *Constitution Act, 1867*, provide two separate rules, one for the languages that may be used by any person with respect to in-court proceedings and the languages that may be used in any pleading or process. A proceeding as well as a process have to emanate from someone, that is from a person, whose language rights are thus protected in the same manner and to the same extent, as the right of a litigant or any other participant to speak the official language of his choice in court. Under both constitutional provisions, there is but one substantive rule for court processes and in-court proceedings and I am here simply paraphrasing what has been said on this point in the *MacDonald* case, in the reasons of the majority, at p. 484.

[53] It is my view that the rights guaranteed by s. 19(2) of the *Charter* are of the same nature and scope as those guaranteed by s. 133 of the *Constitution Act, 1867* with respect to the courts of Canada and the courts of Quebec. As was held by the majority at pp. 498 to 501 in *MacDonald*, these are essentially language rights unrelated to and not to be confused with the requirements of natural justice. These

language rights are the same as those which are guaranteed by s. 17 of the *Charter* with respect to parliamentary debates. They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice.

[…]

[56] Here again, s. 13(1) of the [*Official Languages of New Brunswick*] *Act*, unlike the *Charter*, has expressly provided for the right to be heard in the official language of one's choice. Those who drafted s. 19(2) of the *Charter* and agreed to it could easily have followed the language of s. 13(1) of the *Official Languages of New Brunswick Act* instead of that of s. 133 of the *Constitution Act, 1867*. That they did not do so is a clear signal that they wanted to provide for a different effect, namely the effect of s. 133. If the people of the Province of New Brunswick were agreeable to have a provision like s. 13(1) of the *Official Languages of New Brunswick Act* as part of their law, they did not agree to see it entrenched in the Constitution. I do not think it should be forced upon them under the guise of constitutional interpretation.

[…]

[58] The scheme has now been made more comprehensive in the *Charter* with the addition of New Brunswick to Quebec -- and Manitoba -- and with new provisions such as s. 20. But where the scheme deliberately follows the model of s. 133 of the *Constitution Act, 1867*, as it does in s. 19(2), it should, in my opinion, be similarly construed.

[…]

[72] I do not think the interpretation I adopt for s. 19(2) of the *Charter* offends the equality provision of s. 16. Either official language may be used by anyone in any court of New Brunswick or written by anyone in any pleading in or process issuing from any such court. The guarantee of language equality is not, however, a guarantee that the official language used will be understood by the person to whom the pleading or process is addressed.

[73] Before I leave this question of equality however, I wish to indicate that if one should hold that the right to be understood in the official language used in court is a language right governed by the equality provision of s. 16, one would have gone a considerable distance towards the adoption of a constitutional requirement which could not be met except by a bilingual judiciary. Such a requirement would have far reaching consequences and would constitute a surprisingly roundabout and implicit way of amending the judicature provisions of the Constitution of Canada.

[74] I have no difficulty in holding that the principles of natural justice as well as s. 13(1) of the *Official Languages of New Brunswick Act* entitle a party pleading in a court of New Brunswick to be heard by a court, the member or members of which are capable of understanding the proceedings, the evidence and the arguments, written and oral, regardless of the official language used by the parties.

[75] But in my respectful opinion, no such entitlement can be derived from s. 19(2) of the *Charter*.

[76] I would answer the constitutional question as follows:

A party pleading in a court of New Brunswick is entitled to be heard by a court, the member or members of which are capable by any reasonable means of understanding the proceedings, the evidence and the arguments, written and oral, regardless of the official language used by the parties; this entitlement is derived from the principles of natural justice and from s. 13(1) of the *Official Languages of New Brunswick Act* however, and not from s. 19(2) of the *Charter*.

Bujold v. R., 2011 NBCA 24 (CanLII)

[8] Needless to say, it is not enough that Crown counsel be able to speak the official language of the accused; the mandate conferred upon Crown counsel requires that he or she speak the official language specified in any order made under s. 530. Finally, although it is true that s. 19(2) of the *Charter* recognizes that any person has the right to use either official language in any matter before the courts in New Brunswick, Crown counsel waives this right when he or she accepts to act on behalf of the Attorney General in any proceeding with respect to which an order under s. 530 has been made.

Chiasson v. Chiasson, 1999 CarswellNB 599, 1999 CarswellNB 600, [1999] N.B.J. No. 621, 222 N.B.R. (2d) 233 (NB CA) [hyperlink not available]

[4] In New Brunswick, the only province in Canada with two official languages, when a party indicates his wish to be heard in one official language and the judge's reaction is so hostile that the party ends up being heard in the other official language, the court's judgment cannot be allowed to stand. The right to use the official language of one's choosing is not a privilege; it is a fundamental right unrelated to trial fairness as such. See *R. v. Beaulac*, [1999] 1 S.C.R. 768, at pp. 799-800, paragraphs 45-47.

[5] In our view, judges ought to refrain from engaging in any conduct that might deter a person appearing or giving evidence in any proceeding before the court from being heard in the official language of his choice. In fact, it behoves judges to show the greatest of respect for that person's choice of official language.

Ville de Saint-Jean v. Charlebois et 042504 NB INC (February 25, 2004), Saint-Jean, No. 04939902 (NB PC), Vautour J. [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[p. 15] [S]ubsection 19(2) of the *Charter* leaves no room to doubt that Mr. Charlebois had the right to use French in his first appearance before the Provincial Court. If the judge prevented him from doing so, this was a violation of his rights under that subsection. (p. 5) It was not solely up to the judge to advise the defendant of his language rights. The prosecuting counsel representing the Crown in this appearance had a duty to inform the judge of these provisions to fulfil his obligations as guardian of the Constitution.

SEE ALSO:

Charlebois v. Saint John (City), [2005] 3 S.C.R. 563, 2005 SCC 74 (CanLII)

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

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20. (1) Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

> **(a) there is a significant demand for communications with and services from that office in such language; or**
>
> **(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.**

20. (2) Communications by public with New Brunswick institutions

20. (2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

[LAST UPDATE: MARCH 2017]

ANNOTATIONS – SUBSECTION 20(1)

DesRochers v. Canada (Industry), [2009] 1 S.C.R. 194, 2009 SCC 8

[2] It is common ground in this appeal that the rights being claimed are of constitutional origin, since the relevant provisions of the *OLA* implement the constitutional right of any member of the public to be served by federal institutions in the official language of his or her choice (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 (CanLII), [2002] 2 S.C.R. 773). The Chief Justice stated the following constitutional question:

> Do s. 20(1) of the *Canadian Charter of Rights and Freedoms* and Part IV of the *Official Languages Act*, R.S.C. 1985, c. 31, read in light of the principle of equality set out in s. 16(1) of the *Charter*, require Industry Canada to provide services of equal quality in both official languages?

[3] The parties agree, correctly so in my opinion, that the provisions referred to in this constitutional question create a constitutional duty to make services "of equal quality in both official languages" available to the public. The answer to the constitutional question is therefore clearly yes. What is in issue in this appeal is the scope of this concept of "services of equal quality".

[…]

[51] It seems clear to me that the respondents are correct to say that the principle under s. 20(1) of the *Charter* and Part IV of the *OLA* of linguistic equality in the provision of government services involves a guarantee in relation to the services provided by the federal institution. However, it is not entirely accurate to say that linguistic equality in the provision of services cannot include access to services with distinct content. Depending on the nature of the service in question, it is possible that substantive equality will not result from the development and implementation of identical services for each language community. The content of the principle of linguistic equality in government services is not necessarily uniform. It must be defined in light of the nature and purpose of the service in question. Let us consider the community economic development program in the case at bar.

[…]

[54] Given the nature of the services at issue here, I therefore disagree with Létourneau J.A.'s view that the principle of linguistic equality does not entail a right to "access to equal regional economic development services" (para. 33), or that the respondents did not have a duty under Part IV of the *OLA* to "take the necessary steps to ensure that Francophones are considered equal partners with Anglophones" (para. 38) in the definition and provision of economic development services. With respect, it seems to me that Létourneau J.A. did not fully consider the nature and objectives of the program in question in so defining the scope of the duties resulting from the guarantee of linguistic equality. What matters is that the services provided be of equal quality in both languages. The analysis is necessarily comparative. Thus, insofar as North Simcoe, in accordance with the programs' objectives, made efforts to reach the linguistic majority community and involve that community in program development and implementation, it had a duty to do the same for the linguistic minority community.

[55] However, two points must be made regarding the scope of the principle of linguistic equality in the provision of services. First, the duties under Part IV of the *OLA* do not entail a requirement that government services achieve a minimum level of quality or actually meet the needs of each official language community. Services may be of equal quality in both languages but inadequate or even of poor

quality, and they may meet the community economic development needs of neither language community. A deficiency in this regard might be due to a breach of the duties imposed by the *DIA* [*Department of Industry Act*], as the Federal Court of Appeal pointed out in this case, or to a breach of the duties under Part VII, as the Commissioner seemed to believe. I will come back to this point.

[56] Second, nor does the principle of linguistic equality in the provision of services mean that there must be equal results for each of the two language communities. Inequality of results may be a valid indication that the quality of the services provided to the language communities is unequal. However, the results of a community economic development program for either official language community may depend on a large number of factors that can be difficult to identify precisely.

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549

[20] Sections 16 to 22 of the *Charter* entrench two official languages in Canada. They provide language protection in a broad spectrum of public life, including legislatures, courts, government offices and schools. […]

[21] In my opinion, "all institutions of ... government" includes judicial bodies or courts: see Tremblay, "The Language Rights (Ss. 16 to 23)" in Tarnopolsky and Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms: Commentary* (1982), 443 at p. 457. Despite academic debate about the precise significance of s. 16, at the very least it provides a strong indicator of the purpose of the language guarantees in the *Charter*. By adopting the special constitutional language protections in the *Charter*, the federal government of Canada and New Brunswick have demonstrated their commitment to official bilingualism within their respective jurisdictions. Whether s. 16 is visionary, declaratory or substantive in nature, it is an important interpretive aid in construing the other language provisions of the *Charter*, including s. 19(2).

[…]

[54] I am reinforced in this view by the contrasting wording of s. 20 of the *Charter*. Here, the *Charter* has expressly provided for the right to communicate in either official language with some offices of an institution of the Parliament or Government of Canada and with any office of an institution of the Legislature or Government of New Brunswick. The right to communicate in either language postulates the right to be heard or understood in either language.

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

[40] Like s. 18(1) of the *Charter* (which concerns statutes, records and journals of Parliament), s. 7(1) of the *OLA* [of the Northwest Territories] requires the printing in French and English of Acts of the Legislature and records and journals of the Legislative Assembly. Like s. 20(1) of the *Charter*, which concerns communications with and services from federal institutions, s. 11(1) of the *OLA* entitles the use of French and English with head or central offices of government institutions and with other offices where there is a significant demand or the nature of the office makes it reasonable.

[…]

[141] There is conflicting jurisprudence on whether statutory language rights include active offer. In *R. v. Haché* (1993), 139 N.B.R. (2d) 81, 23 W.C.B (2d) 12 (C.A), in the context of a police officer's failure to provide the accused with his *Charter* cautions in French, the court considered whether an accused has the right to be advised of his linguistic rights when subjected to a police investigation. The majority held that no active offer was required. Rice J.A. referred to the absence in the *Charter* of a specific reference to active offer. Angers J.A., in dissent, held that active offer formed a part of the government's obligation under s. 20(2) of the *Charter*. On the other hand, *R. v. Gautreau* (1989), 101 N.B.R. (2d) 1, [1989] N.B.J No. 1005 (Q.B.) (QL) (reversed on appeal on another ground (1990), 1990 CanLII 4014 (NB CA), 109 N.B.R (2d) 54, 60 C.C.C. (3d) 332 (C.A.), leave to appeal to S.C.C. ref'd [1991] 3 S.C.R. viii), held that where the statute conferred equality to the use of both languages, this mandated the use of active offer.

Gautreau also addressed the rights of an accused motorist under s. 20(2) of the *Charter* in the context of the language used by the police officer and the language used in a highway traffic ticket.

[…]

[339] Several months after this appeal was argued, the Supreme Court of Canada issued its decision in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15 (CanLII), [2008] S.C.J. No. 15 ("*Paulin*"). It considered "whether, by agreeing in a contract to provide police services in the province, the Royal Canadian Mounted Police ("RCMP"), a federal institution, is bound by the more generous rules respecting language in New Brunswick or is required to meet only the federal official languages standards"" at para. 2. The Court concluded that since the New Brunswick legislature had authorized the RCMP to administer justice in the province, the RCMP performed the role of an "institution of the legislature or government of New Brunswick" as described in s. 20(2) of the *Charter* and was therefore obligated to comply with that provision and provide services to the New Brunswick public in French or English according to New Brunswick's more demanding requirements than those pertaining to the federal government under s. 20(1).

[…]

[341] We are of the view that *Paulin* does not inform the issues in this case. A fundamental issue on the cross-appeal is whether the trial judge erred by refusing to consider the application of the *Charter* when the *OLA* contains the same rights and remedies as the relevant parts of the *Charter* and when the GOC [Government of Canada] did not cause any breaches of the *OLA*. In *Paulin*, the question was whether the RCMP was an institution of New Brunswick that had to comply with s. 20(2). Because we uphold the exercise of the trial judge's decision not to determine the *Charter* issue, the question addressed in *Paulin* has no relevance. As we discuss at para. 329, the outcome would be exactly the same under the *Charter* as under the *OLA*. That was not so in *Paulin*.

Knopf v. Canada (Speaker of the House of Commons), 2007 FCA 308 (CanLII)

[38] Subsection 4(1) of the [*Official Languages*] *Act* reiterates the right first recognized by section 133 of the *Constitution Act, 1867* and reaffirmed by subsection 17(1) of the *Charter*. These three sections recognize the right of any person participating in parliamentary proceedings "to use" (*d'employer*) English or French. Subsection 4(1) of the *Act*, as well as subsection 17(1) of the *Charter* create a scheme of unilingualism at the option of the speaker or writer, who cannot be compelled by Parliament to express himself or herself in another language than the one he or she chooses (See *MacDonald v. City of Montreal et al*., 1986 CanLII 65 (SCC), [1986] 1 S.C.R. 460, at page 483).

[39] However, in some other language rights provisions, such as subsection 20(1) of the *Charter* and section 25 of the *Act*, the legislator chose the term "to communicate" (*communiquer*). In my opinion, this is not accidental.

[40] To "communicate" presupposes interactions, bilateral actions between the parties. The verb "to use" does not encompass such interaction. The right is unilateral: one has the right to address the House of Commons in the official language of his choice. In the case at bar, Mr. Knopf made his opinion known on particular topics of interest to the Committee and filed his documents. There stops his right under subsection 4(1) of the *Act*.

R. v. Simard, [1995] O.J. No. 3989, 27 O.R. (3d) 116 (ON CA) [hyperlink not available]

[17] I agree with McDonald J. in *R. v. Rodrigue*, *supra*, that ss. 16(1) to 20(1) of the *Charter* pertain to the general principle of equality of status of the official languages applicable to federal institutions and non-judicial communications. These sections cover distinct and water-tight compartments of parliamentary, judicial and governmental activities of the federal state. The same can be said of the *Official Languages Act of 1988*, R.S.C. 1985, c. 31 (4th Supp.), Parts III and IV, applicable to federal courts. The information in the present case is of a judicial nature and s. 20(1) has no application to it since it is not an activity of the federal state.

St-Onge v. Canada (Office of the Commissioner of Official Languages) (C.A.), [1992] 3 FCR 287, 1992 CanLII 8671 (FCA)

[13] We feel it is important to note that section 22 of the Act [*Official Languages Act*] essentially reproduces paragraph 20(1)(a) of the *Canadian Charter of Rights and Freedoms*, which suggests that the Court should interpret it in the same way as this provision of the *Charter* would be interpreted.

Tailleur v. Canada (Attorney General), 2015 FC 1230 (CanLII)

[38] The *OLA* contains a number of parts including Part IV on communication with members of the public and the right to be served by federal institutions in the official language of their choice, and Part V on language of work and the equality of status and use of both official languages in Government of Canada institutions. Each of these parts has a constitutional foundation: section 20 of the *Charter* for language of service and subsection 16(1) of the *Charter* for language of work (*Schreiber v Canada*, [1999] FCJ No 1576 [*Schreiber*] at para 125; see also Jennifer Klink et al, "Le droit à la prestation des services dans les langues officielles" in Michel Bastarache and Michel Doucet, eds, *Les droits linguistiques au Canada*, 3rd ed, (Cowansville QC: Yvon Blais 2014) at pp 523-24).

See also: Patanguli v. Canada (Citizenship and Immigration), 2015 FCA 291 (CanLII)

Abbasi v. Canada (Citizenship and Immigration), 2010 FC 288 (CanLII)

[14] With respect to the official languages of Canada and the right conveyed in s. 20(1) to receiving services in either language, Counsel for the Applicant argues that, because the *Official Languages Act* is "a quasi-constitutional document that not only mirrors but implements the constitutional bilingual order", sections 21 to 24 of the *Official Languages Act* require that the business of federal institutions must be conducted in English and French and no other language (*Hearing transcripts*, January 20, 2010, p. 10):

[…]

B. Conclusion

[16] Section 20(1) of the *Charter* provides a right to any member of the public in Canada to communicate with and receive available services from federal institutions in English and French. As confirmed in *Lavigne*, this right imposes an obligation and practical requirements on federal institutions to comply with the right. I agree with Counsel for the Respondent that this rights based concept does not inhibit federal institutions to offer services in languages other than English or French if the members of the public involved do not wish to exercise their right under s. 20(1) of the *Charter*, and, indeed, wish to conduct business in any other language to which the institution's officials are capable of reliably communicating without an interpreter. This point was made by Justice Pinard in *Toma v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 779 (CanLII), [2006] F.C.J. No. 1000 at paragraph 33 where a visa officer conducted an interview in Arabic without an interpreter:

> If the officer speaks the applicant's language – as was the case here – it would be strange indeed for the office to use an interpreter. There would be no need to do so. The preferable options, as the Manual suggests [*Overseas Processing Manual* (OP) 5], is to conduct the interview in the applicant's language.

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[8] Notably, both as a Crown corporation and a "federal institution" to which the *OLA* applies, VIA has the constitutional or quasi-constitutional duty to ensure that members of the travelling public can communicate with and obtain its services in their official language at its head office as well as in any local office, railway station or train where there is a "significant demand" or where it is reasonable, due to the "nature of the office". This duty flows directly from subsection 20(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*), and sections 23 or 24 of the *OLA*, which are found in Part IV of same.

[…]

[76] Coming back to the nature of the rights conferred on the public by Part IV of the *OLA*, it must be understood that the right to communicate, which is already guaranteed by section 20 of the *Charter*, implies a right to be heard and understood by the institution in either official language. Moreover, the concept of public "services", which is also guaranteed by section 20 of the *Charter*, is broader than the term "communications". Simultaneous or consecutive translation is impractical in the case of oral communication, and diminishes the quality of service. Therefore, the opportunity to be served in the official language of one's choice in the cases contemplated by the law can only be assured by the presence of bilingual personnel. Lip service does not satisfy the letter and spirit of provisions found in Part IV of the *OLA* which require an "active offer". See Nicole Vaz and Pierre Foucher, *Language Rights in Canada*, Second Edition, Edited by Michel Bastarache (Les Editions Yvon Blais, 2004), chapter 4.

[…]

[98] What constitutes under the *Charter* or the *OLA* "significant demand" or in what circumstances it is reasonable, due to the "nature of the office", to provide bilingual services, is subject to differing interpretations. Regulatory criteria provide greater certainty and uniformity in the application of such opened concepts. For this purpose, regulations established by the Governor in Council under Part IV of the *OLA* enumerate specific cases where railway stations or train routes are "deemed" to meet the "significant demand" or the "nature of the office" criteria: sections 7, 9, 11 and 12. Thus, the Regulations establish a legal presumption facilitating the proof that the *Charter* or *OLA* criteria are met. This is their basic purpose but they are not exhaustive and should not be rigidly interpreted and applied. Indeed, it must be accepted by the Court that neither the *Regulations* nor Burolis can supersede or restrain the *OLA* or the *Charter*, but must always be interpreted and applied in a manner consistent with the general objectives of the preamble of the *OLA* and a recognition of the fundamental values of the *Charter* and Canadian policy in the matter of bilingualism.

See also: Seesahai v. Via Rail Canada, 2009 FC 859 (CanLII), Collins v. Via Rail Canada, 2009 FC 860 (CanLII), Bonner v. Via Rail Canada, 2009 FC 857 (CanLII), Temple v. Via Rail Canada Inc., [2010] 4 FCR 80, 2009 FC 858 (CanLII)

Doucet v. Canada, [2005] 1 F.C.R. 671, 2004 FC 1444 (CanLII)

[4] For the reasons for judgment which follow, I conclude that the *Regulations* [*Official Languages (Communications with and Services to the Public Regulations*, SOR/92-48] are incompatible with subsection 20(1) of the *Charter* in that they violate the right of any member of the public to communicate with a federal institution in either official language where there is a significant demand for the use of that language. I also conclude that the violation is not justified under section 1 of the *Charter*.

[…]

[9] The defendant submits that the summons cannot be likened to a service or a communication pursuant to Part IV of the *Official Languages Act*, R.S.C., 1985 (4th Supp.), c. 31 (the OLA) or subsection 20(1) of the *Charter*. In *MacDonald v. City of Montréal et al.*, 1986 CanLII 65 (SCC), [1986] 1 S.C.R. 460, and *Bilodeau v. Manitoba (Attorney General)*, 1986 CanLII 64 (SCC), [1986] 1 S.C.R. 449, the Supreme Court of Canada held that the failure to produce a summons in both languages is not an infringement of the language rights guaranteed by the *Charter*.

[10] Although based on the same facts, the issue now before the Court is quite different. The summons and the plaintiff's conviction for speeding are no longer the issue. The issue is rather to determine whether the plaintiff's rights as a Francophone were infringed because, contrary to the right guaranteed in section 20 of the *Charter*, he did not receive services in French and could not communicate in French when he addressed a member of the RCMP who was patrolling Highway 104 near Amherst. […]

[16] Section 16 of the *Charter* guarantees the equality of both official languages in Canada, and section 20 enshrines the right of members of the public to communicate with the central office of any federal institution in the official language of their choice. The same right exists in respect of any other office of the federal institution, wherever it is located in Canada, provided that there is a significant demand for the official language used by the minority or that its use is warranted by the nature of the office. The *OLA* adopted the wording of the *Charter*, which gives it special status, as noted by Décary J.A., speaking for a unanimous Court in *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373 (C.A.), at page 386:

[…]

[19] The *Regulations*, adopted pursuant to the *OLA* [*Official Languages Act*], set out in detail the various circumstances where there is a "significant demand" and specify what the "nature of the office" involves. M. Ricciardi, conseiller principal, Division des politiques de la Direction des langues officielles (auparavant relevant du Secrétariat du trésor, maintenant partie de l'Agence de gestion des ressources humaines de la fonction publique), a témoigné de l'élaboration du Règlement, à laquelle il a participé. Son témoignage montre bien à quel point certaines décisions sont prises de façon politique. On ne peut les qualifier d'arbitraires, parce qu'il est clair qu'elles ont été réfléchies et qu'elles tiennent compte de bon nombre de contraintes.

[…]

[21] It is not the Court's function to question these decisions, which reflect both the desire to comply with the provisions of the *Charter* and the *OLA* and the need to apply some rationality to offering bilingual services in a country where the two languages do not always coexist in the same area. However, if the implementation of these decisions, political though they may be, has the effect of infringing the rights guaranteed by the *Charter*, the Court has a duty to intervene (*Canada (Commissioner of Official Languages) v. Canada (Department of Justice)* (2001), 2001 FCT 239 (CanLII), 35 Admin. L.R. (3d) 46 (F.C.T.D.)). Accordingly, it must determine whether the *Regulations* as currently drafted infringe the rights guaranteed by the *Charter* and the *OLA*.

[…]

[25] Where a significant demand is established, it is clear that the government has a duty to act. In *R. v. Saulnier* (1989), 90 N.S.R. (2d) 77 (Co. Ct.), a fisherman was convicted of exceeding his fishing quota. The judge hearing the appeal quashed the conviction reasoning the quota had been modified while the fisherman was at sea and the quota modification notices were broadcast on the maritime radio in English only. The fisherman was a Francophone and, although he apparently had no difficulty understanding English, the Judge found that the fisherman was entitled to be informed in his own language of the changes in the quota:

> It is immaterial that the appellant understands English or that his trial was conducted in English. His first language, the language of his choice, the language in which he communicates with other fishermen, is the French language. It is his mother tongue as defined in the *Official Languages Act*. His right to use that language is guaranteed under the *Charter*.

[…]

[34] In the case at bar, both parties acknowledge that, when patrolling Nova Scotia highways or responding to calls from citizens, the RCMP is a federal institution offering services to the public. The parties further agree that, as such, the RCMP is bound by the provisions of the *OLA* and the *Charter* on the right of Canadians and the public in general to communicate with federal institutions and receive services in either of the two official languages, at their choice.

[…]

[43] Sgt. Hastey testified with respect to the protocol established by the RCMP for meeting the needs of Francophone travellers. I would like to point out that, however well intentioned it may be, the service is limited. Sgt. Hastey testified that, on occasion, a unilingual English officer meets someone who speaks only French. Arrangements are made for such individuals to communicate via radio to a bilingual member who is on the air. In my view, such an arrangement is by no means sufficient for the RCMP to fulfill its obligations under the *Charter* and the *OLA* so that any member of the public is entitled to communicate with a federal institution in the official language of his or her choice.

[…]

[49] Thus, it is clear that there is a void in the *Regulations*. Notwithstanding a "significant demand", the *Regulations* do not provide for services to a linguistic minority travelling on a major highway. In my view, the *Regulations* do not comply with subsection 20(1) of the *Charter*, because they infringe the right of individuals to communicate with a federal institution in the official language of their choice, although a significant demand exists. For this reason alone, the *Regulations* do not meet the requirements of sections 22 and 23 of the *OLA*, section 22 providing for the right of members of the public to communicate with the office of a federal institution in the official language of their choice where a "significant demand" exists, and section 23 providing for services to the travelling public in the official language of their choice, if there is a significant demand for the use of that language.

[…]

[80] I allow the plaintiff's claim in part. I declare subparagraph 5(1)(h)(i) of the *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48, adopted pursuant to section 32 of the *OLA*, inconsistent with paragraph 20(1)(a) of the *Charter* in that the right to use French or English to communicate with an institution of the Government of Canada should not solely depend on the percentage of Francophones in the census district. Consideration must also be given to the number of Francophones who use or might use the services of the institution, as illustrated by the circumstances in this case, along Highway 104 near Amherst, Nova Scotia. In my view, it is reasonable to give the Governor in Council 18 months to correct the problem identified in the *Regulations*.

R. v. Doucet, 2003 NSSCF 256 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[31] In my opinion, R.C.M.P. members do not lose their federal status when they are acting under contract with a province or enforcing provincial legislation. They are simply carrying out their mandate under the *R.C.M.P. Act*. Therefore, this is still a service provided by a federal institution. Subsection 20(1) of *R.C.M.P. Act* supports this finding:

> 20(1) The Minister may, with the approval of the Governor in Council, enter into an arrangement with the government of any province for the use or employment of the Force, or any portion thereof, in aiding the administration of justice in the province and in carrying into effect the laws in force therein.

[32] In my opinion, a contract with a province does not affect the R.C.M.P.'s status. It is still a federal institution. Finding otherwise would allow the R.C.M.P. to avoid its language obligations to the public as guaranteed by the *Charter*. This would clearly be inconsistent with the purpose of constitutional language rights. Justice Bastarache ruled on this issue in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, where he stated as follows at paragraph 25:

> Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools Act (Man.)*, *supra*, at p. 850.

[33] Federal institutions are not permitted to evade their constitutional language responsibilities through contracts or other arrangements that transfer or delegate some of their duties. This principle is set out in

Canada (Commissioner of Official Languages) v. Canada (Department of Justice), [2001] F.C.T. 239, at paragraphs 182 and 183:

> [182] I therefore have no hesitation in concluding that the measures taken by the respondents regarding the application of the *CA* and the agreements entered into by the respondents and the Government of Ontario and the subsequent municipal agreements do not adequately and completely protect the quasi-constitutional language rights provided by sections 530 and 530.1 of the *Criminal Code* and by Part IV of the *OLA*.
>
> [183] The violation of the language rights provided in sections 530 and 530.1 of the *Criminal Code* and Part IV of the *OLA* also constitutes a violation of the rights provided in sections 16 to 20 of the *Charter*.
>
> (Emphasis added)

In my opinion, subsection 20(1) of the *Charter* applies in this case. Finding otherwise would have the illogical effect of recognizing that an accused has constitutional language rights when he or she is arrested for a federal offence but not upon arrest for a provincial offence. When the R.C.M.P. acts as a police agency enforcing provincial legislation, it acts as a federal institution, whether or not it is under contract with a province, and the requirements of subsection 20(1) of the *Charter* apply to it. The R.C.M.P. has a protocol for providing services in both official languages where the need arises, even on highways.

Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001 FCT 239 (CanLII)

[68] This case may be summarized as follows. By an oral agreement, the federal government delegated its powers under the *CA* [*Contraventions Act*] to the Government of Ontario. In so doing, the federal government did not include a clause guaranteeing the language rights of offenders prosecuted under the *CA*. Formerly, language rights were protected by sections 530 and 530.1 of the *Criminal Code* and section 16 of the *Charter*, with respect to the "judicial" aspect of prosecutions, and by Part IV of the *OLA* and section 20 of the *Charter*, with respect to the "administrative" or "extra-judicial" aspect of prosecutions.

[…]

[145] Before the *CA* was amended in 1996, communications with the public and the provision of extra-judicial services in relation to the administration of prosecutions of federal contraventions were handled by the Department of Justice Canada, in both official languages, in accordance with Part IV of the *OLA* and section 20 of the *Charter*.

[…]

[148] However, it would be wrong to say that the successive and cumulative application of the *CA*, the *French Language Services Act of Ontario* and the agreements between the respondents and the Attorney General of Ontario and the municipalities of Mississauga and Ottawa could make Part IV of the *OLA*, or section 20 of the *Charter*, inoperative.

[149] Part IV of the *OLA* and section 20 of the *Charter* still apply, and if any conflict arises with the *French Language Services Act of Ontario*, the *OLA* and section 20 of the *Charter* must prevail.

[…]

[163] Thus, although the *French Language Services Act of Ontario* has expanded access to French language services in Ontario, it can not be regarded as ensuring the language rights guaranteed by Part IV of the *OLA* and section 20 of the *Charter*.

[…]

[194] In any measure taken to delegate administrative powers in relation to the application of the *CA* to the Government of Ontario, whether such measures, present or future, be legislative or regulatory in nature or in the form of agreements with the Government of Ontario, the respondents shall incorporate a clause to provide that the government of Ontario, when it delegates its administrative powers in relation to the application of the *CA* to third parties, including municipalities, whether by legislation or regulation or by agreement, must include in such measures a provision that the third parties must respect the quasi-constitutional language rights provided by Part IV of the *OLA* which apply to persons who are prosecuted for contraventions of federal statutes or regulations, when the conditions set out in sections 22 and 24 of the *OLA* and section 20 of the *Charter* apply. The respondents shall also incorporate a clause to provide that the Government of Ontario, when it delegates its administrative powers in relation to the application of the *CA* to third parties, including municipalities, whether by legislation or regulation or by agreement, must include in such measures a provision that the third parties must respect the quasi-constitutional language rights provided by sections 530 and 530.1 which apply to persons who are prosecuted for contraventions of federal statutes or regulations. Regarding the existing agreements, if any, the respondents shall, within no more than one year from the date of this order, ensure that the said agreements are amended to comply with the order. Upon the expiry of that time, if the agreements have not been amended, they will become void.

Professional Institute of the Public Service v. Canada, [1993] 2 F.C.R. 90, 1993 CanLII 2921 (FC)

[28] The fountainhead of official bilingualism is found in the Canadian constitution. Sections 16 to 22 of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] declare that English and French are the official languages of Canada, that they enjoy equal status, equal rights and equal privileges in all institutions of Parliament and government of Canada. More specifically, section 20 of the *Charter* gives a right to any member of the public in Canada to communicate with and to receive available services in the language of one's choice from any federal institution where there is a significant demand or where, due to the nature of the institution, it is reasonable that such communications with or services from it be available in both languages.

Tucker v. Supreme Court of Canada, 1992 CarswellNat 1344, [1992] F.C.J. No. 1116, 12 C.R.R. (2d) 295, 37 A.C.W.S. (3d) 850 (FC TD) [hyperlink not available]

[8] Item five seeks a declaration that the failure of the Supreme Court of Canada to respond to the plaintiffs declaration is a violation of the plaintiffs right of communication contained in section 20(1)(a) of the *Charter*. That section deals with the right to choose to receive services in English or French and gives no right to services not otherwise being provided in either language and certainly does not compel the filing of a defence. Item five will be dismissed.

R. v. Brewer, 2009 NBPC 5 (CanLII)

[2] The defendant brought a motion for a declaration that his *Charter* rights were violated by virtue of the failure of the Canada Revenue Agency (CRA) to provide the said notices to the defendant in both official languages. The defendant relies upon s. 16, 16.1, and 20 of the *Charter*, sections 21, 22, 27, and 41 of the *Official Languages Act (Canada)*, and the preamble and sections 27, 28, 28.1, 29 and 30 of the *Official Languages Act (New Brunswick)*.

[…]

[4] The motion raises the question of whether the CRA had a responsibility, in this case, to provide the notice in both official languages. Another way of considering that issue is whether the defendant had a right to receive a notice in the language of his choice or alternatively a bilingual notice.

[…]

[26] Further, the defendant was being notified in his capacity as a director of the company. The company had given its own choice of language for correspondence. In my opinion that indication can be relied upon for any correspondence with the company and any officer or director of that company unless and until the CRA receives an indication to the contrary. That indication may well be made explicitly by an election of language choice filed by an individual on a tax return, or filing correspondence indicating a different language choice, or requesting bilingual correspondence, or verbal notice. It may also be done implicitly by any other conduct.

[27] In coming to this position, the court is mindful of the purposes of official languages legislation. And the difference between language rights relating to the administration of justice and the rights set out in section 20 of the *Charter* which are indicative of a desire to make Canada a bilingual country. (See *R. v. Doucette* 2004 FC 1444 (CanLII) (CanLII and *Societe des Acadiens du Nouveau-Brunswick et al v. Association of Parents for Fairness in Education* et al 1986 CanLII 66 (SCC), [1986] 1 S.C.R. 549))

[28] If one accepts, as I believe the court in Doucette does, that "language rights that are institutionally based require government action for their implementation and therefore create obligations for the state", then CRA had an obligation to communicate with the defendant in a language of his choice. Alternatively then, if CRA is unaware of that choice, communication should be bilingual.

R. v. Beaupré (January 7 1998), Smithers, B.C. 14311C (BC PC) [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[p. 1] The motion has, in my view, four bases.

[…]

Second, that his rights under paragraph 20(1)(b) of the *Charter* were violated because the Royal Canadian Mounted Police officers did not speak with Mr. Beaupré in French.

[…]

[p. 2] Second, I am not satisfied . . . that the New Hazelton police station meets the criteria described in paragraph 20(1)(b) of the *Constitution Act, 1982*.

R. v. Desgagne, [1997] A.J. No. 1307, Ticket No. A 06115443 T (AB PC) [hyperlink not available]

[471] THE COURT: Although the accused has not given notice of his intention to allege a breach of a Charter right as prescribed in the case of *R v. Dwernychuk*, a decision of the Alberta Court of Appeal, I note that the evidence before me does not establish, in any event, a breach of the accused's rights pursuant to Section 20 (1), Section 7 or any other *Charter* right. There is no evidence that the accused did not understand the communication directed to him by the peace officer, or that his right to a fair trial was prejudiced.

R. v. St. Pierre (March 21 1995), (Ont. C. Gen. Div) [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[p. 6] I do not find that, when he made a statement under oath, the deponent was communicating with the accused or providing her with a service such that the accused could raise subsection 20(1) of the *Charter of Rights and Freedoms*.

[p. 7] The information on oath is, rather, part of the evidence on which a justice of the peace could rely in determining whether to issue a summons or a warrant for the accused's arrest.

[28] Counsel for the accused relies in paragraph 13 of his memorandum of argument on sections 21 and 24 of the *Official Languages Act*, *supra*, and on subsection 9(d) of the *Official Languages (Communications with and Services to the Public) Regulations* (*Canada Gazette*, Part II, Vol. 126, No. 1, SOR/92-48). It should be pointed out that sections 21 and 24 of *the Official Languages Act* are included in Part IV of this-*Act*, which deals with services and communications with the public and which is derived directly from section 20(1) of the *Canadian Charter*, as opposed to Part III of the *Act*, which deals with the administration of justice and which flows from section 19(1) of the *Canadian Charter*. These two types of provisions are in two separate fields, since section 19(1) of the *Charter* and Part III of the *Official Languages Act* concern the arguments and written pleadings of federal institutions in legal cases, whereas section 20(1) of the *Charter* and Part IV of the *Act* and its *Regulations* are concerned more directly with communications unrelated to legal proceedings. This distinction is also evident from the following passage of the judgment of Mr. Justice Beetz of the Supreme Court of Canada in *Société des Acadiens*, *supra*, at pp. 574-575:

> And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice.
>
> I am reinforced in this view by the contrasting wording of s. 20 of the *Charter*. Here, the *Charter* has expressly provided for the right to communicate in either official language with some offices of an institution of the Parliament or Government of Canada and with any office of an institution of the Legislature or Government of New Brunswick. The right to communicate in either language postulates the right to be heard or understood in either language. (Emphasis added.)

[29] Consequently, subsection 20(1) of the *Charter* and Part IV of the *Official Languages Act* and the *Regulations* made under this *Act* do not apply to disclosure of evidence in judicial cases, since the very structure of sections 16 to 20 of the *Charter* illustrates that each of these sections covers a different, water-tight subject matter, distinct from parliamentary, governmental and judicial activities. It would therefore be inappropriate to install communicating tubes between these provisions. Indeed, if section 20(1) were to apply to communications in a judicial context, then the Supreme Court would have come to a very different conclusion in *Société des Acadiens*, *supra*. The following statements by Mr. Justice Meyer in *St. Jean v. The Queen* (unreported, Supreme Court of the Yukon, September 26, 1986) are quite revealing in this regard:

> Thirdly, even if the *Charter* did not apply I do not believe it was the intention of the framers of s. 20(1) of the *Charter*, to include a ticket or summons, for having committed a traffic violation, within the ambit of the rights therein described, namely, the right of any person to communicate with or receive services from an institution of the government or Parliament of Canada. I think that what was contemplated was the provision of services to a person, at his request, or desired by him, or to his advantage, and that communications were not intended to cover pleadings or processes in or issuing from a Court, since these were already contemplated by s. 19 of the *Charter*, and by s. 133 of the *Constitution Act, 1987*. In the present instance, there is no question of services being rendered to the Appellant, nor is there any question raised of Appellant's right to communicate himself in the French language, or to receive replies in the French language, assuming such a right exists. Thus, I do not find that any of Appellant's rights under s. 20 of the *Charter* have been infringed in the present instance by the issuance of a ticket in the English language only.

[30] In addition, section 20(1) of the *Charter* as well as Part IV of the *Official Languages Act* and the *Regulations* made under that *Act* aim to ensure the availability in French and English of services and communications 1) which originate from federal institutions, and 2) which are, by their very nature, specifically intended for the public (or for a member of the public). However, the documentary evidence which the Crown compiles in preparation for trial does not generally originate from a federal institution, as it often consists of documents which are either written by or obtained from municipal or provincial police forces or from individuals.

[31] In cases where the evidence actually does come from a federal institution, such as the Royal Canadian Mounted Police, strictly speaking the documents are not specifically intended for the public, since they are prepared and compiled for internal use (i.e., to prepare the Crown's case). The fact that the Crown has an obligation to disclose these documents to the accused, under *R. v. Stinchcombe* (1991] 1991 CanLII 45 (SCC), 3 S.C.R. 326, does not mean that these documents are specifically intended for the public as understood from subsection 20(1) of the *Charter*. An appropriate analogy to illustrate my point would be the fact that citizens can obtain information under the *Access to Information Act*, S.C., ch. A-1, but this information does not have to be made available in both official languages simply because it is made available to the public; once again, the documents in question are generally prepared for internal use and are not mainly intended for the public.

[32] There is no doubt, however, that the oral and written correspondence of the Whitehorse office of the Department of Justice must be prepared in the official language preferred by the accused or his counsel, since in this situation this is truly communication specifically intended for a member of the public as understood under section 20(1) of the *Charter*, Part IV of the *Official Languages Act* and section 9(d) of the *Official Languages Regulations*. But once again, the right of counsel for the accused or his counsel to communicate in French with the Whitehorse office is not in dispute.

[33] For these reasons, section 20(1) of the *Charter* and Part IV of the *Official Languages Act* and *Regulations* do not require that the disclosure of evidence be done in the official language of the accused in a criminal matter.

N.B. – The appeal of this judgment was dismissed on other grounds by the Yukon Court of Appeal and the application for leave to appeal to the Supreme Court of Canada was dismissed.

R. v. Saulnier, 1989 CarswellNS 305, [1989] N.S.J. No. 131, 230 A.P.R. 77 (N.S. Co. Ct.) [hyperlink not available]

[32] I take judicial notice that Yarmouth, where the Coast Guard marine radio is located, is situated between the large francophone communities of the Districts of Argyle and Clare where the Acadian culture has been firmly rooted since early historical times and where it continues to flourish. I further notice that a significant number of the people of those communities follow the fishery.

[33] Failure to recognize the importance of the French language to the affected people of the area goes beyond mere official insensitivity on the part of Department of Fisheries; it is an infringement of a *Charter* right.

[…]

[36] The promulgation of an official measure of the federal government, disobedience to which has penal consequences, should not be in English alone where it can be shown that a significant number of the persons affected by it not only speak French as their first language but reside and work in sizeable francophone communities.

[37] It is immaterial that the appellant understands English or that his trial was conducted in English. His first language, the language of his choice, the language in which he communicates with other fishermen, is the French language. It is his mother tongue as defined in the *Official Languages Act*. His right to use that language is guaranteed under the *Charter*.

[38] The right to which I find the appellant entitled neatly fits the language of the *Charter*: under s. 20(1)(b), “due to the nature of the office (of the Regional Director General of Fisheries) it is reasonable that communications with and services from that office be available in both English and French."

[39] Presumably variation notices should be broadcast in both languages over Yarmouth Coast Guard radio. Alternatively, notice might be given using the French-language VHF channel. That should be determined by the Regional Director-General in consultation with the affected fishermen.

St. Jean v. R., 1986 CarswellYukon 10, [1986] Y.J. No. 76, [1987] N.W.T.R. 118, 2 Y.R. 116 (NWT YK SC) [hyperlink not available]

[29] Appellant's final argument concerns the validity of the ticket issued, based on s. 20(1) of the *Charter*, which provides for the right of any member of the public in Canada to communicate with and to receive available services from an institution of the Parliament or Government of Canada in English or French. With respect, I cannot agree with this submission. Firstly, I believe that the ticket issued is indistinguishable, in legal terms, from the uniligual summons which was in issue in the Supreme Court decisions in *Bilodeau* and *MacDonald*. Thus, a unilingual ticket issued in the Yukon Territory would not be invalid, in my view. Secondly, s. 20(1) of the *Charter* only applies to institutions of the parliament or Government of Canada, like s. 16(1), and I have already determined that the Yukon Government is not such an institution.

[…]

[31] Thirdly, even if the *Charter* did apply I do not believe it was the intention of the framers of s. 20(1) of the *Charter*, to include a ticket or summons, for having committed a traffic violation, within the ambit of the rights therein described, namely, the right of any person to communicate with or receive services from an institution of the government or parliament of Canada. I think that what was contemplated was the provision of services to a person, at his request, or desired by him, or to his advantage, and that communications were not intended to cover pleadings or processes in or issuing from a Court, since these were already contemplated by s. 19 of the *Charter*, and by s. 133 of the *Constitution Act 1867*. In the present instance, there is no question of services being rendered to Appellant, nor is there any question raised of Appellant's right to communicate himself in the French language, or to receive replies in the French language, assuming such a right exists. Thus, I do not find that any of Appellant's rights under s. 20 of the *Charter* have been infringed in the present instance by the issuance of a ticket in the English language only.

R. v. Jervis, 1984 CarswellMan 294, 11 C.R.R. 373, 12 W.C.B. 195, 27 Man. R. (2d) 217 (Man. Co. Ct.) [hyperlink not available]

[24] The rights created by section 20 of the *Charter* (as opposed to the duties prescribed by section 9 of the *Official Languages Act*) are guaranteed as such under section 1 thereof and capable of effective legal enforcement by any member of the public under section 24. Additionally, since it forms part of the *Constitution Act, 1982* any law inconsistent therewith is, to the extent of the inconsistency, of no force and effect. The creation of such rights is a matter of substantive law.

[25] Given the applicable presumption to the creation of such statutory rights and the legislative indication set forth in s. 1 of the *Canada Act* and s. 58 of the *Charter* endorsing a prospective application to s. 20 of the *Charter*, the learned provincial court judge erred in giving retrospective effect thereto and applying the same to an offence which arose prior to the enactment of the *Constitution Act*.

R. v. Holman, 1983 CarswellAlta 163, [1983] A.W.L.D. 875, [1983] A.J. No. 1043, 28 Alta. L.R. (2d) 35 (AB PC) [hyperlink not available]

[34] The census form which, by virtue of s. 29(1)(b) of the *Statistics Act*, the accused was required to complete, sign and furnish to the appropriate authority is partly in the French language. The accused's language of choice is English. It may be that really he does not understand the notice printed in French, that in his mind, his signature beneath the French words may commit him to something more than he can appreciate. I dismiss the charge by reason that s. 29(1)(b) of the *Statistics Act* which requires the accused to provide census information upon a form delivered to him which is not printed entirely in the language of his choice, is to the extent of that requirement of no force or effect.

[35] First of all, s. 20(1) of the *Charter* does not provide, as both Mr. Freeman and the learned Provincial Judge appear to think, that any member of the public in Canada has the right to communicate with, and to receive available services, etc., entirety in English or French.

[36] That being the case, it is, in my opinion, extremely important that the notice in French upon this otherwise English form can have no adverse or prejudicial effect upon an Anglophone who signs the form. One may also ask whether, because of the presence of this notice, anyone could be misled as to the nature of the document or its contents or have reason to believe that by signing it he might be committing himself to something more than he can appreciate.

[…]

[38] In my judgment, no one could have been prejudiced or misled in any way by this notice. The accused's rights under s. 20(1) have not been infringed and the first branch of defence counsel's *Charter* argument fails.

SEE ALSO:

R. v. Car-Fre Transport Ltd., 2015 ABPC 280 (CanLII) [judgment available in French only]

Musa v. Canada (Citizenship and Immigration), 2012 FC 298 (CanLII)

Thompson v. Canada (Citizenship and Immigration), 2009 FC 867 (CanLII)

Toma v. Canada (Minister of Citizenship and Immigration), 2006 FC 779 (CanLII)

R. v. Larcher (19 September 2002), J. Lalonde (ON SC) [hyperlink not available]

ANNOTATIONS – SUBSECTION 20(2)

Société des Acadiens v. Association of Parents, 2008 SCC 15, [1986] 1 S.C.R. 549 (CanLII)

[1] Section 20(2) of the *Canadian Charter of Rights and Freedoms* provides that any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French, and, unlike in the case of services provided by federal institutions under s. 20(1) of the *Charter*, this right does not depend on the territorial concentration of the language group or the nature of the office in question. This is complete institutional bilingualism, as citizens have the right to use the language of their choice at all times when requesting a service from or communicating with the provincial government. Section 20 reads as follows:

[…]

2. Issue

[7] This Court must therefore decide whether RCMP members designated as provincial peace officers under an agreement between Canada and the province of New Brunswick (“Agreement”) are required, when performing their duties as provincial police officers, to fulfil the language obligations imposed on institutions of the New Brunswick government by s. 20(2) of the *Charter*. It is common ground that the RCMP is at all times subject to the minimum obligations imposed on it by s. 20(1) of the *Charter* and by the federal official languages legislation, regardless of whether it is acting as the federal police force or as a provincial or municipal force under an agreement.

[…]

[16] Section 2(2) of the *Police Act* provides that "[e]very member of the Royal Canadian Mounted Police ... has all the powers, authority, privileges, rights and immunities of a peace officer and constable in and for the Province of New Brunswick". Since each RCMP member is authorized by the New Brunswick legislature to administer justice in the province, he or she performs the role of an "institution of the legislature or government" of New Brunswick and must comply with s. 20(2) of the *Charter*. Although New Brunswick continues to be responsible for administering justice in accordance with its constitutional language obligations despite the Agreement, this in no way changes the fact that the RCMP may have its own language obligations to meet in fulfilling its mandate in New Brunswick.

[…]

[18] In the instant case, there is no transfer of responsibility for the administration of justice in the province. Under the Agreement between the RCMP and New Brunswick, the New Brunswick Minister of Justice is responsible for setting "the objectives, priorities and goals of the Provincial Police Service" (art. 3.3). The Minister determines the level of service to be provided. The respondent acknowledges, at para. 62 of her factum, that — as the Federal Court observed (para. 39) — New Brunswick retains control over the RCMP's policing activities. The RCMP remains responsible for internal management only (art. 3.1(a)). What must be concluded from this situation is that the institution in question is an institution of the New Brunswick government, that is, its Minister of Justice, and that the Minister discharges his or her constitutional obligations through the RCMP members designated as New Brunswick peace officers by the provincial legislation. The provision of services by the RCMP must therefore be consistent with the obligations arising under s. 20(2) of the *Charter*.

[19] The RCMP does not act as a separate federal institution in administering justice in New Brunswick; it assumes, by way of contract, obligations related to the policing function. The content of this function is set out in provincial legislation. Thus, in New Brunswick, the RCMP exercises a statutory power — which flows not only from federal legislation but also from New Brunswick legislation — through its members, who work under the authority of the New Brunswick government.

[…]

[23] Richard C.J. of the Federal Court of Appeal stressed the fact that the RCMP's obligations are contractual and not constitutional. I do not think these two types of obligations are mutually exclusive. It is as a result of the Agreement that the RCMP, by participating in a function of the New Brunswick government, has constitutional obligations imposed on it under s. 20(2) of the *Charter*. As I explained above, the RCMP must fulfil that province's obligations when acting on its behalf. This reasoning is echoed in the Agreement itself, art. 2.2 of which provides as follows:

> Those Members who form part of the Provincial Police Service shall
>
> a) perform the duties of peace officers; and
>
> b) render such <u>services</u> as are <u>necessary</u> to
>
> ...
>
> ii) execute all warrants and perform all duties and services in relation thereto that may, under the laws of Canada or the Province, be executed and performed by peace officers. [Emphasis added.]

Article 4.1 is also quite explicit:

> For the purposes of this Agreement, the Commanding Officer shall act under the direction of the Minister in aiding the administration of justice in the Province and in carrying into effect the <u>laws in force therein</u>. [Emphasis added.]

[24] The parties have used the word “services” in the second paragraph of art. 2.2, in contrast with the word “duties” used in the preceding paragraph. It can be inferred from this that the concept of “services” as understood by the parties is similar to that found in s. 20(2) of the *Charter* and that the parties intended that the RCMP, in performing its mandate, also assume the language “duties” in relation thereto and, therefore, provide citizens with bilingual services. This seems all the more true given that “necessary” services are, by definition, services that are consistent with the law, including the Constitution. I see no need to expressly provide for the duty of bilingualism in the Agreement, since bilingualism is at any rate a constitutional requirement.

4. Conclusion and Costs

[26] For the reasons set out above, I would allow the appeal and declare that s. 20(2) of the *Charter* requires the RCMP to provide services in both official languages when acting as a provincial police force pursuant to the Agreement between the New Brunswick government and the Government of Canada dated April 1, 1992.

R. v. Losier, 2011 NBCA 102 (CanLII)

[8] That being said, we are in substantial agreement with the reasons given by the judge of the Court of Queen’s Bench (see paras. 14-49 in particular). In our opinion, those reasons reflect a sound appreciation of the pertinent principles of law, particularly with respect to the meaning and scope to be given to s. 20(2) of the *Charter*.

[9] The police officer who stopped the respondent was under a duty to comply with the obligations imposed on institutions of the government of New Brunswick by s. 20(2) of the *Charter* (see *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15 (CanLII), [2008] 1 S.C.R. 383; *R. v. Gautreau* (1989), 101 N.B.R. (2d) 1, [1989] N.B.J. No. 1005 (Q.B.) (QL), rev’d on other grounds (1990), 1990 CanLII 4014 (NB CA), 109 N.B.R. (2d) 54, [1990] N.B.J. No. 860 (C.A.) (QL), leave to appeal refused [1991] 3 S.C.R. viii, [1990] S.C.C.A. No. 444 (QL); and R. v. Gaudet, 2010 NBQB 27 (CanLII), [2010] N.B.J. No. 25 (QL)).

[10] As the majority pointed out in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, [1999] S.C.J. No. 25 (QL), it is incumbent upon courts to eschew a restrictive interpretation of legislative and constitutional provisions dealing with language rights. We draw additional guidance from that landmark decision. Indeed, among the interpretations that might reasonably be given to such provisions, courts must favour the one that is more likely to reflect the application of the following principles: (1) the right to use one or the other official language requires acknowledgement of a duty on the part of the state to take positive steps to promote the exercise of that right; and (2) the objective of the entrenchment of this right in the *Charter* was none other than to contribute to “the preservation and protection of official language communities”:

> Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees; see J. E. Oestreich, “Liberal Theory and Minority Group Rights” (1999), 21 *Hum. Rts. Q.* 108, at p. 112; P. Jones, “Human Rights, Group Rights, and Peoples’ Rights” (1999), 21 *Hum. Rts. Q.* 80, at p. 83: “[A] right . . . is conceptually tied to a duty”; and R. Cholewinski, “State Duty Towards Ethnic Minorities: Positive or Negative?” (1988), 10 *Hum. Rts. Q.* 344.
>
> […]
>
> Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools Act (Man.)*, *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved

> in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply. It is also useful to re-affirm here that language rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin. I will return to this point later. [paras. 20, 25]
>
> [Emphasis added.]

We are of the opinion that the interpretation the Provincial Court, as well as the Court of Queen's Bench, gave to s. 20(2) is in synch with those instructions. We note that it echoes the interpretation adopted by the Court of Queen's Bench in *R. v. Gautreau* (Richard C.J.Q.B) and *R. v. Gaudet* (LaVigne J.). At any rate, we reject the restrictive interpretation of s. 20(2) espoused in other decisions, notably *R. v. Robichaud*, 2009 NBPC 26 (CanLII), 350 N.B.R. (2d) 113.

[11] Finally, while there is no question that language rights under the Charter are "infrangible" (see *R. v. McGraw*, 2007 NBCA 11 (CanLII), 312 N.B.R. (2d) 142 and *Bujold v. R.*, 2011 NBCA 24 (CanLII), 369 N.B.R. (2d) 262) and that s. 24 must be interpreted in a way that upholds "*Charter* rights by providing effective remedies for their breach" (see *R. v. 974649 Ontario Inc.*, 2001 SCC 81 (CanLII), [2001] 3 S.C.R. 575 at para. 19), it bears underscoring that exclusion of evidence essential to the prosecution is not necessarily the appropriate remedy for every violation of language rights, regardless of the circumstances. The analysis required under s. 24(2) must be carried out.

[12] The trial judge's analysis in this case is, in all respects, harmonious with s. 24(2) and the instructions provided by McLachlin C.J.C. in *R. v. Grant*, 2009 SCC 32 (CanLII), [2009] 2 S.C.R. 353. Given the circumstances and the applicable standard of review (see *R. v. Silveira*, 1995 CanLII 89 (SCC), [1995] 2 S.C.R. 297, [1995] S.C.J. No. 38 (QL) and *R. v. Buhay*, 2003 SCC 30 (CanLII), [2003] 1 S.C.R. 631), we are of the view, like the judge of the Court of Queen's Bench, that the trial judge's decision to exclude the qualified technician's certificate should not be reversed.

R. v. Losier, 2011 NBQB 177 (CanLII)

[21] The Attorney General admits that Officer Jordan did not inform Mr. Losier of his right under s. 31(1) of the *Official Languages Act* to communicate in the language of his choice. The right to be informed is not specified in s. 20(2) of the *Charter*. The trial judge nevertheless found that there had been a violation of this right not only under s. 31(1) of the *Official Languages Act*, but also under s. 20(2) of the *Charter*.

[…]

[28] As to whether or not this right to be informed of the right to use the language of one's choice is incorporated in s. 20(2) of the *Charter*, I quote Lavigne J. in *Gaudet*:

> 36 The wording of the right guaranteed in s. 20(2) of the *Charter* is very general. In light of the historic evolution of minority rights in New Brunswick and of the principles enunciated by the Supreme Court of Canada with respect to linguistic rights, the *Charter* language rights contained in s. 20(2) must be construed in a manner that is broad, dynamic, liberal, remedial and purposive. Equality does not have a more restricted meaning in linguistic matters than it does in other areas. The meaning of a *Charter* right must be construed in a purposive way, that is, in terms of the interests the right aims to protect. Both precision and respect for the letter and spirit of the Constitution are called for in this arena.
>
> 37 Language rights must be construed in a manner attuned to the context. A proper interpretation must balance the necessity of taking into account the purpose of the guarantee in question and the preservation and flourishing of the official language communities.
>
> [...]

41 Unlike s. 31(1) of the *Official Languages Act*, s. 20(2) does not specifically require a peace officer to inform members of the public of their right to be served in the official language of their choice. However, in my view, this right arises by implication from s. 20(2) of the *Charter*. Based on the generous and liberal approach to the interpretation of language rights taken by the Supreme Court of Canada in *Beaulac*, and based on a purposive approach to the provisions in question, I find that s. 20(2) of the *Charter* imposes a duty by implication to make an "active offer". In order to give full effect to the right to choose under s. 20(2) of the *Charter*, there must be a corresponding duty on the part of peace officers to inform the public of that right. To construe s. 20(2) otherwise would have the obvious result of obstructing the remedial purpose of this linguistic right and this would be incompatible with a broad and dynamic purposive interpretation. Section 20(2) of the *Charter* necessarily includes an active offer of service. The freedom to choose given by s. 20(2) is meaningless in the absence of a duty to inform the citizen of this choice. Section 20(2) of the *Charter* necessarily includes an active offer of service and accordingly, a peace officer in New Brunswick must inform every member of the public with whom he communicates of their right to be served in the official language of their choice.

42 People who speak a minority official language must be afforded linguistic guarantees. Providing services in the minority language only when the citizen makes such a request does not provide any serious guarantee. Linguistic minorities will not always ask for the services to which they are entitled. When a citizen is stopped by a peace officer who speaks to him in an official language that is not the language of his choice, that citizen will resign himself to speaking the peace officer's language for fear of worsening his lot if he asks the officer to speak to him in the other official language. The notion of "active offer" is of the utmost importance in terms of progression towards the equality of status of the two official languages. This coincides well with the notion that *Charter* language rights are remedial in nature having regard to past injustices.

43 As the Supreme Court of Canada stated in *Beaulac*, at para. 20:

> [...] Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees.

And again, at para. 19:

> [...] in the context of institutional bilingualism, an application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language. The governing principle is that of the equality of both official languages.

44 The fact that the provincial legislator adopted s. 31(1) of the *Official Languages Act* does not make the *Charter* inoperative. The rights protected by s. 31(1) of the *Official Languages Act* are not new. They are already *Charter* rights under s. 16(2) and under s. 20(2) in particular. The *Official Languages Act* is simply an illustration of the advancement of linguistic rights by statutory means under s. 16(3) of the *Charter*. In fact, I venture to say that s. 31 remedied the situation as it existed. As we know, many decisions handed down prior to the coming into force of s. 31(1) of the *Official Languages Act* came to the conclusion that the absence of an active offer did not automatically infringe *Charter* language rights.

[29] I agree with my colleague Lavigne J. and with the trial judge that s. 20(2) of the *Charter* includes the officer's duty to inform the accused of his right to use the language of his choice, as does s. 31(1) of the *Official Languages Act*.

See also: R. v. Allen Brideau, 2016 NBQB 197 (CanLII), R. v. Robichaud, 2012 NBQB 359 (CanLII), R. c. Landry, 2012 NBBR 185 (CanLII) [judgment available in French only], R. v. Jacky Savoie, 2012 NBPC 10 (CanLII).

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

[141] There is conflicting jurisprudence on whether statutory language rights include active offer. In *R. v. Haché* (1993), 139 N.B.R. (2d) 81, 23 W.C.B (2d) 12 (C.A), in the context of a police officer's failure to provide the accused with his *Charter* cautions in French, the court considered whether an accused has the right to be advised of his linguistic rights when subjected to a police investigation. The majority held that no active offer was required. Rice J.A. referred to the absence in the *Charter* of a specific reference to active offer. Angers J.A., in dissent, held that active offer formed a part of the government's obligation under s. 20(2) of the *Charter*. On the other hand, *R. v. Gautreau* (1989), 101 N.B.R. (2d) 1, [1989] N.B.J No. 1005 (Q.B.) (QL) (reversed on appeal on another ground (1990), 1990 CanLII 4014 (NB CA), 109 N.B.R (2d) 54, 60 C.C.C. (3d) 332 (C.A.), leave to appeal to S.C.C. ref'd [1991] 3 S.C.R. viii), held that where the statute conferred equality to the use of both languages, this mandated the use of active offer. *Gautreau* also addressed the rights of an accused motorist under s. 20(2) of the *Charter* in the context of the language used by the police officer and the language used in a highway traffic ticket.

[…]

[339] Several months after this appeal was argued, the Supreme Court of Canada issued its decision in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15 (CanLII), [2008] S.C.J. No. 15 ("*Paulin*"). It considered "whether, by agreeing in a contract to provide police services in the province, the Royal Canadian Mounted Police ("RCMP"), a federal institution, is bound by the more generous rules respecting language in New Brunswick or is required to meet only the federal official languages standards" at para. 2. The Court concluded that since the New Brunswick legislature had authorized the RCMP to administer justice in the province, the RCMP performed the role of an "institution of the legislature or government of New Brunswick" as described in s. 20(2) of the *Charter* and was therefore obligated to comply with that provision and provide services to the New Brunswick public in French or English according to New Brunswick's more demanding requirements than those pertaining to the federal government under s. 20(1).

[…]

[341] We are of the view that *Paulin* does not inform the issues in this case. A fundamental issue on the cross-appeal is whether the trial judge erred by refusing to consider the application of the *Charter* when the *OLA* contains the same rights and remedies as the relevant parts of the *Charter* and when the GOC [Government of Canada] did not cause any breaches of the *OLA*. In *Paulin*, the question was whether the RCMP was an institution of New Brunswick that had to comply with s. 20(2). Because we uphold the exercise of the trial judge's decision not to determine the *Charter* issue, the question addressed in *Paulin* has no relevance. As we discuss at para. 329, the outcome would be exactly the same under the *Charter* as under the *OLA*. That was not so in *Paulin*.

R. v. McGraw, 2007 NBCA 11 (CanLII)

[4] When called upon to answer the charges in the Provincial Court, Mr. McGraw urged their dismissal, arguing that his language rights under s. 20(2) of the *Charter* and s. 31(1) of the *Official Languages Act* had been violated (s. 20(2) provides that any member of the public in this Province has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in one or the other of the official languages). The trial judge disagreed, being of the view that, since Mr. McGraw was fluently bilingual, no violation of language rights had taken place. As might be expected, that clearly erroneous understanding of language rights was rejected on appeal to the Court of Queen's Bench.

[5] The summary conviction appeal judge concluded, on the authority of this Court's decision in *Haché*, that s. 20(2) of the *Charter* did not impose on the peace officer the burden of informing Mr. McGraw that he had the right to be served in the official language of his choice. There being no violation of the *Charter*, s. 24(1) ("Enforcement of guaranteed rights and freedoms") did not come into play. The justice did, however, find that Mr. McGraw's rights under s. 31(1) of the *Official Languages Act* had been violated and that finding led him to quash the "information and to declare the charge a nullity". He went on to quash the

verdict rendered at trial and to order a verdict of acquittal on both charges: *R. v. McGraw*, [2006] N.B.J. No. 271 (QL), 2006 NBQB 216 (CanLII).

[…]

[13] At the trial, which was conducted in the English language at his request, Mr. McGraw argued unsuccessfully that his language rights under s. 31(1) of the *Official Languages Act* and s. 20(2) of the *Charter* had been violated and that he ought to be acquitted as a result.

[…]

[20] Many important questions are raised and discussed in the thoughtful reasons for judgment of the summary conviction appeal judge. These include whether s. 20(2) of the *Charter* imposes, by implication, the informational duty explicitly recognized in s. 31(1) of the *Official Languages Act* and whether the last-mentioned provision was constitutionalized by s. 16(3) of the *Charter*. In my view, those questions need not and should not to be resolved in the present context. Where, as here, the litigation touches upon the scope of language rights and the roster of remedies available for their breach, and the party claiming to be aggrieved is not represented by counsel, this Court is particularly chary about deciding more than what is absolutely necessary to do right according to law. As I will explain shortly, in the case at hand, justice can be meted out through s. 106 of *POPA* [*Provincial Offences Procedure Act*]. That said, some brief and focused observations are warranted concerning s. 20(2) of the *Charter*.

[21] In the course of his reasons for judgment, the summary conviction appeal judge accepted the proposition that the officer's failure to inform Mr. McGraw of his right to receive services in the official language of his choice did not constitute a violation of s. 20(2) of the *Charter*. He endorsed that viewpoint because of this Court's decision in *Haché*. In my view, that case does not settle the issue.

[22] While it is true that in Haché, Justices Rice and Ayles agreed that an obligation to inform members of the public of their right to service in the official language of their choice did not arise by implication from s. 20(2) of the *Charter*, the statement on point by Justice Rice was made in *obiter*. A careful reading of Justice Rice's reasons for judgment reveals that that feature of his interpretative analysis was not an essential link in the chain of reasoning that led him to reject the application of s. 20(2) and it is, therefore, not part of his *ratio decidendi*. Indeed, Justice Rice's rejection of the application of s. 20(2) was first and foremost based on the conclusion that municipal police forces are not "institutions of the legislature or government of New Brunswick", a viewpoint not shared by his colleagues and at odds with this Court's more recent unanimous decision in *Charlebois v. Moncton (City)* (2001), 242 N.B.R. (2d) 259, [2001] N.B.J. No. 480 (QL), 2001 NBCA 117 (CanLII). In any event, there have been significant developments in the law relating to language rights since *Haché*, including a number of authoritative judicial pronouncements favoring a more liberal approach to the interpretation of language rights legislation (e.g., *Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, [1999] S.C.J. No. 25 (QL) and *Charlebois v. Moncton (City))* and the adoption of s. 31 of the *Official Languages Act* which, having regard to the Act's Preamble, arguably adds invaluable clarifying insights into the intended effect of s. 20(2) of the *Charter*. That this Court considers the issue unsettled is clear from a close reading of *R. v. Maillet (L.)* (2006), 297 N.B.R. (2d) 289, [2006] N.B.J. No. 62 (QL), 2006 NBCA 22 (CanLII).

[23] A definition of the scope of s. 20(2) of the *Charter* is neither sought nor required in these proceedings. That is so because Mr. McGraw has not filed a Notice of Contention or otherwise argued, whether in writing or orally, that the decision rendered in the Court of Queen's Bench should be affirmed on grounds other than those given by the summary conviction appeal judge. Importantly, Mr. McGraw confirmed at the hearing his satisfaction with the disposition proposed in the reasons that follow.

[…]

[35] I would wrap up the proceedings by echoing the summary conviction appeal judge's emphasis on the importance of linguistic rights in New Brunswick, the only Province with two official languages. Language rights, whether sourced in the *Charter*, the *Official Languages Act* or *POPA*, set us apart in the Canadian

federation; as time goes by, more and more of our citizens proudly view those rights as what defines them as New Brunswickers. Hopefully, the outcome of these proceedings will bring home to peace officers engaged in the enforcement of provincial legislation that language rights are infrangible.

See also: Bujold v. R., 2011 NBCA 24 (CanLII).

Maillet v. R, 2006 NBCA 22 (CanLII)

[2] Ms. Maillet raises only one ground of appeal. She submits that the judge of the Court of Queen's Bench sitting on appeal erred, as did the trial judge, in failing to hold that her language rights under ss. 16.1 and 20(2) of the *Canadian Charter of Rights and Freedoms* had been violated. This violation is alleged to have occurred when the police officer who stopped and questioned her on one of the provincial capital's streets failed, upon first contact, to offer her the choice to be served in one or the other of the province's official languages. According to the applicant, the only appropriate and just remedy within the meaning of s. 24(1) of the *Charter* would be a stay of proceedings following the setting aside of her conviction.

[…]

[6] It appears that Ms. Maillet spoke English with ease, that she never asked to be served in French, and, in fact, that everything suggested she wanted to be served in English. Moreover, she was never prevented from using French or denied access to services in French. In addition, the alleged violation of language rights did not lead to the discovery of incriminating evidence or violate Ms. Maillet's right to a fair trial, including her right to make full answer and defence. Lastly, it should be noted that all the court proceedings were in French, Ms. Maillet's language of choice, that there is no evidence of a systematic violation of language rights by the Fredericton police force and that, when she appeared before the judge of the Court of Queen's Bench, she did not argue that her rights under s. 20(2) of the *Charter* had been violated. Indeed, Ms. Maillet raised the question for the first time before this Court.

[7] A stay of proceedings is a remedy generally reserved for "the clearest of cases" of violations of rights (*R. v. Regan*, 2002 SCC 12 (CanLII), [2002] 1 S.C.R. 297). This is one of the most stringent threshold tests. Even if we assume, solely for the sake of argument, that the applicant's language rights were violated when she was stopped and questioned, the present application for leave to appeal would still fail because a stay of proceedings is not the "appropriate and just" remedy (s. 24(1) of the *Charter*) having regard to the above test and the cumulative effect of the factors set out in the preceding paragraph (see *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3, and *R. v. Regan*). That being so, and since no other remedy is being sought, it follows that the question whether a violation of language rights occurred is entirely moot. I would add that we are mindful of the fact that any attempt to answer this delicate question would involve a substantial risk of error because the applicant is not represented by counsel and the scope of s. 20(2) was not the subject of debate in either court below.

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[9] In short, the province pioneered by enacting in 1969 the *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1, which recognizes that the English and French languages possess and enjoy equality of status and equal rights and privileges in all matters within the jurisdiction of the province and provides for the exercise of specific language rights. In 1981, the provincial government enacted *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, S.N.B. 1981, c. O-1.1. This Act officially recognizes the existence and equality of the two official linguistic communities. The following year, 1982, when the federal government was proceeding to patriate the Canadian Constitution and enact the Canadian *Charter of Rights and Freedoms*, the New Brunswick government had certain language rights entrenched in the *Charter*; these rights apply specifically to the institutions of the legislature and government of New Brunswick. These language rights are contained in subsections 16(2) to 20(2) of the *Charter*. Finally, in 1993, by way of constitutional amendment under section 43 of the *Constitution Act, 1982*, the provincial government constitutionalized the principles of *An Act Recognizing*

the Equality of the Two Official Linguistic Communities in New Brunswick that the Legislative Assembly passed in 1981. This became section 16.1 of the *Charter*; it contains a declaration that the English linguistic community and the French linguistic community are equal, defines the role of preserving and promoting the equality of status of the official linguistic communities and specifically confers this role on the legislature and government of New Brunswick.

[…]

[59] The second branch of the analysis of the language rights provided for in subsection 18(2) concerns the meaning and purpose of the other related specific *Charter* rights and freedoms. Subsection 18(2) is part of a series of provisions in the *Charter* which, since 1982, have entrenched in the Constitution the concept of linguistic duality and the notion of equality of official languages for Canada and New Brunswick. Indeed, the effect of subsections 16(2) to 20(2), which specifically apply to New Brunswick institutions, whereas subsections 16(1) to 20(1) apply to federal institutions, is to ensure the protection of language rights in a number of public institutions such as legislative institutions, courts and offices of the institutions of the legislature and government. These provisions therefore entrench the language guarantees of citizens vis-à-vis the government of New Brunswick. They are individual language rights guaranteed to Francophones and Anglophones alike. The establishment of official bilingualism which results from the combined effect of these provisions is in fact complemented in this province by section 23 of the *Charter* which, at the national level, guarantees the right to instruction in the language of the minority.

[…]

[131] The intervener, the Commissioner of Official Languages, relied on subsection 20(2) of the *Charter* arguing in her brief and her oral submission that the order made by Mr. Mowat with respect to the appellant's property was invalid. I wish to point out that this Court will refrain from making any pronouncement on that issue because the Court believes it is neither necessary nor desirable in this case. First of all, given the conclusion of this Court as to the invalidity of the City's by-laws, it is unnecessary, for the purposes of this appeal, to settle the issue of the possible invalidity of the order under subsection 20(2). Besides, the trial judge left this issue unresolved in his decision. The respondents and the intervener, the Province of New Brunswick, did not address the issue. Finally, some related matters were not raised before this Court, for example, the possibility that the order might be enforceable by reason of the *de facto* doctrine.

R. v. Haché, 1993 CanLII 5351 (NB CA)

[35] [RICE J.A.:] In my opinion, before ruling on the issue of the violation of the appellant's rights under subsection 20(2), it must first be determined whether the police officer, at the time of his interaction with the appellant, worked in an office of an institution of the legislature or government.

[…]

[38] In my opinion, the word "office" in the wording of subsection 20(2) limits the scope of the institutions covered by this subsection to public institutions whose management, policies and guidelines are supervised and controlled by the legislature or government.

[…]

[40] A municipality, despite the intervention of the government in some of its activities, is sufficiently autonomous, sovereign and responsible in its administration and organization within the limits of its powers and is not, in my opinion, subject to such supervision and control by the government or legislature as to make it an institution within the meaning of subsection 20(2) of the *Charter*.

[…]

[44] I would dismiss the appeal on these grounds and also for the following reasons.

[45] As previously mentioned, the appellant argued that because he was not advised as to his choice of official language by the police officer, his rights under subsection 20(2) of the *Charter* were violated. On this basis, he argued that the analyst's certificate should not have been received in evidence.

[46] Subsection 20(2) does not provide that a citizen must be informed of his or her rights under that subsection. The same goes for all of the other sections of the *Charter*, even though they guarantee such fundamental rights as life, freedom, etc., with the exception of paragraph 10(b) which states that a detainee must be informed of the rights set out therein. In my opinion, the Parliament of Canada would have set out the same duty in the wording of subsection 20(2) if such had been its intent. I am not satisfied that this Court must interpret the provision other than according to its wording and thus give it a different meaning than the whole of the legislation.

N.B. – See R. v. Losier, 2011 NBQB 177 (CanLII), adopted by the New-Brunswick Court of Appeal in R. v. Losier 2011 NBCA 102 (CanLII), concerning the obligation to inform a citizen of his or her rights under subsection 20(2) of the *Charter*.

R v. Nde Soh, 2014 NBQB 14 (CanLII)

[75] The defence argues that the accused's language rights under s. 20(2) of the *Charter* and 31(1) of the *Official Languages Act* were violated given that Cst. Francis arrested Mr. Soh in English and informed him of his rights in English.

[…]

[81] Cst. Francis had an obligation to make an active offer to Mr. Soh, that is, to inform him that he had the choice to be served in French or English. He fulfilled this obligation during the telephone conversation and when they met at the Fredericton detachment. Since Cst. Francis, who was at the Fredericton detachment, was not able to speak to him in his language of choice, which was French, he had a duty to take the necessary measures within a reasonable time, i.e. to call upon a colleague who could speak French. He fulfilled this obligation by making arrangements with a colleague who could speak French (namely Cst. Carter) even prior to Mr. Soh choosing French and by contacting him a second time to ask him to come immediately to the police station because Mr. Soh had arrived earlier than expected and now wanted to be served in French. Cst. Carter arrived at the police station about 15 minutes later and immediately took charge of Mr. Soh. In these circumstances, I find that Cst. Carter and Cts. Francis took the necessary measures within a reasonable time in order to honour the language choice made by Mr. Soh.

Evenson v. Saskatchewan (Ministry of Justice), 2013 SKQB 296 (CanLII)

[31] In my opinion, the fact that the Court in the *Société des Acadiens* held that the RCMP was subject to contract obligations with the province and, therefore, was also acting under the authority of the provincial government does not mean that the RCMP investigation in this case was subject to the Act but, rather, that as in the (sic) *Société des Acadiens* case, even though the RCMP's powers were set out by a contact (sic) in the provincial legislation, it was still subject to specific constitutional obligations as a federal police force, such that *Charter* rights could not be infringed upon.

McGraw v. R., 2012 NBQB 358 (CanLII)

[21] Following the decision by our Court of Appeal in *R. v. Losier*, 2011 NBCA 102 (CanLII), it is well established that police officers have an obligation to make an active offer to the driver of any intercepted vehicle. Failure by a peace officer to make an active offer to any member of the public constitutes a violation of subsection 31(1) of the *Official Languages Act* and of subsection 20(2) of the *Charter of Rights*.

[…]

[26] As a result of interpretation given by the courts of the applicable legislative provisions, peace officers have two obligations: 1) the obligation to inform members of the public of their right to receive service in either one of the official languages; and 2) the obligation to inform members of the public of the choice they have to receive service in either one of the official languages.

[27] In the circumstances of this case, are the words "Hello/Bonjour, Français/Anglais, French/English" sufficient to meet the obligations stated in article 31 of the *Official Languages Act*?

[28] With respect, I am of the opinion that the words used by Constable Lajoie do not meet the double obligation imposed under subsection 31(1) of the *Official Languages Act*. More precisely, the words used do not inform the appellant, as a member of the public, that they refer to a right to receive service in the language of his choice. Furthermore, at the hearing the representative for the Attorney General admitted that the words used by Officer Lajoie did not meet the informational requirement, that is the obligation to inform the appellant that the words meant he had the right to receive service in the language of his choice.

[29] I find that the words used by Constable Lajoie cannot constitute an active offer within the meaning of subsection 31(1) of the *Official Languages Act* and of subsection 20(2) of the *Charter*, therefore, I find that there was a violation of the appellant's linguistics rights.

R. v. Theriault, 2012 NBQB 184 (CanLII)

[13] I agree with the finding of the trial judge that a peace officer who stops a member of the public, such as the respondent, and only says "Hello, Bonjour" does not meet the obligation described under s. 31(1) of the *Official Languages Act*. In my opinion, the peace officer's duty to inform the respondent of his right to be served in the official language of his choice, a duty that arises not only from s. 31(1) of the *Official Languages Act*, but also from s. 20(2) of the *Charter*, cannot be met merely by saying "Hello, Bonjour". I am of the opinion that the trial judge was correct in finding that there was a violation of the respondent's language rights conferred by s. 31(1) of the *Official Languages Act* and by s. 20(2) of the *Charter*.

R. v. Furlotte, 2010 NBQB 228 (CanLII)

[28] *Assuming, without deciding*, that s. 20(2) of the *Charter* carries with it an implied "duty of active offer" of language choice on the part of Cst. Allain when he arrested the accused on September 4, 2007, was the imposition of a stay of proceedings appropriate in the circumstances, that is, within the discretion of the trial judge? That is the central issue in this appeal aside from the availability of a choice of language right *Charter* defence.

[…]

[42] In this instance the trial judge stated that he had no other option but to stay proceedings in order to "extinguish the prejudice caused by the said breach." However, there was no further articulation of the prejudice that had been caused by the failure to accord Ms. Furlotte her right to language choice. The record is silent on this point. That should not be taken as any indication that the language right that lies at the centre of the *Charter* motion is not an important fundamental right. It is. There will be occasions where the breach of such a constitutional right without more could lead to a stay of the proceeding being imposed. This is not one of those instances for the reasons that follow.

[43] The police breach of Ms. Furlotte's *Charter* right, in this case the assumed "duty of active offer" of language rights choice, is, as noted in Taillefeur and Duguay, not the only component of the analytic framework that must be considered in determining whether a stay of proceedings should be entered in this criminal trial. Societal interests are also an important aspect of that analysis. When a trial judge is deciding whether to permanently halt a criminal proceeding by imposing a stay of proceedings for a breach of a *Charter* right he or she must balance the nature and seriousness of the *Charter* violation(s)

against the societal interest in having a case adjudicated on its merits. See: *R. v. Regan* (*supra*) at paragraph 69. The trial judge made no reference to that competing societal interest in this case.

[…]

[57] Against that evidentiary and legal backdrop, to allow Ms. Furlotte to use her assumed *Charter* right to "a duty of active offer" of a choice of language in dealing with Cst. Allain at the time of her arrest on September 4, 2007 as a legal sword to halt the proceedings in these matters seriously risks bringing the administration of justice into disrepute. An objective analysis of the evidence and principles relevant to the issue at hand thus leads to the opposite conclusion to that which the trial judge determined was appropriate when he halted proceedings on the basis that allowing them to continue constituted an abuse of the court's process.

R. v. Gaudet, 2010 NBQB 27 (CanLII)

[10] For reasons that I will explain shortly, I find that the trial judge did not err in law in concluding that the absence of an active offer on the part of the peace officer amounted not only to a violation of s. 31(1) of the *Official Languages Act* but also to a violation of s. 20(2) of the *Charter*. My ruling opens the way to remedial action under s. 24 of the *Charter*. Therefore it is unnecessary for the purposes of this appeal to determine the origin of the Provincial Court's jurisdiction to order a remedy for a violation of the *Official Languages Act* which does not bring the Charter into play. I will thus abstain from ruling on this issue.

[11] With respect to the violation of s. 20(2) of the *Charter*, the Provincial Court is a court of first instance with jurisdiction to hear allegations of the infringement of rights and freedoms guaranteed by the *Charter* whenever it has jurisdiction over the person and the subject-matter. In the case at bar, Mr. Gaudet was charged under s. 253(b) of the *Criminal Code of Canada*. The matter was properly before the Provincial Court. It had a duty to adjudicate and to enforce the substantive rights and obligations guaranteed by the *Charter*.

[…]

[13] It is well-recognized that in New Brunswick, a peace officer who fails to inform a member of the public of his or her right to be served in the official language of his or her choice infringes that citizen's language rights under s. 31(1) of the *Official Languages Act*. However, there is no consensus as to whether the absence of an active offer constitutes a violation of s. 20(2) of the *Charter*.

[…]

[21] Chief Justice Drapeau's remarks in *Maillet* and *McGraw* compel me to come to the decision that notwithstanding the principle of *res judicata*, I cannot rely on *Haché* as precedent that in New Brunswick, the absence of an active offer does not constitute a violation of s. 20(2) of the *Charter*. I will elaborate on this point.

[22] Section 20(2) of the *Charter* establishes two distinct rights: the right to communicate and the right to receive services in French or English. Unlike s. 31(1) of the *Official Languages Act*, there is no express duty on the part of a peace officer to inform the public of their right to receive service in the official language of their choice.

[23] To communicate means to address an institution and to receive a response from that institution. What does the right to receive services mean? There must be a distinction between the two concepts. There is no doubt that s. 20(2) of the *Charter* gives the public the right to receive services in both official languages. The question remains whether that section imposes a duty to make an active offer of these services.

[24] It is not enough for a linguistic guarantee to be offered on paper; it must be applied or put into practice in order to have meaning. In its Preamble, the *Official Languages Act* introduces a law that

"respects the rights conferred by the *Canadian Charter of Rights and Freedoms* and allows the Legislature and the Government to fulfill their obligations under the *Charter*." The Province of New Brunswick passed legislation to satisfy its constitutional obligations under s. 20(2) and to thus ensure the respect and practical application of linguistic guarantees. As Chief Justice Drapeau stated in *McGraw*, at para. 22: "the adoption of s. 31 of the *Official Languages Act* which, having regard to the Act's Preamble, arguably adds invaluable clarifying insights into the intended effect of s. 20(2) of the *Charter*."

[…]

[29] It is impossible to appreciate the scope of *Charter* language rights without taking into account the fundamental principle at the heart of New Brunswick's language policy and the government's commitment to bilingualism and biculturalism. New Brunswick introduced a constitutional and legal system for the residents of this province that is unique in Canada. Section 20(2) of the *Charter* must be construed against this backdrop. The legislative and constitutional context of the application must be taken into account.

[…]

[36] The wording of the right guaranteed in s. 20(2) of the *Charter* is very general. In light of the historic evolution of minority rights in New Brunswick and of the principles enunciated by the Supreme Court of Canada with respect to linguistic rights, the *Charter* language rights contained in s. 20(2) must be construed in a manner that is broad, dynamic, liberal, remedial and purposive. Equality does not have a more restricted meaning in linguistic matters than it does in other areas. The meaning of a *Charter* right must be construed in a purposive way, that is, in terms of the interests the right aims to protect. Both precision and respect for the letter and spirit of the Constitution are called for in this arena.

[…]

[41] Unlike s. 31(1) of the *Official Languages Act*, s. 20(2) does not specifically require a peace officer to inform members of the public of their right to be served in the official language of their choice. However, in my view, this right arises by implication from s. 20(2) of the *Charter*. Based on the generous and liberal approach to the interpretation of language rights taken by the Supreme Court of Canada in *Beaulac*, and based on a purposive approach to the provisions in question, I find that s. 20(2) of the *Charter* imposes a duty by implication to make an "active offer". In order to give full effect to the right to choose under s. 20(2) of the *Charter*, there must be a corresponding duty on the part of peace officers to inform the public of that right. To construe s. 20(2) otherwise would have the obvious result of obstructing the remedial purpose of this linguistic right and this would be incompatible with a broad and dynamic purposive interpretation. Section 20(2) of the *Charter* necessarily includes an active offer of service. The freedom to choose given by s. 20(2) is meaningless in the absence of a duty to inform the citizen of this choice. Section 20(2) of the *Charter* necessarily includes an active offer of service and accordingly, a peace officer in New Brunswick must inform every member of the public with whom he communicates of their right to be served in the official language of their choice.

[…]

[44] The fact that the provincial legislator adopted s. 31(1) of the *Official Languages Act* does not make the *Charter* inoperative. The rights protected by s. 31(1) of the *Official Languages Act* are not new. They are already Charter rights under s. 16(2) and under s. 20(2) in particular. The *Official Languages Act* is simply an illustration of the advancement of linguistic rights by statutory means under s. 16(3) of the *Charter*. In fact, I venture to say that s. 31 remedied the situation as it existed. As we know, many decisions handed down prior to the coming into force of s. 31(1) of the *Official Languages Act* came to the conclusion that the absence of an active offer did not automatically infringe Charter language rights.

R. v. Butler, 2002 NBQB 325 (CanLII)

[22] I subscribe to both Mr. Justice MacDonald's and Lacourcière's reasoning on this issue, holding that section 20(2) does not apply to the judicial process. It necessarily follows, then, that the Applicant has failed to prove a violation of section 20(2) of the *Charter*.

[…]

[25] Although I have decided that Mr. Butler's language rights pursuant to section 20(2) have not been violated, I, nevertheless, am of the opinion that language can be and is, in this case, an important factor to be considered in determining whether Mr. Butler's ability to make full answer and defence has been impaired due to his failure to obtain disclosure in English.

R. v. Bastarache, 1992 CarswellNB 106, [1992] A.N.B. No. 529, [1992] N.B.J. No. 529, 128 N.B.R. (2d) 217 (NB QB) [hyperlink not available]

[20] I agree that police forces are government institutions serving the public. In my opinion, in the Canadian context police forces can be either federal, provincial or municipal government institutions. The Royal Canadian Mounted Police and Military Police are federal government institutions. Provincial police forces such as the now defunct Highway Patrol, are provincial government institutions. It is my opinion that municipal police forces are municipal government institutions as are regional police forces. There are also of course many private security forces. Under the *Police Act* of this Province municipalities are authorized and directed to provide and maintain an adequate police force. A municipal police force such as the Saint-John Police Force, in my opinion, is not an office of an institution of the legislature or government of New Brunswick. I realize that municipalities are creatures of the legislature and are dependent upon the legislature for existence. They are incorporated bodies as are limited companies that have status by virtue of statute. Nonetheless, a municipal corporation has a corporate identity distinct from that of the Province. […]

[…]

[23] Even though I have reached the above conclusion which if correct, should determine this appeal, I believe I must nonetheless determine whether the rights of Mr. Bastarache were infringed in the present circumstances.

[…]

[28] Police officers in carrying out their duties also have certain responsibilities and the duty to give a meaningful and reasonable language choice to members of the public and the opportunity to use the official language of their choice. Whether the member of the public should ask to be served in the language of his choice first or whether the police officer should offer such a service first is, in my opinion, not relevant nor required.

[29] Legal Rights are set out in Sections 7 to 14 of the *Charter of Rights and Freedoms*. Section 10 of the *Charter* sets out rights of persons arrested or detained. Section 11 sets out rights of persons charged with an offence. Language Rights are set out in Sections 16 to 23. As I understand the *MacDonald* and *Société des Acadiens* decisions, legal rights and language rights are conceptually different. The right of any member of the public in New Brunswick to communicate with and to receive available services from an office of an institution of the legislature or government of New Brunswick in French or English is a right guaranteed under the *Charter* which should and must be respected. This right conceptually or in theory is different from the legal right to retain and instruct counsel without delay and to be informed of that right for example. It is conceptually or in theory different from other legal rights set out in Sections 7 to 14 of the *Charter*.

[30] The proper criteria, in my opinion, ought to be whether a meaningful language choice is given to the individual along with the right and opportunity to express himself and be served in either official language.

Of course, any person detained by police or arrested should understand why he is being detained or arrested and his legal rights as guaranteed by the *Charter* should be respected.

[31] In the present case as I see it a meaningful and a reasonable language choice was given to Mr. Bastarache and he was given a fair and reasonable opportunity to express himself in the language of his choice. In my opinion, police acted reasonably and fairly in taking steps to ensure that he understood why he was being charged, what he was being charged with and he was properly notified of his right to legal counsel and he had an opportunity to consult legal counsel. He was, as I see it, given the opportunity to speak in the official language of his choice.

R. v. Robinson, 1992 CarswellNB 408, [1992] A.N.B. No. 146, [1992] N.B.J. No. 146, 127 N.B.R. (2d) 271, 319 A.P.R. 271 (NB QB) [hyperlink not available]

[15] In essence, it is argued that the appellant has been denied a constitutional right because he was not given a choice of language by constable Parent when the section 254(2) [*Criminal Code of Canada*] demand was made.

[16] Section 20(2) of the *Charter* provides:

[…]

[17] In his brief, the appellant submits that the R.C.M.P represent a policing body duly mandated by the government of New Brunswick and must be capable of offering a service to the public in English or French.

[18] In choosing to converse with the appellant in the English language and omitting to enquire as to the choice of language by the appellant, the language rights of the appellant were violated.

[19] In my opinion, this argument may be disposed of almost summarily for the following reasons:

(1) There was no evidence that the Riverview detachment of the Royal Canadian Mounted police is "an institution of the legislature or government of New Brunswick".

(2) There was no evidence that the Riverview detachment of the R.C.M.P. was not capable of offering a service to the public in English or French.

(3) There was no evidence that the appellant requested service in any particular language.

(4) There was no evidence that the appellant did not understand the demand made of him and his response to the demand was graphic and explicit proof that he completely understood the proceeding.

[20] There is nothing in the trial proceedings or on appeal to suggest that there was any lack of comprehension or understanding on the part of the appellant. In simplest terms the appellant's position is that the first thing a police officer must do in an investigation is to enquire as to language choice.

[21] In effect this would mean that every police officer in New Brunswick must be bilingual or accompanied by another officer so that all necessary questions can be asked in either language. In some circumstances a police officer is required by statute to make enquiries and demands "forthwith". Surely all that is required is an understanding or comprehension and there is no indication here that the appellant could not or did not understand or comprehend the demand.

[22] I am not of the opinion that either the meaning or the intention of the language provisions of the *Charter* can be stretched to the extent expounded by the appellant.

R. v. Gautreau, 1989 CarswellNB 292, 1989 CarswellNB 360, [1989] N.B.J. No. 1005, 101 N.B.R. (2d) 1, 254 A.P.R. 1 (NB BR) [hyperlink not available]

N.B. – Judgment was reversed by the New Brunswick Court of Appeal on another issue: R. v. Gautreau, 1990 CanLII 4014 (NB CA))

[33] It is therefore appropriate to analyze s. 20(2) of the *Charter* according to the literal method.

[34] The word "public" does not cause any problems. Whether it be in English or French, the term has a clear meaning. Public understanding or dictionary meanings, all lead to the same result: the word "public" in s. 20(2) of the *Charter* necessarily includes any individual or group of people.

[…]

[37] I, thus, easily conclude that, in this case, the applicant is included in the term "public".

[38] The "right to communicate with, and to receive available services from ... in English or French" should not be confusing either. It is a simple and explicit right. The only reasonable meaning that can be given to these words is that in New Brunswick, everyone has a constitutional right of communicating both verbally and in writing in one of the two official languages, English or French, with the government and its institutions. In addition, everyone has the right to receive government services in the language of his or her choice. Finally, the section specifies that it covers any communication with "any office of an institution of the legislature or government". In other words, the government of New Brunswick declares itself under s. 20(2) a bilingual entity and, moreover, confers equal status on each of the two chosen languages. This constitutional reality is also consistent with the *Official Languages of New Brunswick Act*, S.N.B. 1969, c. 14; R.S.N.B. 1973, c. 0-1, with *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, S.N.B. 1981, c. 0-1.1, with s. 462.1 of the *Criminal Code of Canada* and with s. 16(2) of the *Charter*, *supra*.

[…]

[49] I am satisfied of the relevance and practical application of the above-mentioned criteria. The application of these criteria leads me to conclude that the issuing of a ticket by a member of a police force in New Brunswick to an individual in New Brunswick is a communication or a service as contemplated by s. 20(2) of the *Charter*. Consequently, the communication must be made by the police officer in the individual's desired language. I will return to the practical consequences of this conclusion.

[…]

[89] Section 20(2) confers to the New Brunswick public the right to communicate in French or English with the listed government institutions. This right to communicate must necessarily be accompanied by a right to be understood.

[90] In the instant case, the respondent, an employee of the civil service, unilaterally decided not to ask the desired language of the applicant. The police officer voluntarily neglected to follow the steps on the form that included a box to guarantee an active offer to the public. By refusing to use the form prescribed by government authorities, the respondent violated the constitutional rights of the applicant.

4. Conclusion

[91] No matter what method of interpretation is used, the result is the same - the minimum rights of the applicant guaranteed by subsection 20(2) of the *Charter* were violated. This violation of the *Charter* grants the applicant the right to an appropriate remedy under subsection 24(1) of the *Charter*.

[92] The interpretation of subsection 20(2) of the *Charter* according to each of the three methods, leads to one and the same result, that is, that the applicant has the constitutional right to receive his ticket in his desired language and that the violation of this right by officer Carson gives the applicant the right to an

appropriate remedy under subsection 24(1) of the *Charter*. Before addressing the issue of remedy, I would like to comment on the practical consequence of this decision.

C. Practical Consequence of This Decision

[93] The question is whether this decision means that all police officers in New Brunswick must be bilingual. Unequivocally, the answer is no. Following the example of judges in *La Société*, police officers who have direct and frequent contact with the public, more specifically the Highway Patrol or traffic control police, should communicate and serve their clientele by using "reasonable means" to respect the desired language of the recipient. In this case, the bilingual form and the Guide are tools which can be considered in some cases as a "reasonable means" to be understood. Unfortunately, officer Carson refused to use them.

R. v. Lavoie, 2014 NBPC 43 (CanLII)

[39] In *R. v. Losier*, 2011 NBCA 102 (CanLII), the Court of Appeal of New Brunswick ruled on the meaning and scope that should be given to s. 20(2) of the *Charter*. Indeed, the Court of Appeal reiterates that it is incumbent upon courts to eschew a restrictive interpretation of legislative and constitutional provisions dealing with language rights. I draw additional guidance from that landmark decision. On the one hand, a peace officer who stops a member of the public in New Brunswick is under a duty to comply with the obligations imposed on institutions of the Government of New Brunswick by s. 20(2) of the *Charter*, in particular as regards the active offer of service in both official languages. On the other hand, while there is no question that language rights under the *Charter* are “infrangible” and that s. 24 must be interpreted in a way that upholds *Charter* rights by providing effective remedies for their breach, it bears underscoring that for the purposes of the analysis required under s. 24(2), the exclusion of evidence is not necessarily the appropriate remedy for every violation of language rights, regardless of the circumstances. This case is striking proof of that.

[40] In any event, although the prosecution concedes that the language rights guaranteed by s. 20(2) of the *Charter* were infringed, the analysis does not end there. The next question is whether the evidence should be excluded based on the three criteria set out in *R. v. Grant* 2009 SCC 32 (CanLII), [2009] 2 S.C.R. 353:

> (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message that the justice system condones serious state misconduct),
>
> (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and
>
> (3) society’s interest in the adjudication of the case on its merits.

[…]

[49] Corporal Parish’s conduct in this case was not marked by bad faith. Although solicitous about the defendant’s language rights, he immediately proceeded with the investigation under circumstances in which, it has to be said, he failed to grasp the meaning and scope of s. 20(2) of the *Charter*. Nevertheless, upon noting that the defendant spoke only rudimentary English and wished to receive services in French, Corporal Parish immediately contacted a bilingual RCMP member, who was dispatched to the scene some 30 to 45 minutes later. The evidence also reveals that a more thorough inspection resumed in the bilingual officer’s presence.

[…]

[63] I consider the breach of s. 20(2) of the *Charter* to be serious, although it was merely transient and there was no bad faith in Officer Parish’s conduct. There is an inevitable risk of undermining the confidence of the New Brunswick public by including the statement made by the accused under

circumstances in which he had already opted to receive services in the official language of his choice. The analysis of the first criterion therefore militates in favour of its exclusion.

[…]

[76] I have also noticed that there is a whole range of decisions in the Canadian jurisprudence interpreting s. 849(3) of the *Criminal Code*. Some suggest that failure to use the pre-printed portions of the forms in both official languages is merely a formal defect. The fact remains that this argument, although undoubtedly attractive, is not entirely convincing in that it fails to acknowledge the uniqueness of the province of New Brunswick as laid down in ss. 16(2) and 20(2) of the *Charter*. We have to remember that peace officers in that province have a duty to comply with the language requirements that s. 20(2) of the *Charter* imposes on New Brunswick institutions. This is also the principle that emerges from *Losier*, *supra*, a landmark decision on language rights in New Brunswick. As Bastarache J. stated unequivocally in *Beaulac*, 1999 CanLII 684 (SCC), [1999] S.C.J. No. 25, language rights must be given a large and liberal interpretation by the courts.

[…]

[79] It seems to me, however, that the jurisprudence has evolved a great deal since then on the issue of language rights. Notably, Bastarache J. of the Supreme Court states at para. 25 of *R. v. Beaulac*, *supra*, that to the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, "stands for a restrictive interpretation of language rights, it is to be rejected." The Court of Appeal of New Brunswick says much the same thing in *Losier*, *supra*, in terms of s. 20(2) of the *Charter*.

[…]

[120] I am of the opinion that in this case, the *SPCA* [Society for the Prevention of Cruelty to Animals] officers breached the defendant's language rights on October 25 and 27, 2011, infringing the guarantees set out in s. 31(1) of the *Official Languages Act* and s. 20(2) of the *Charter*. In light of the very specific circumstances of this case, and with the exception of the statement by the accused, I am of the view that these breaches do not justify the exclusion of evidence under s. 24(2) of the *Charter*.

[…]

[122] However, the infringement of the defendant's language rights should be considered at the sentencing hearing as a mitigating circumstance justifying a reduced sentence for the offence under s. 18(2) of the *SPCA Act*. I am of the view that, pursuant to s. 24(1) of the *Charter*, and having regard to the principles that emerge from *R. v. Nasogaluak*, 2010 SCC 6 (CanLII), [2010] 1 S.C.R. 206, this would be an appropriate and just remedy for the infringement of the defendant's language rights as guaranteed under s. 20(2) of the *Charter*. This issue was also raised during the parties' closing arguments. I further note that the Court of Queen's Bench of New Brunswick recently applied those principles in *R. v. Martin* 2013 NBQB 322 (CanLII) at para. 39.

R. v. Robinson, 2014 NBPC 37 (CanLII)

[57] Being satisfied that the Accused's language rights were not respected by Cpl. White and by Cst. McEachern, I must now direct my mind to the analysis required by s. 24(2) of the *Charter* in order to determine the appropriate remedy. In particular, I must decide whether the evidence consisting of the officers' observations of the Accused assaulting his mother ("the evidence") should be excluded as a result of a violation of s. 20(2) of the *Charter*.

[…]

[59] Equally important, a peace officer's duty to inform a member of the public of his or her right to be served in the official language of choice, a duty that arises not only from s. 31(1) of the *Official Languages*

Act, but also from s. 20(2) of the *Charter*, cannot be met merely by saying “Hello, Bonjour” or “Allo”: *R. v. Theriault*, 2012 NBQB 184 (CanLII), at p. 13.

[…]

[63] Similarly, in the case at bar, there is no evidence which would allow me to conclude there was a *Charter* violation other than the officers’ failure to inform the Accused that he had a choice to be served in English or French immediately upon “communicating” with him as he was standing on his deck and while placed under arrest for assault and impaired driving. I also note that he was informed of his language rights once at the police station.

See also: R. v. McKenzie, 2012 NBPC 15 (CanLII).

R. v. Robichaud, 2011 NBCP 2 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[22] In a previous decision, (*R. v. Gaudet*, 2009 NBPC 8), I found that the peace officer’s omission to inform the accused, upon first contact, of his right to communicate in the official language of his choice, and to enquire about his choice, not only constituted a violation of subsection 31(1) of the *Official Languages Act*, but a violation of subsection 20(2) of the *Charter* as well, and as a result opened the way to an analysis under subsection 24(2) of the *Charter*. In other words, subsection 20(2) of the *Charter* implicitly imposes the duty to inform expressly provided for in subsection 31(1) of the *Official Languages Act*. On this point, see also the findings of Justice LaVigne, who heard the appeal from that decision (2010 NBQB 27).

[…]

[34] Moreover, the decisions of our courts in cases where language rights have been violated should not create different regimes for different regions of our province. This is why it is imperative to avoid allowing the “circumstances” of the case to justify denying a remedy for a violation of language rights, as the positive duty created by subsection 31(1) of the *Official Languages Act*, as well as by subsection 20(2) of the *Charter*, would be pointless and serve no real purpose if the violation of the right did not result in a remedy that reflects its importance.

Canadian Union Of Public Employees, Local 1252 v. Service New Brunswick, 2016 CanLII 96056 (NB LA)

[45] New Brunswick has a great reputation as Canada’s only officially bilingual province. At the federal level, local access to government services in the language of choice is based on a “numbers warrant” approach; not so in New Brunswick where the right to access is territorial. In this province, members of the public have a right to communicate with government in the official language of their choice wherever they are in the province. This is a strength of New Brunswick and its people and is guaranteed by both the *Official Languages Act*, S.N.B. 2002, c O-0.5 and the *Canadian Charter of Rights and Freedoms*, s. 20(2).

SEE ALSO:

Charlebois v. Town of Riverview and Attorney General of New Brunswick, 2015 NBCA 45 (CanLII)

City of Toronto v. Braganza, 2011 ONCJ 657 (CanLII)

Sonier v. Ambulance New Brunswick Inc., 2016 NBQB 218 (CanLII)

R. v. Maurice Frenette, 2007 NBCP 33 (CanLII)

R. v. Mario Régis Mazerolle, 2008 NBPC 31 (CanLII)

R. v. Cormier (21 July 1999), Moncton (NB PC), Savoie J [hyperlink not available]

Bourque v. R. (20 August 1992), M/M/141/92 (NB QB) J. Landry [hyperlink not available]

R. v. Bertrand, 1992 CanLII 5946 (NB BR) [judgment available in French only]

Moncton Firefighters Association, International Association of Firefighters, Local 999 v. Moncton (City), 2015 CanLII 19678 (NB LA)

Canadian Union of Public Employees, Local 1190 v. New Brunswick (Transportation and Infrastructure), 2015 CanLII 38685 (NB LA)

New Brunswick Union of Public And Private Employees v. Horizon Health Network, 2015 CanLII 38678 (NB LA)

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21. Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

[LAST UPDATE: JUNE 2017]

ANNOTATIONS

Lavigne v. Canada Post Corporation, 2009 QCCA 776 (CanLII)

ON THE MOTION TO ORDER RESPONDENT TO PROCEED IN ENGLISH:

[1] Section 133 of the *Constitution Act* is both explicit and unambiguous.

[2] Section 21 of the *Canadian Charter of Rights and Freedoms* explicitly states that nothing in section 16 to 20 of the *Charter* abrogates or derogates from any right that exists by virtue of any provision of the Constitution of Canada which includes Section 133. Finally, section 18 of the *Official Languages Act*, apart from the fact that it obviously cannot derogate or depart from the *Constitution Act*, only applies by its own terms to the courts of law created by an Act of Parliament under section 3(2) of the same Act, which is not the case of this Court.

[3] Therefore, the motion is without merit and is dismissed without costs.

Reference re an Act to Amend the Education Act, 1986 CanLII 2863 (ON CA)

The key *Charter* provision that has to be considered is s. 29, because it relates specifically to the subject at hand. Because of its critical importance, the English version is repeated with certain emphasis and the French version, with the same emphasis, is added.

[…]

The crucial words in s. 29 are: "any rights or privileges guaranteed by or under the Constitution of Canada", especially the words "guaranteed by or under". "Guaranteed by the Constitution" would appear to refer specifically to s. 93 as far as concerns the four original provinces, as well as British Columbia and

Prince Edward Island, admitted to the Union pursuant to s. 146. It was urged upon us that the words "or under" must refer to such other provisions as s. 22 of the *Manitoba Act*, 1870 (Can.), c. 33, confirmed by the *Constitution Act*, 1871; s. 17 of each of the *Alberta Act*, 1905 (Can.), c. 3, and the *Saskatchewan Act*, 1905 (Can.), c. 42; and Term 17 of the *Terms of Union of Newfoundland with Canada* (confirmed by the *Newfoundland Act*, 1949 (U.K.), c. 22). However, these four Acts are listed in the *Schedule to the Constitution Act*, 1982 and so, by virtue of s. 52(2)(b), constitute part of the Constitution of Canada. Therefore, the words, "or under" were evidently not necessary to cover these situations. Clearly the words "or under" were intended to cover guarantees other than those granted by the Constitution. It might be noted that s. 21 of the *Charter* which, according to the marginal note, provides for "continuation of constitutional provisions" with respect to the English and French languages uses the following terms:

> 21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued *by virtue of any other provision of the Constitution of Canada*.
>
> (Emphasis added.)

If s. 29 was intended to protect only constitutional rights and privileges from the *Charter*, the words "by virtue of any provision of the Constitution of Canada" might have been expected to be used instead of "by or under the Constitution of Canada". The words "under the Constitution of Canada" must include rights and privileges granted by laws enacted under the authority of the Constitution. This conclusion is supported by the French version of s. 29 which uses the one term "en vertu de", which is translated by *Le Petit Robert* as "par le pourvoir de", which could be translated as "by the power of ". It is interesting to note that the French equivalent of the words "by Law" in s. 93(1) of the *Constitution Act*, 1867, is "par la loi". All of this indicates that the words as used in s. 29 were intended to include not only constitutional guarantees of rights or privileges in respect of denominational, separate or dissentient schools, but also those provided by a law enacted pursuant to constitutional authority.

N.B. – The appeal of this reference was dismissed by the Supreme Court (Reference re Bill 30, An Act to Amend the Education Act (Ont.), [1987] 1 SCR 1148, 1987 CanLII 65 (SCC)), but the above-mentioned point was not discussed by the Supreme Court.

McDonnell v. Federation des Franco-Colombiens, 1985 CarswellBC 388, [1985] B.C.W.L.D. 3428, [1985] B.C.W.L.D. 3452 (B.C. Ct.C.) [hyperlink not available]

[27] In his submission counsel for the Attorney General contended that the guarantees in s. 15 do not extend to language rights. He pointed out that neither a linguistic group nor language are enumerated in the section and that language rights are specifically dealt with in ss. 16 to 23 with s. 19 specifically dealing with the issue here - the use of English and French in the courts in Canada. He submits that since use of English and French in certain courts is specifically dealt with in s. 19, this is evidence of the clear intention of the framers of the *Charter* that no right to use French in British Columbia is guaranteed by s. 15. If such is not the case, the argument goes, s. 19(2) would be unnecessary. In support of this submission the Attorney General cited *R. v. Speicher* (1983), 6 C.C.C. (3d) 262; *Haywood Securities Inc. v. Inter-Tech Resource Group Inc., Vancouver No. C845334* (unreported), and *Curr v. R.*, [1972] S.C.R. 889, as well as passages from Hogg, *Canada Act 1982 Annotated* (1982). Only the *Speicher* case deals specifically with s. 15 and it was decided before that section became effective.

[28] The defendant says this submission is met by the plain language of s. 21, which it contends makes s. 15 applicable to language rights.

[29] In answer the Attorney General says s. 21 was included in the *Charter* to indicate clearly that the language rights created under the *B.N.A. Act* (now the *Constitution Act*, 1867) and the *Manitoba Act*, 1870 are not affected by the specific provisions in the *Charter* dealing with language rights.

[30] These submissions of the Attorney General as to the inapplicability of s. 15 to the language rights issue are attractive and undoubtedly have merit. In view of the conclusion I have reached on the

discrimination issue, I do not find it necessary to deal with them at this time. Were I to do so, I would be inclined to agree with these submissions made on behalf of the Attorney General.

N.B. – The appeal of this judgment was dismissed by the British Columbia Court of Appeal (*McDonnell c. Fédération des Franco-Colombiens* [1986] B.C.J. No 730, 31 D.L.R. (4th) 296 [hyperlink not available]), but the above-mentioned point concerning s. 21 of the *Charter* was not discussed by the Court of Appeal.

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22. Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

[LAST UPDATE: JUNE 2017]

ANNOTATIONS

Reference re an Act to Amend the Education Act, 1986 CanLII 2863 (ON CA)

The Constitution of Canada, of which the *Charter* is now a part, has from the beginning provided for group collective rights in ss. 93 and 133 of the *Constitution Act, 1867*. As Professor Hogg (Peter W. Hogg, *Constitutional Law of Canada*, 2nd ed. (1985), at p. 634 and p. 824) has expressed it: these provisions amount to "a small bill of rights". 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 denominations to 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. To that extent, they are an exception from the equality rights provided equally to everyone. Thus, a court cannot rely upon s. 15 to invalidate a provision for the English or French languages, pursuant to ss. 16 to 23 of the *Charter*, on the ground that such provision does not provide for equal protection or benefit to another language. There could be an argument, perhaps based upon s. 22, that other languages should one day be recognized.

> 22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this *Charter* with respect to any language that is not English or French.

However, until a "legal or customary right or privilege" is recognized, a court of law cannot now enforce, in the light of ss. 15 and 16 to 23 of the *Charter*, equality for any languages other than the two official ones. In fact, even if another language were to gain recognition under s. 22, it would still be a group right that users of still other languages might not be able to claim, except in a political forum.

N.B. – The appeal of this reference was dismissed by the Supreme Court (Reference re Bill 30, An Act to Amend the Education Act (Ont.), [1987] 1 S.C.R. 1148, 1987 CanLII 65 (SCC)), but the above-mentioned point was not discussed by the Supreme Court.

Minority Language Educational Rights (section 23)

23. (1) Language of instruction

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**
>
> **(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,**

have the right to have their children receive primary and secondary school instruction in that language in that province.

23. (2) Continuity of language instruction

23. (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.

23. (3) Application where numbers warrant

23. (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

> **(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**
>
> **(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.**

[LAST UPDATE: JUNE 2017]

ANNOTATIONS – GENERAL

Association des parents de l'école Rose-des-vents v. British Columbia (Education), [2015] 2 S.C.R. 139, 2015 SCC 21 (CanLII)

[25] Section 23 is a remedial right that differs from many other *Charter* rights. The provision is an important marker of Canada's commitment to bilingualism, and to the bicultural founding character of this country. It imposes a constitutional duty on the provinces and territories to provide minority language education to children of s. 23 rights holders where numbers warrant. This commitment sets Canada apart among nations, as Justice Vickers of the Supreme Court of British Columbia explained in *Assn. des Parents Francophones*: […]

[26] Section 23 is concerned with the preservation of culture as well as language. As the Royal Commission on Bilingualism and Biculturalism noted, "[l]anguage and culture are not synonymous, but the vitality of the language is a necessary condition for the complete preservation of a culture" (*Report of the Royal Commission on Bilingualism and Biculturalism*, Book II, *Education* (1968), at p. 8). As this

Court noted in *Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342, at p. 362, "any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it": see also M. Bastarache, "Education Rights of Provincial Official Language Minorities (Section 23)", in G.-A. Beaudoin and E. Ratushny, eds., The *Canadian Charter of Rights and Freedoms* (2nd ed. 1989), 687, at p. 695.

[27] Section 23 was designed to correct and prevent the erosion of official language minority groups so as to give effect to the equal partnership of Canada's two official language groups in the context of education: *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1 (CanLII), [2000] 1 S.C.R. 3, at para. 26; *Mahe*, at p. 364. Minority language education is crucial to the maintenance of that partnership: […]

> Indeed, in minority language communities, schools are a primary instrument of linguistic, and thus cultural, transmission: Mahe, at pp. 362-63. In many such communities, demographic changes and the shifting role of religious establishments have turned local minority language schools into vital community centres (M. Power and P. Foucher, "Language Rights and Education", in G.-A. Beaudoin and E. Mendes, eds., *Canadian Charter of Rights and Freedoms* (4th ed. 2005), 1095, at pp. 1100-1101).

[28] One distinctive feature of s. 23 is that it is particularly vulnerable to government inaction or delay. Delay in implementing this entitlement or in addressing s. 23 violations can result in assimilation and can undermine access to the right itself. As this Court has noted before, for every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation and cultural erosion (*Doucet-Boudreau*, at para. 29). Left neglected, the right to minority language education could be lost altogether in a given community. Thus, there is a critical need both for vigilant implementation of s. 23 rights, and for timely compliance in remedying violations.

Nguyen v. Quebec (Education, Recreation and Sports), [2009] 3 S.C.R. 208, 2009 SCC 47 (CanLII)

[23] Section 23 of the *Canadian Charter* establishes the general framework for the minority language educational rights of Canadian citizens. This provision is unlike those generally found in charters and declarations of fundamental rights (*Quebec Association of Protestant School Boards*, at p. 79). Although it has a collective scope, it confers individual rights. A codification of basic language rights, it reflects a fundamental political compromise in Canada in this area (*Quebec Association of Protestant School Boards*, at p. 82; *Solski*, at paras. 5-10; M. Bastarache, "Introduction", in M. Bastarache, ed., *Language Rights in Canada* (2nd ed. 2004), 1, at pp. 6-7; M. Power and P. Foucher, "Language Rights and Education", in G.-A. Beaudoin and E. Mendes, *Canadian Charter of Rights and Freedoms* (4th ed. 2005), 1095, at pp. 1102-3).

[25] This Court has considered s. 23 several times since the *Canadian Charter* came into force in 1982. This provision lays down a comprehensive code that establishes the nature and scope of the educational rights of an English or French linguistic minority. Section 23 applies in particular to minority language communities throughout Canada. Moreover, it was not enacted in a vacuum. Well aware of the situations of linguistic minorities and the existing legislative schemes with respect to the language of instruction in Canada, the framers wanted to remedy the most serious defects in the legal rules being applied to such minorities and to implement uniform corrective measures for past injustices (*Quebec Association of Protestant School Boards*, at p. 79; *Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342, at pp. 363-64; *Solski*, at para. 21). Section 23 was thus conceived as a tool for achieving equality between Canada's two official language groups (*Mahe*, at p. 369; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1 (CanLII), [2000] 1 S.C.R. 3, at para. 26).

[26] Since *Quebec Association of Protestant School Boards*, this Court has consistently held that in interpreting s. 23, it is necessary to take a purposive approach aimed at identifying the framers' objective at the time of its enactment. The Court has stated on a number of occasions that the purpose of this section is to protect the official languages and their respective cultures, and promote their development, in the provinces where they are spoken by a minority (*Mahe*, at p. 364; *Reference re Public Schools Act*

(Man.), s. 79(3), (4) and (7), 1993 CanLII 119 (SCC), [1993] 1 S.C.R. 839, at p. 849; *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15 (CanLII), [2005] 1 S.C.R. 238, at para. 28; *Solski*, at para. 7). Moreover, even if the guaranteed language rights are the embodiment of a political compromise, they must, like the other rights entrenched in the *Charter*, be given a generous and expansive interpretation that is consistent with the identified purpose (*Mahe*, at pp. 364-65; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3, at paras. 23-24; *Solski*, at para. 20). However, the social, demographic and historical context of the recognition of the rights guaranteed by s. 23 remains the backdrop for the analysis of language rights and assists in identifying the concerns that led to their being given constitutional recognition (*Solski*, at para. 5). In analysing and interpreting language rights, it is also necessary to consider the official languages dynamics in each province (*Reference re Public Schools Act (Man.)*, at p. 851; *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at pp. 777-78; *Solski*, at para. 7). These principles form the framework for interpreting s. 23 of the *Canadian Charter.*

Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14 (CanLII)

[2] The protection of minority language rights by s. 23 of the *Canadian Charter* is an integral part of the broader protection of minority rights, a principle recognized as foundational to Canada's Constitution in *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 79. Minority language rights are fundamental because "[l]anguage is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it": *Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342, at p. 362; *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at pp. 748-49. The constitutional protection of minority language rights is necessary for the promotion of robust and vital minority language communities which are essential for Canada to flourish as a bilingual country.

[3] Education rights play a fundamental role in promoting and preserving minority language communities. Indeed, "[m]inority language education rights are the means by which the goals of linguistic and cultural preservation are achieved": *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62 (CanLII), at para. 26; see also *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3, 2000 SCC 1 (CanLII), at para. 26; *Mahe*, at pp. 363-64. Minority language education is a requisite tool to encourage linguistic and cultural vitality. Not only do minority schools provide basic language education, they also act as community centres where the members of the minority can meet to express their culture. Thus, the education rights provided by s. 23 form the cornerstone of minority language rights protection.

[…]

[6] The very presence of s. 23 in the *Canadian Charter* attests to the recognition, in our country's Constitution, of the essential role played by the two official languages in the formation of Canada and in the country's contemporary life (*Lavigne v. Canada (Office of the Commissioner of Official Languages*), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII), at para. 22). It also confirms that the need and desire to ensure that language communities continue to exist and develop represented one of the primary objectives of the language rights scheme that has gradually been implemented in Canada. Although the process of recognizing and defining those rights has at times been marked by difficulties and conflicts, some of which are still before the courts today, the presence of two distinct language communities in Canada and the desire to reserve an important place for them in Canadian life constitute one of the foundations of the federal system that was created in 1867, as this Court observed in *Reference re Secession of Quebec*, at para. 59:

> The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West

under the *Union Act, 1840* (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself.

[7] Section 23, which is linked to the broader principle of protection of minority rights that was recognized by this Court in *Reference re Secession of Quebec* as one of the fundamental principles of the Canadian Constitution, reflects a common desire to protect Canada's English- and French-speaking minorities, and to promote their development. Any broad guarantee of language rights attests to a fundamental respect for and interest in the cultures that are expressed by the protected languages (*Mahe*, at p. 362). Thus, the recognition of rights to minority language instruction contributes to the preservation of the minority language and culture, as well as of the minority group itself (*Doucet-Boudreau*, at para. 26). With this in mind, this Court has been sensitive to the concerns, and the language dynamics, of Quebec, where a majority of the members of Canada's French-speaking minority is concentrated (see, for example: *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, 1984 CanLII 32 (SCC), [1984] 2 S.C.R. 66, at p. 82; Ford, at pp. 777-78; *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), 1993 CanLII 119 (SCC), [1993] 1 S.C.R. 839, at p. 851).

[8] When the Canadian Constitution was patriated, the adoption of s. 23 of the *Canadian Charter* confirmed the framers' intention to guarantee rights to instruction that were, in principle, identical for all of Canada's minority language groups (*Arsenault-Cameron*, at para. 26). However, that principle was watered down considerably in the case of Quebec: s. 59 of the *Constitution Act, 1982* provides that s. 23(1)(a) does not apply in Quebec. It may come into force only with the authorization of the National Assembly or the Quebec Government. To date, such authorization has not been given. To this extent, s. 59 limits the classes of rights holders in Quebec to those described in ss. 23(1)(b) and 23(2) (*Quebec Association of Protestant School Boards*, at p. 82). By so defining the classes of rights holders, which are in theory uniform throughout Canada but are limited in Quebec by the effect of s. 59, the framers also rejected the freedom to choose the language of instruction in Quebec (P. Foucher, "Language Rights and Education", in M. Bastarache, ed., *Language Rights in Canada* (1987), 255, at p. 263; J.-P. Proulx, "Les normes périjuridiques dans l'idéologie québécoise et canadienne en matière de langue d'enseignement" (1988), 19 *R.G.D.* 209, at p. 219; A. Braën, "Les droits scolaires des minorités de langue officielle au Canada et l'interprétation judiciaire" (1988), 19 *R.G.D.* 311, at pp. 317 and 319).

[9] The current wording of s. 23 undoubtedly reflects the difficulties encountered in the discussions and negotiations that led up to the patriation of the Canadian Constitution in 1982. In formulating those constitutional rights, the framers could not turn a deaf ear to the recognition sought by Francophones outside Quebec for substantive equality in education. It was also impossible to ignore the concern felt by Quebec's Anglophone minority as a result of the language disputes arising out of the "Quiet Revolution", which had culminated in the enactment of the *CFL* [*Charter of the French Languages*]. Finally, the anxiety of a significant segment of Quebec Francophones about the future of their language was a known fact, if only because of the upheavals it had caused in Canadian politics, and even more so in Quebec politics. This Court in fact acknowledged the existence of this fear among Quebec Francophones that their mother tongue would disappear when, in a case involving the legislation regarding the language of signs, it analysed, under s. 1 of the *Canadian Charter*, the evidence submitted by the parties to demonstrate that the legislation had a serious and legitimate purpose (*Ford*, at p. 778).

[10] Indeed, federalism still plays an important role in the application of s. 23. As education falls within the purview of provincial power, each province has a legitimate interest in the provision and regulation of minority language education: *Arsenault-Cameron*, at para. 53. Nevertheless, with the exception of s. 23(1)(a) in Quebec, all provincial minority language education regimes must be consistent with the requirements of s. 23 of the *Canadian Charter*. As the Court noted in *Arsenault-Cameron*, "[a]lthough the Minister is responsible for making educational policy, his discretion is subordinate to the Charter" (para. 40).

[…]

[20] Section 23 provides a comprehensive code of minority language education rights which afford special status to minority English- or French-language communities. The Court in *Mahe*, at p. 369, recognized that this special status would create inequalities between linguistic groups. See also *Adler v. Ontario*, 1996 CanLII 148 (SCC), [1996] 3 S.C.R. 609, at para. 32. Specifically, English speakers living in Quebec and French speakers living in the territories and other provinces would enjoy rights denied to other linguistic groups. Section 23 has been described as an exception to ss. 15 and 27 of the *Canadian Charter*; it is rather an example of the means to achieve substantive equality in the specific context of minority language communities. While this entrenched inequality may be the product of political compromise and negotiation, this does not mean that s. 23 rights are to be construed narrowly. The Court has confirmed on several occasions that language rights must be interpreted in a broad and purposive manner consistent with the preservation and promotion of both official language communities in Canada: *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, at para. 25; *Reference re Public Schools Act (Man.)*, at p. 850; *Reference re Secession of Quebec*, at para. 80; *Arsenault-Cameron*, at para. 27.

[21] The minority language education rights entrenched in s. 23 are national in scope and remedial in nature. At the time the section was adopted, the framers were aware of the various regimes governing the Anglophone and Francophone linguistic minorities throughout Canada and perceived these regimes as inadequate. Section 23 was intended to provide a uniform solution to remedy these inadequacies. […] Given the national character of s. 23, the Court has interpreted the rights provided by this provision in a uniform manner from province to province: *Quebec Association of Protestant School Boards*; *Mahe*; *Reference re Public Schools Act (Man.)*; *Arsenault-Cameron*; *Doucet-Boudreau*. This is not to say however that the unique historical and social context of each province is irrelevant; rather, it must be taken into account when provincial approaches to implementation are considered, and in situations where there is need for justification under s. 1 of the *Canadian Charter*: *Ford*, at pp. 777-81.

[…]

[33] Provincial legislation that establishes criteria regarding the educational experience of the child is helpful. These criteria must, however, accord with the purpose of s. 23. This purpose indicates that s. 23 is both a social and collective right, and an individual and civil right. It must indeed be noted here again that children qualified under s. 23 are not required to have a working knowledge of the minority language, or to be members of a cultural group that identifies with the minority language. The section is remedial. In previous cases, this Court has insisted that s. 23 must be interpreted so as to facilitate the reintegration of children who have been isolated from the cultural community the minority school is designed to protect and develop. Section 23(2) in particular facilitates mobility and continuity of education in the minority language, though change of residence is not a condition for the exercise of the right. As noted, s. 23 is also meant to apply to some members of cultural communities that are neither French nor English. To purposefully assess the requirement for participation in s. 23(2), therefore, all the circumstances of the child must be considered including the time spent in each program, at what stage of education the choice of language of instruction was made, what programs are or were available, and whether learning disabilities or other difficulties exist. In this way, it is possible to determine whether a child's overall educational experience is sufficient to meet the requirements of s. 23(2).

[34] The application of s. 23 is contextual. It must take into account the very real differences between the situations of the minority language community in Quebec and the minority language communitie of the territories and the other provinces. The latitude given to the provincial government in drafting legislation regarding education must be broad enough to ensure the protection of the French language while satisfying the purposes of s. 23. As noted by Lamer C.J. in *Reference re Public Schools Act (Man.)*, at p. 851, "different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province".

Gosselin (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 238, 2005 SCC 15 (CanLII)

[28] The purpose of s. 23 is the protection and promotion of the minority language community in each province. Section 23 is of prime importance given "the vital role of education in preserving and

encouraging linguistic and cultural vitality. It thus represents a linchpin in this nation's commitment to the values of bilingualism and biculturalism" (*Mahe*, at p. 350).

[29] Section 23 achieves its purpose by ensuring that the English community in Quebec and the French communities of the other provinces can flourish. As this Court said in *Mahe*, at p. 362, "[t]he section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada" (emphasis added). This goal is quite distinct from the offering of minority language instruction to the majority, as was made clear during the constitutional debates when the then Minister of Justice, Jean Chrétien, addressed the Special Joint Committee hearings:

> We are not determining education for the majority, but for the minorities.
>
> The fact that many Anglophones now take advantage of immersion courses which have become very popular in Manitoba, Alberta, Saskatchewan, British Columbia etc., pleases me immensely; and it is the provinces that run these programs. Here, in the charter, we aim to protect the rights of the minority. [Emphasis added.]

(Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Issue No. 48, January 29, 1981, at p. 108)

[…]

[34] Practical reasons as well as legal principle support the conclusion that s. 23 minority language education rights cannot be subordinated to the equality rights guarantees relied upon by the appellants.

Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General), [2005] 1 S.C.R. 257, 2005 SCC 16 (CanLII)

[34] […] Based on the revised approach from *Martin*, the only conclusion that can be drawn is that the ATQ [Administrative Tribunal of Québec] has the capacity to consider and decide constitutional questions, including the conformity of s. 73 of the *Charter of the French language* with s. 23 of the *Canadian Charter*.

[35] The appellants put forth a further argument. They argue that, owing to the special nature of the rights conferred by s. 23 of the *Canadian Charter*, an ordinary provincial statute like *the Charter of the French language* cannot confer jurisdiction over the determination of the status of s. 23 rights-holders on an administrative tribunal to the exclusion of the Superior Court. Again, the recent case law of this Court, this time in Paul, puts to rest this portion of the appellants' submissions.

[37] The same legal reasoning can be applied to the cases at bar. Section 23 is not within the exclusive province of the courts. The ATQ is empowered to decide questions of law. It is therefore empowered to consider and decide constitutional questions. This includes the power to consider s. 23, and to decide whether s. 73 of the *Charter of the French language* restricts the scope of s. 23 rights. The Forest Appeals Commission could rule on s. 35 matters in *Paul*. Here, the ATQ may rule on s. 23 matters that come before it.

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 2003 SCC 62 (CanLII)

[26] The purpose of s. 23 of the *Charter* 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" (*Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342, at p. 362). Minority language education rights are the means by which the goals of linguistic and cultural preservation are achieved (see *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, 1993 CanLII 119 (SCC), [1993] 1 S.C.R. 839, at p. 849-50 ("*Schools Reference*")). This Court has, on a number of occasions, observed the close link between language and culture. In *Mahe*, at p. 362, Dickson C.J. stated:

> . . . any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

[27] A further aspect of s. 23 of the *Charter* is its remedial nature (see, for example, *Mahe*, *supra*, at p. 363; *Schools Reference*, *supra*, at p. 850; *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3, 2000 SCC 1 (CanLII), at para. 26). The section is designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by actively promoting their flourishing (*Mahe*, *supra*, at p. 363; *Schools Reference*, *supra*, at p. 850). Section 23 must therefore be construed "in recognition of previous injustices that have gone unredressed and which have required the entrenchment of protection of minority language rights" (*Schools Reference*, at p. 850; see also *Arsenault-Cameron*, *supra*, at para. 27). This Court has made it clear that the fact that language rights arose from political compromise does not alter their nature and importance; consequently, s. 23 must be given the same large and liberal interpretation as all *Charter* rights (*R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, at para. 25; *Arsenault-Cameron*, *supra*, at para. 27).

[28] The minority language education rights protected under s. 23 of the *Charter* are unique. They are distinctively Canadian, representing "a linchpin in this nation's commitment to the values of bilingualism and biculturalism" (*Mahe*, *supra*, at p. 350). Section 23 places positive obligations on governments to mobilize resources and enact legislation for the development of major institutional structures (*Mahe*, at p. 389). While the rights are granted to individuals (*Schools Reference*, at p. 865), they apply only if the "numbers warrant", and the specific programs or facilities that the government is required to provide varies depending on the number of students who can potentially be expected to participate (*Mahe*, *supra*, at p. 366; *Schools Reference*, *supra*, at p. 850; *Arsenault-Cameron*, *supra*, at para. 38). This requirement gives the exercise of minority language education rights a unique collective aspect even though the rights are granted to individuals.

[29] Another distinctive feature of the right in s. 23 is that the "numbers warrant" requirement leaves minority language education rights particularly vulnerable to government delay or inaction. 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". Thus, particular entitlements afforded under s. 23 can be suspended, for so long as the numbers cease to warrant, by the very cultural erosion against which s. 23 was designed to guard. In practical, though not legal, terms, such suspensions may well be permanent. If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23 through their own failure to implement the rights vigilantly. 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. […]

Arsenault-Cameron v. Prince Edward Island, [2000] 1 S.C.R. 3, 2000 SCC 1 (CanLII)

[26] Section 23 imposes a constitutional duty on the province to provide official minority language education to children of s. 23 parents where the numbers warrant. In *Mahe*, *supra*, at pp. 362 and 364, this Court affirmed that language rights cannot be separated from a concern for the culture associated with the language and that s. 23 was designed to correct, on a national scale, the historically progressive erosion of official language groups and to give effect to the equal partnership of the two official language groups in the context of education; see *Reference re Public Schools Act (Man.)*, *supra*, at p. 849. Section 23 therefore mandates that provincial governments do whatever is practically possible to preserve and promote minority language education; see *Mahe*, at p. 367.

[27] As this Court recently observed in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, at para. 24, the fact that constitutional language rights resulted from a political compromise is not unique to language rights and does not affect their scope. Like other provisions of the *Charter*, s. 23 has a remedial aspect; see *Mahe*, *supra*, at p. 364. It is therefore important to understand the historical and social context of the situation to be redressed, including the reasons why the system of education was not

responsive to the actual needs of the official language minority in 1982 and why it may still not be responsive today. It is clearly necessary to take into account the importance of language and culture in the context of instruction as well as the importance of official language minority schools to the development of the official language community when examining the actions of the government in dealing with the request for services in Summerside. As this Court recently explained in *Beaulac*, at para. 25, "[l]anguage rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada" (emphasis in original). A purposive interpretation of s. 23 rights is based on the true 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.

[…]

[29] The historical and contextual analysis is important for courts in determining whether a government has failed to meet its s. 23 obligations. It should also guide governmental actors in reaching appropriate decisions to give effect to s. 23.

Reference re: Education Act (Que.), [1993] 2 S.C.R. 511, 1993 CanLII 100 (SCC)

[9] *Bill 107* [*Education Act*] also comprises a fundamental reform of the organization of school boards. The Quebec public school system would move from a system organized according to religion to one organized according to language. Thus, the new legislation divides the province into two groups of territories, one of territories for French-language school boards and the other of territories for English-language school boards.

[…]

[90] Like the Court of Appeal, I conclude that the provisions in question are constitutional. By legislating on education in this way, the Quebec government is pursuing a legitimate purpose which is in keeping with s. 23 of the *Canadian Charter of Rights and Freedoms*. Although the measures contemplated by the legislature will occasion a fundamental upheaval in the institutions to which the province has been accustomed for over a hundred years -- even though they have been altered on several occasions, as I noted, they have always focused on religion -- the legislature's power to create some other kind of school system, neutral or for denominations other than Catholics and Protestants, has been recognized since the Privy Council decision in *Hirsch*, supra.

[…]

[92] It is natural and normal for the linguistic boards to be the successors of the boards for Catholics and the boards for Protestants. Like the latter, they are boards which are not the result of the exercise of a right of dissent and are therefore not protected by s. 93.

[93] The abolition of the existing boards is also not in itself an infringement of the rights guaranteed by the Constitution. Furthermore, if the province has the power to create linguistic school boards, it is proper that it should also have the power to determine their territories.

Mahe v. Alberta, [1990] 1 S.C.R. 342, 1990 CanLII 133 (SCC)

[2] Section 23 is one component in Canada's constitutional protection of the official languages. The section is especially important in this regard, however, because of the vital role of education in preserving and encouraging linguistic and cultural vitality. It thus represents a linchpin in this nation's commitment to the values of bilingualism and biculturalism.

[…]

(1) The purpose of s. 23

[39] The general purpose of s. 23 is clear: it 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. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.

[40] My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them. The cultural importance of language was recognized by this court in *Ford v. Que. (A.G.)*, [1988] S.C.R. 712 at 748-49, 10 C.H.R.R. D/5559, 54 D.L.R. (4th) 577, 36 C.R.R. 1, (sub nom. *Chaussure Brown's Inc. v. Qué.* (P.G.)) 19 Q.A.C. 69, 90 N.R. 84:

> Language is not merely a means or medium of expression; it colors the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. [emphasis added]

Similar recognition was granted by the Royal Commission on Bilingualism and Biculturalism, itself a major force in the eventual entrenchment of language rights in the *Charter*. At p. 8 of Book II of its report, the commission stated:

> Language is also the key to cultural development. Language and culture are not synonymous, but the vitality of the language is a necessary condition for the complete preservation of a culture.

And at p. 19, in a comment on the role of minority language schools, the commission added:

> These schools are essential for the development of both official languages and cultures; ... the aim must be to provide for members of the minority an education appropriate to their linguistic and cultural identity ... [emphasis added]

[41] In addition, it is worth noting that minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture.

[42] A further important aspect of the purpose of s. 23 is the role of the section as a remedial provision. It was designed to remedy an existing problem in Canada, and hence to alter the status quo. As Kerans J.A. succinctly put it, "the very existence of the section implies the inadequacy of the present regime" (p. 534). […]

[43] In my view the appellants are fully justified in submitting that "history reveals that s. 23 was designed to correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the 'equal partnership' of the two official language groups in the context of education".

[…]

[53] […] While I agree that it is often useful to consider the relationship between different sections of the *Charter*, in the interpretation of s. 23 I do not think it helpful in the present context to refer to either s. 15 or s. 27. Section 23 provides a comprehensive code for minority language educational rights; it has its own internal qualifications and its own method of internal balancing. A notion of equality between Canada's official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada. As the Attorney General for Ontario observes, it would be totally incongruous to invoke in aid of the interpretation of a provision

which grants special rights to a select group of individuals the principle of equality intended to be universally applicable to "every individual".

A.G. (Que.) v. Quebec Protestant School Boards, [1984] 2 S.C.R. 66, 1984 CanLII 32 (SCC)

[p. 79] Section 23 of the *Charter* is not, like other provisions in that constitutional document, of the kind generally found in such charters and declarations of fundamental rights. It is not a codification of essential, pre-existing and more or less universal rights that are being confirmed and perhaps clarified, extended or amended, and which, most importantly, are being given a new primacy and inviolability by their entrenchment in the supreme law of the land. The special provisions of s. 23 of the *Charter* make it a unique set of constitutional provisions, quite peculiar to Canada.

Perron v. Perron, 2012 ONCA 811 (CanLII)

[17] The French language has special status in both Canada and Ontario. For example, access to homogeneous French-language schools is guaranteed by s. 23 of the *Canadian Charter of Rights and Freedoms*.

[18] The education offered in a homogeneous French-language school is quite distinct from what is provided in a French immersion program. A homogeneous French-language school responds to the cultural and linguistic needs of the Francophone community. In contrast, the French immersion program is designed for English speakers in an English-language majority environment and provides bilingual instruction -- usually 50 per cent in French and 50 per cent in English. See *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 201, [2005] S.C.J. No. 14, 2005 SCC 14 (CanLII), at para. 50.

[…]

[20] Homogenous French-language education brings many advantages. It promotes full mastery of the French language and the development of the child's cultural identity. This type of instruction also allows the child to become bilingual in French and English, because a homogeneous French-language school helps the child to develop a high level of skill in both French and English: *Aménagement Linguistique Policy*, at p. 42. In addition, in a social environment dominated by English, a child will generally communicate in English in many aspects of daily life and, as a result, acquire knowledge of the language of the majority: *Aménagement Linguistique Policy*, at p. 23. It should also be noted that bilingualism provides a number of advantages in terms of employment: *Aménagement Linguistique Policy*, at p. 42.

[21] Apart from these advantages, where children have one Francophone parent, knowledge and mastery of the language and culture of the linguistic minority promotes and helps maintain the bonds between the children and the Francophone parent.

[…]

[42] In my opinion, the court should be particularly sensitive to the language of education in circumstances where there is only one Francophone parent and the English-speaking parent has been granted custody. In such circumstances, there is necessarily less contact with the French-speaking parent and the linguistic and cultural environment of the children is likely to become that of the linguistic majority.

[43] It is true that, in this case, the children would have some exposure to French in the French immersion program. But since French immersion instruction largely reflects the majority culture, the risk of cultural and linguistic alienation of the children from their father and their father's family is increased.

[44] In a linguistic minority environment, homogeneous French-language schools are generally preferable to French immersion programs for ensuring that both languages, namely, French and English, are maintained at the highest level. In a region with a large English-speaking majority, homogeneous instruction in French does not result in losing the language and culture of the linguistic majority. This does

not therefore imply a choice of preferring the culture and language of the minority over those of the majority. In a minority setting, homogeneous French-language schools in fact make it possible to maintain cultural and linguistic links with both the French- speaking and English-speaking parents. In accordance with s. 24(2)(d) of the *Children's Law Reform Act*, the children's language of education should therefore be taken into account when determining their best interests.

[…]

[46] Homogeneous instruction in French also promotes an in- depth knowledge of both official languages of Canada, which opens doors to a wider array of university and job opportunities. In addition, as mentioned by the appellant, if the children receive their primary-level instruction in French, they will acquire the right under s. 23 of the *Charter* to have their future children educated in the language of the minority.

Perron v. Perron, 2011 ONCA 776 (CanLII)

[12] Counsel submits first, that the trial judge erred by failing to appreciate the fundamental difference between French immersion and French language education. The second alleged error is that the trial judge failed to take into account the fact that if these children were not educated in French language schools, the appellant's s. 23 right to have his children educated in French would not be transmitted to them, denying them their s. 23 right to have their future children educated in French. This would, in the appellants' submission, lead to the inevitable cultural and linguistic assimilation of his children and his future grandchildren.

[…]

[17] The rights accorded by s. 23 of the *Charter* are, among others, rights of the parent, enforceable against the province, to have the beneficiary's child "receive primary and secondary school instruction" in the minority language where the numbers criterion is met. Decisions regarding a child's education are incidents of custody and the rights-bearer under s. 23 is the "the person with parental authority at the moment section 23 is invoked": see Mark Power and Pierre Foucher, "Language Rights and Education" in Michel Bastarache, ed., *Language Rights in Canada*, 2nd ed. (Cowansville: Éditions Yvon Blais, 2004) 365, at p. 385. Section 23 confers no right on one parent, enforceable against the other parent, to insist that their children attend a French language school.

[…]

[19] The trial judge also recognized that the issue of language of education was one factor bearing on the determination of their best interests, but he properly concluded that it could not be the sole or the governing factor. While he did not specifically advert to the fact that if they were not educated in a French language school, they could not acquire and transmit s. 23 rights to their children, he clearly considered, as a significant factor, the importance to these children of learning French and maintaining their connection with the French culture. The trial judge specifically found, however, at para. 135, that the issue of language rights could not overcome the appellant's "serious shortcomings…as a parent capable of sharing his children." Having taken the language issue into account, he determined that the respondent should be awarded sole custody.

Lavoie v. Nova Scotia (Attorney-General), 1989 CanLII 5221 (NS CA)

[22] I agree with the submission of the appellants that s. 23 of the *Charter* was intended as a remedial provision and, in order to be effective as a remedy for past defects, it must be given a large and liberal interpretation. With the advent of s. 23 linguistic minorities have been granted a constitutionally guaranteed right and this right must not be restricted by a confined approach to its interpretation.

[…]

[27] The framers of the *Charter* by using a separate heading for s. 23, obviously wished to separate the rights in s. 23 from the other language rights in the *Charter*. The *Societe des Acadiens* decision did not address the interpretation of s. 23. Even though ss. 16 through 22 resulted from a political compromise emanating from Confederation, s. 23 is a unique and new remedial provision of the *Charter*. Its purpose is to give education rights to specified linguistic minorities. Such rights cannot be overridden by an Act of Parliament or of the Legislature pursuant to s. 33 of the *Charter*. Section 23 should be given a large and liberal interpretation rather than a restrictive one resulting from a restrained approach.

Reference re School Act, 1988 CanLII 1363 (PESCAD)

[44] Section 23 of the *Charter* was enacted having regard to the history of existing provincial regimes touching the language of instruction for minority linguistic groups.

[45] Section 23 is intended to be remedial of perceived defects current in such regimes.

[46] Section 23 has as its object the securing for, and the guaranteeing to, the individual the full benefit of the protection of the *Charter* as it applies to minority language education.

Reference re Education Act of Ontario and Minority Language Education Rights, 1984 CanLII 1832 (ON CA)

[80] From the historical background set out earlier, it is possible to draw certain conclusions as to the nature of the problem which s. 23 of the *Charter* was designed to ameliorate. Since 1867, the French and English languages have had official status in Canada. The *Charter* has recognized bilingualism. Its provisions apply to both anglophones and francophones wherever they may reside. No doubt with a view to the future strength and unity of the country, it has made provision for minority language education rights. In each province throughout the country, the members of one or other of the official language groups are now and probably always will be in the minority.

[81] Prior to the passage of the *Charter*, the necessity of preserving the minority language and thus the culture of the minority by educational rights had been recognized. The Royal Commission on Bilingualism and Biculturalism stressed this principle. It has been observed that the Premiers' Conferences held in 1977 and 1978 unanimously recognized and stressed this concept. Section 23 of the *Charter* has given effect to this principle and made it part of the "supreme law of the land".

[82] Minority language education rights are emphasized and given added importance by the *Charter* for they are included among the rights which cannot be overridden by an Act of Parliament or the legislature of Ontario. These are the democratic rights set out in s. 3, the mobility rights in s. 6, the language rights in ss. 16 to 22 and the minority language education rights in s. 23. These rights are effectively placed beyond legislative reach. They cannot be taken away; at most they may be made subject to "such reasonable limits" as can be "demonstrably justified in a free and democratic society" as provided by s. 1 of the *Charter*.

[83] This Court has recognized that the *Charter* must be given a broad and liberal interpretation. It has stated that the *Charter* should not be stultified "by narrow technical literal interpretations without regard to its background and purpose". *Re Southam Inc. and R. (No. 1)* (1983), 41 O.R. (2d) 113, 34 C.R. (3d) 27, 33 R.F.L. (2d) 279, 3 C.C.C. (3d) 515, 6 C.R.R. 1, 146 D.L.R. (3d) 408 (Ont. C.A.). Section 23 of the *Charter* particularly must be given such a liberal interpretation for it enacts new rights and in effect creates a code which establishes minority language education rights for the nation.

Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764 (CanLII)

[118] As I see it, the line of cases that have considered the purpose of s. 23 emphasizes its important goal of protecting Canada's strength and unity by preserving its official languages and their cultures.

[…]

[123] I take from the cases the following purpose of s. 23. The right to minority language education in s. 23 is designed to preserve and promote Canada's two official languages, and thus the culture associated with those languages, so that they may flourish, so far as possible, in those regions where the language group is in the minority. By promoting the development of robust minority language communities through minority language education, s. 23 is designed to enhance our country's bilingualism and biculturalism, and maintain the unique partnership between language groups that sets our country apart among nations.

[…]

[132] The cases show that courts must seek an interpretation of s. 23 that is remedial and alive to background context. The interpretation of s. 23 should encourage the flourishing and preservation of minority language groups and their culture, bearing in mind the historic and social context of the situation to be redressed. The context includes British Columbia's social context, demographics and history, and the reasons why an education system does or does not respond to the needs of official language minorities.

[133] Despite initial judicial comments to the contrary, s. 23 should not be interpreted restrictively because of its basis in political compromise. However, because the interpretation of s. 23 is remedial and contextual, as suggested in *Solski*, it will inevitably involve some balancing of interests, and sensitivity to the unique background and situation of the minority language group in each province.

B. The British Columbia Context

[134] Given that s. 23 is to be interpreted purposively, remedially and contextually, the analysis of the plaintiffs' claims must take into account the history and status of the French language and culture in British Columbia. As suggested in *Arsenault-Cameron* at para. 27, it must also be alive to the status of the minority language education system and the response to rightsholders' needs, both in 1982 and at the time of this decision.

[…]

[343] In the context of this litigation, whether Dr. Castonguay's views are correct is irrelevant: Section 23 guarantees the right to minority language education as a tool for combating assimilation. It is a constitutional bargain that was struck, and it requires governments to provide minority language education out of public funds where the numbers so warrant. Schools must be built and have a duty to attempt to fight assimilation, even if they only exist to serve those students until they grow older, start their own homes and assimilate.

[…]

d) Conclusions on the Role of Schools

[367] There is no doubt that schools are important sites for minority language communities. This has been recognized by many courts over the years. In *Mahe*, Chief Justice Dickson wrote that "minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture" (at 363). In *Association des Parents- SCC*, Karakatsanis J. noted that minority language schools "are a primary instrument of linguistic, and thus cultural, transmission" that are often "vital community centres" (at para. 27).

[368] These conclusions are borne out by the expert evidence in this case. As Dr. Landry noted, minority language schools provide a foundation for other institutions and community leadership, counterbalancing the influence of the majority language. They also serve as a primary site for socializing children into the French language and culture, and play an essential role ensuring children experience Additive, rather than Subtractive Bilingualism.

[…]

[411] Unlike other provisions of the *Charter*, s. 23 and the other language rights are more akin to rights than freedoms. In *Ford c. Quebec (Procureur general)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, the Court acknowledged that s. 23 entitles rightsholders to specific benefits from the government, and obliges the government to provide those services or benefits in both languages. The Court differentiated s. 23 from other rights in the *Charter*, which guarantee freedoms to choose a course of activity without government interference. In that way, they are said to guarantee a "precise scheme" of opportunities to receive services in English or French "in concrete, readily ascertainable and limited circumstances" (at 751).

[…]

[419] As I see it, s. 23 has a unique place in the *Charter*. Rather than recognizing a universal freedom, s. 23 creates an individual right (with a collective aspect) that is peculiar to Canada. Because the right to minority language education is constitutionally entrenched, the obligation on government to act can require expenditures out of public funds even where political vagaries might lead a government to want to do otherwise. It also requires prompt action to prevent the very assimilation that s. 23 is intended to guard against.

[420] While the duty on government is positive, it is also limited by the words of s. 23 and the broader context. Through its own internal limitations, s. 23 creates a complete code for the obligation placed on Government to provide minority language education rights in Canada. The duty and limits inherent to the provision require governments to do whatever is practical in the circumstances to preserve and promote minority language education. Given the contextual, remedial interpretation that must be given to s. 23, determining what is practical in the circumstances will necessarily require the Court to consider the broad background context of a minority language group and the educational services they receive.

[421] In many instances in their argument, the plaintiffs go further than this. They suggest that s. 23 places an affirmative duty on government to preserve and promote the French language and culture, or minority language education, in British Columbia. This goes too far. As was explained in the *Ontario Education Act Reference* at 28, s. 23 gives effect to the principle of preserving the minority language and culture. It provides education rights as a means of strengthening our country's bilingual and bicultural character. It does not, however, place a duty on government to achieve those ends through any means other than providing the mandatory minimum level of minority language education. As suggested in *Mahe*, *Ford* and *Adler*, s. 23 creates a complete code, and the Government is not required to provide services that go beyond what is envisioned by the rights created in the text of s. 23.

[…]

[6455] […] To reiterate, British Columbia enjoys broad, plenary power over education pursuant to s. 93 of the *Constitution Act, 1867*. That jurisdiction is limited by s. 23. Section 23 places a unique positive duty on governments to make expenditures out of public funds, and to act promptly to prevent assimilation. The Province is also required to cede management and control over aspects of education going to minority language and culture to the minority community, where the numbers so warrant. If the minority takes a decision within its jurisdiction over language and culture, s. 23 requires that the Province not interfere it.

[…]

[6841] Moreover, in the context of s. 23, it is important to resolve questions of entitlement as quickly as possible to ensure that generations of rightsholders do not lose their rights. […]

N.B. – This decision is currently under appeal before the British Columbia Court of Appeal.

Conseil des Écoles Publiques de l'Est de l'Ontario v. Ontario Federation of School Athletics Associations, 2015 ONCS 5328 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[1] The Conseil des Écoles Publiques de l'Est de l'Ontario (CÉPEO) and Claude Provost (Provost) brought this motion seeking an interlocutory injunction pending a decision on the merits. The order sought is the suspension of certain by-laws of the respondent, the Ontario Federation of School Athletics Associations (OFFSA) since the applicants allege that they are in violation of section 23 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B of the *Canada Act, 1982* (UK), 1982, c.11 ("*Charter*"). The respondent, the Department of Education (DEO), did not intervene in this motion and will submit an application to dismiss the declaration against the DEO at a future date.

[…]

[12] On September 4, 2012, the OFSAA adopted new by-laws, which introduced certain restrictions. According to the new by-laws, a student living outside the catchment area and attending a sport-study school cannot participate in competitions sanctioned by the OFSAA in their designated sport for the duration of their secondary school enrolment.

[13] Furthermore, the new by-laws provide that a school board that chooses not to have catchment areas is considered to have them. According to the new by-laws, it is the CÉPEO school closest to the residence of a student that is considered to be his or her school. Therefore, the new by-laws create artificial boundaries despite the fact that school catchment areas do not exist in the CÉPEO at the secondary level.

[…]

[16] The applicants argued that the new by-laws are discriminatory against students and parents of the linguistic minority since the students registered at English secondary schools may participate in OFSAA competitions at the elite level because their numbers are greater in the same school. As opposed to the French minority, they are not required to group together in the same sport-study school to access higher classification competitions while getting a high-quality education. Accordingly, the grouping of Francophone students within a school helps them challenge teams from large Anglophone schools.

[…]

[18] According to the CÉPEO, the impact of the new by-laws is determinative of its capacity to attract, welcome and retain the children of parents who have rights under section 23 of the *Charter* at Louis-Riel high school and favours assimilation of the linguistic minority.

[…]

[56] Therefore, the quality of the instruction delivered to the minority language group should, in principle, be substantially equal to that of instruction delivered to the majority, but not identical. This right to a quality of education substantially equal has once more been confirmed by the Supreme Court in the recent decision *Association des parents de l'école Rose-des-vents v. British Columbia (Education)* 2015 SCC 21 (CanLII), 69 B.C.L.R. (5th) 1.

[57] The Supreme Court confirmed at para 59 that the analysis to determine whether the quality of the education offered to the right-holders is substantially equal to that offered to the linguistic majority must include all the factors that could discourage reasonable parents from sending their children to a minority language school. Extracurricular activities are specifically included in the list.

> Thus, the comparative exercise is contextual and holistic, accounting for not only physical facilities, but also quality of instruction, educational outcomes, extracurricular activities, and travel times, to name a

> few factors. Such an approach is similar to the way parents make decisions regarding their children's education. Of course, the extent to which any given factor will represent a live issue in assessing equivalence will be dictated by the circumstances of each case. The relevant factors are considered together in assessing whether the overall educational experience is inferior in a way that could discourage rights holders from enrolling their children in a minority language school.

[58] The importance of extracurricular activities, including sports activities, was expressly recognized in *Hall (Litigation guardian of) v. Powers* (2002), 2002 CanLII 49475 (ON SC), 59 O.R. (3d) 423. Although the decision related to section 15 of the *Charter*, Justice MacKinnon stated at para 15 that:

> School is a fundamental institution in the lives of young people. It often provides the context for their social lives both in and outside of school hours. Recreational activities such as sports, clubs and dances, which are important in the development of a student's development, are often experienced within the school setting. Exclusion of a student from a significant occasion of school life, like the school prom, constitutes a restriction in access to a fundamental social institution.

[59] I conclude that education is not limited to classroom teaching only, but extends to all extracurricular activities included in the experience and learning of students. It seems that the DEO has delegated to the OFSAA the responsibility of managing the interschool athletic program in the entire province and the responsibility of acting as coordinator, regulator and organizer.

[60] If the entire educational experience is perceived to be inferior in minority language schools and discourages parents from having their children educated in the minority language, I believe that this creates a risk of assimilation that does not comply with the remedial goal of section 23 of the *Charter*.

[61] In this case, the evidence submitted by the applicants shows that these new by-laws discourage parents from having their children educated in the minority language. Indeed, these new by-laws have and will continue to have the result of a significant decrease in the number of enrollments at Louis-Riel high school.

Clermont v. Consortium de transport scolaire d'Ottawa, 2014 ONCS 948 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[10] The lack of reasonable accessibility, including difficulties related to transportation to a French-language school, may result in the conclusion that the right guaranteed by section 23 was denied. […]

[13] The *Consortium* [*de transport scolaire d'Ottawa*] is, for all intents and purposes, an affiliate of or an entity related to the school board. Essentially, it performs a governmental function. In *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 (CanLII), the Supreme Court of Canada found that the entity named "Translink", which falls under the purview of the Greater Vancouver Transportation Authority, performed a governmental function and was consequently subjected to *Charter* scrutiny. In my view, there is practically no distinction between a school board that delegates the management and control of school transportation to a consortium and the facts of the case before the Supreme Court of Canada.

[14] Therefore, the *Consortium*'s activities are subjected to *Charter* scrutiny.

Is this a denial of the applicants' section 23 rights?

[15] The right to educate one's child in French to conserve and protect one of the founding cultures of our country is the fundamental purpose underlying the drafting of this part of the *Charter of Rights and Freedoms*. It appears to me that, for me to be able to determine that the right was denied, the applicant would have to submit the objective evidence demonstrating, on a balance of probabilities, that available and easily accessible French instruction equivalent to English instruction is not available to a citizen or a

group of citizens who wish to have their children instructed in this language. In the case before me, I do not have such evidence.

[16] The only distinction between English and French language schools related to the discretion exercised for the management of bus stops and itineraries to and from schools. To conclude that the section 23 rights were denied, I would have required objective evidence demonstrating that the discrepancy between the discretion exercised has had an impact on the right to instruction. The inconvenience caused by the need to accompany children on foot for sixty (60) metres so that they can take the bus instead of having a bus in front of the house is not, by any objective standard, an obstacle to French-language education guaranteed by the *Charter*.

Van Vlymen v. Canada (Solicitor General), [2005] 1 FCR 617, 2004 FC 1054 (CanLII)

[16] Further, the applicant says that section 6 [of the *Canadian Charter*] mobility rights apply only to "citizens". A focus on the importance of citizenship is also grounded on a structural approach to *Charter* interpretation. Most *Charter* rights are held by "everyone" or "any person". The right to enter Canada in section 6 is only accorded to "every citizen of Canada". Only section 3 of the *Charter* (which gives a citizen a right to vote) and section 23 (which protects minority language education rights) are held by "citizens". In *Singh et al. v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, the Supreme Court of Canada held that a person was entitled to a right held by "everyone" merely by virtue of their physical presence within Canadian territory, even if they had entered the country illegally. A Canadian citizen, however, has a special status conferred by sections 3, 6 and 23 of the *Charter*; a status that is not enjoyed by foreigners or permanent residents. A Canadian citizen who becomes a prisoner does not lose his or her citizenship because of his or her conviction or sentence.

Buckland v. Prince Edward Island, 2004 PESCTD 66 (CanLII)

[51] Section 23 of the *Charter* provides individuals with a right to French first language educational instruction, but, unlike most *Charter* rights, one individual alone cannot enforce his or her right. Right-holders must act collectively to ensure they can individually benefit from the exercise of their rights. It is only “where the numbers warrant” that their rights can be enforced. The plaintiffs refrained from taking collective action to enforce their rights in 2003, having the comfort of a Government promise for 2004.

[52] The value of preserving and promoting one’s language and culture is beyond question. Substantive delay or denial of the opportunity for a right-holder to have exposure to first language instruction can only lead to greater difficulty in acquiring that language later in life, as can be attested to by any adult who has ever tried to learn a second language. In addition, the rights guaranteed by section 23 of the *Charter* were enshrined not just to preserve and promote, but to restore and enhance the cultural well-being of minority language groups throughout Canada.

Whittington v. Saanich Sch. Dist. 63, 1987 CanLII 2642 (BC SC)

[5] The primary issue in this case involves s. 23(2) of the *Canadian Charter of Rights and Freedoms*. Does s. 23(2) provide citizens of Canada who have a child enrolled in a French Immersion programme with a constitutional right to have all their children educated in a French Immersion programme? Does an anglophone majority population have the constitutional right to receive their education in the minority language of the province? Does s. 23(2) of the *Charter* provide the citizens of Canada, residents of British Columbia a majority English linguistic group, with the right to have their children educated in a French Immersion programme?

[…]

[20] To properly interpret s. 23(2), it is necessary to look at the entire s. 23. To do otherwise would be to deal with that section in a vacuum. The section has a heading “Minority Language Education Rights”. The marginal notes make reference to “language of instruction”, “continuity of language instruction”, and finally “application where numbers warrant”.

[…]

[22] To take the words “instruction in French” out of s. 23(2) and attempt to attribute an isolated meaning (not in the context of the entire section) is, I agree, the wrong approach.

[23] Similarly, the heading of a section can become an integral part when deciding what meaning to attribute to the section. […]

[24] In adopting that reasoning in the case at Bar there is, I suggest, an easy reconciliation of the heading and the section itself. The marginal notes assist in giving the section some continuity.

[…]

[28] Historically there is no doubt that Parliament intended to ensure that linguistic minority populations in any Canadian province were protected. These children were entitled to be educated in the minority language, *i.e.*, an English minority in Quebec and a French minority in British Columbia. They did just that in s. 23. […]

[29] Does s. 23 clearly express the intention of Parliament? I suggest yes it does. Is it capable of some other interpretation? I suggest not.

[30] The petitioners’ interpretation, if accepted, would be that those words “instruction in French” in the section refer to the linguistic majority, that simply cannot be correct. Section 23 does not guarantee majority rights, which they already have; rather, it guarantees rights to the English or French linguistic minority populations residing in each province to have their children receive education in the language of their minority. A unilingual programme in French equivalent to the education programme offered in English to the majority, subject of course to the “numbers warrant” qualification.

[31] I think it is important at this juncture to comment on s. 23(3) which is a section dealing with where “numbers warrant”. While the section may indeed create a right, it is a qualified right, a right governed by numbers, i.e., “whenever 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”. There is no legislation determining what numbers are required to qualify for such instructions. It seems to me the matter is left to a ministry to establish a policy to cover that aspect. In the circumstances of this case the ministry does have a policy in place and there can be no difficulty in deciding that the numbers are insufficient and do not warrant such instruction. The petitioners have not met the onus necessary to qualify under s. 23(3). In the case at bar all petitioners (except Lise Webb) are of the linguistic majority of the province of British Columbia. Any constitutional rights guaranteed under s. 23(1), (2) or (3) are not available to these petitioners.

[32] The right that is conferred by s. 23 is the right to be educated in an educational programme in which French or English is used as a primary language, a right which I stated earlier is extended to a linguistic minority not a linguistic majority. The English linguistic majority in British Columbia has no such right to the programme offered to the linguistic minority. The programme established for the minority assures they will receive the equivalent of the education offered to the members of the linguistic majority, always recognizing the “numbers warrant” criteria.

[33] British Columbia offers the P.C.D.F. [Programme – Cadre de Français] with French the exclusive language of instruction. In other words, all subjects are taught in French. These children obtain the same education core curriculum in French as the English linguistic majority. The P.C.D.F. parallels the English core curriculum in content. Twenty-two school districts offer this programme where numbers warrant. As stated earlier, 36 school districts offer F.I. [French Immersion], which is quite a different programme. There is no doubt the P.C.D.F. programme offered by the school board falls within s. 23 as constituting primary and secondary instruction in French. Needless to say, those persons who qualify under s. 23(1) or (2) are entitled to have their children educated in that programme. They, however, can only qualify for that programme as part of the linguistic minority, *i.e.*, French in British Columbia, always subject to the

“numbers warrant” qualification as referred to in s. 23(3). The children of the petitioners were enrolled in the French Immersion programmes. This is an optional programme offered by local school districts. In that programme French is taught as a second language, recognizing English as the primary or first language.

[34] As Jean Chrétien, Minister of Justice as he then was, said, “We are not determining education for the majority but for the minorities”. Section 23 protects the minority education language rights. It does not provide the anglophone community in British Columbia the right to have their children educated in French Immersion no more than it would create a right to have a francophone community in Quebec have their children educated in an English Immersion programme. The Ministry of Education has clearly developed a policy to promote the implementation of immersion programmes. However, the implementation of such a programme cannot, and is not, creating a constitutional right; it is an optional programme.

[35] In summary, s. 23(2) creates the right to obtain instruction in French as a first or primary language. The right, however, is conferred only on a citizen who has a child who has received or is receiving instruction in French as a first primary language and then if numbers warrant. It does not include the right to instruction in a French Immersion programme.

[36] To accept the petitioners’ argument that the words “instruction in French” in s. 23(2) convey a right to the English linguistic majority in British Columbia to be educated in the French language, would indeed be to “overshoot the actual purpose”: see Dickson J. in *R. v. Big M Drug Mart*, *supra*.

Conseil Scolaire Acadien Provincial (Re), 2016 NSUARB 115 (CanLII)

[1] This is a Decision with respect to an application under the *Education Act*, S.N.S. 1995-1996, c. 1 (“Act”), by the Conseil scolaire acadien provincial ("CSAP"), which has applied to the Nova Scotia Utility and Review Board ("Board") to increase the number of school board members from 17 to 18; to increase the number of electoral districts from 9 to 10; and to amend the boundaries of the electoral districts.

[…]

[4] The creation of the CSAP under the *Education Act* resulted from the Province's commitment to providing the minority Acadian and Francophone communities within Nova Scotia with an education in their own language as guaranteed by Section 23 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). It is recognized that minority language education is crucial to the preservation of the language and culture of these Acadian and Francophone communities. This right was highlighted by the Nova Scotia Department of Education in Education Horizons - White Paper on Restructuring the Education System which was released in February, 1995. In noting the significant role of Francophone governance for these communities, the White Paper contained the following commitment at page 16:

> The Acadian and French language population in Nova Scotia has added and will continue to add, a unique cultural, historical and political perspective to Nova Scotia. The introduction of the *Canadian Charter of Rights and Freedoms* in 1982 formally recognized this contribution by guaranteeing minority linguistic rights. Nova Scotia is obligated to provide for these rights, by providing French and English Nova Scotians with equivalent education opportunities. These opportunities must reflect the unique experiences of both Acadian and French-language societies while providing the foundation for the continuation of their respective cultures in Nova Scotia.

[5] The result of this commitment was the creation of the CSAP with jurisdiction throughout the Province and responsibility for the delivery and administration of all French-first-language programs to the children of entitled parents pursuant to s. 11 of the *Education Act*. The concept of "entitled parent" or "entitled person" is important in that their children are entitled as of right under the *Charter* to a French language education as well as the right to manage and administer their own education system. This differs from French immersion programs for Anglophone students and parents whose mother tongue is English. Such immersion programs are only a privilege that these parents may ask for and are not a right guaranteed under the *Charter*.

[…]

[40] For the above reasons, the Board approves the application. The Board has carefully considered the issue of ensuring effective representation of the Acadian and Francophone communities in the Province, as required under s. 13(6) of the *Education Act*. The Board determines that there will be 18 school board members and 10 electoral districts, as described in the application.

ANNOTATIONS – SUBSECTION 23(1)

Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General), [2015] 2 S.C.R. 282, 2015 SCC 25 (CanLII)

[69] There is no doubt that a province or territory can delegate the function of setting admission criteria for children of non-rights holders to a school board. This delegation can include granting a minority language school board wide discretion to admit the children of non-rights holders.

[70] There is also no doubt that a province or territory may pass legislation which offers protections higher than those protected by the *Charter*. Section 23 establishes a constitutional minimum: *Mahe*, at p. 379. Two important corollaries flow from this. First, because the *Charter* sets out minimum standards with which legislation must comply, any legislation which falls below these standards contravenes the *Charter* and is presumptively unconstitutional. Second, because the *Charter* sets out only minimum standards, it does not preclude legislation from going beyond the basic rights recognized in the *Charter* to offer additional protections. This fact was recognized by Dickson C.J. in *Mahe*, where he explained that s. 23 establishes "a minimum level of management and control in a given situation; it does not set a ceiling": p. 379. Provincial and territorial governments are permitted to "give minority groups a greater degree of management and control" than that set out in the provision: p. 379.

[…]

[74] In this case, however, the Yukon has not delegated the function of setting admission criteria for children of non-rights holders to the Board. In the absence of any such delegation, there is no authority for the Board to unilaterally set admission criteria which are different from what is set out in the *Regulation*. This does not preclude the Board from claiming that the Yukon has insufficiently ensured compliance with s. 23, and nothing stops the Board from arguing that the Yukon's approach to admissions prevents the realization of s. 23's purpose: see *Mahe*, at pp. 362-65. But that is a different issue from whether the Board has, in the absence of delegation from the Yukon, the unilateral right to decide to admit children other than those who are covered by s. 23 or the *Regulation*.

Gosselin (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 238, 2005 SCC 15 (CanLII)

[1] In this appeal, the Court is asked to measure the constitutional right to minority language education against the right to equality. The appellants claim that the *Charter of the French language*, R.S.Q., c. C-11, which provides access to English language schools in Quebec only to children who have received or are receiving English language instruction in Canada or whose parents studied in English in Canada at the primary level, discriminates between children who qualify and the majority of French-speaking Quebec children, who do not. The result, the appellants argue, violates the right to equality guaranteed at ss. 10 and 12 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. Equality requires, the appellants argue, that all children in Quebec be given access to publicly funded English language education.

[2] If adopted, the practical effect of the appellants' equality argument would be to read out of the Constitution the carefully crafted compromise contained in s. 23 of the *Canadian Charter of Rights and Freedoms*. This is impermissible. As the Court has stated on numerous occasions, there is no hierarchy amongst constitutional provisions, and equality guarantees cannot therefore be used to invalidate other rights expressly conferred by the Constitution. All parts of the Constitution must be read together. It cannot be said, therefore, that in implementing s. 23, the Quebec legislature has violated either s. 15(1) of

the *Canadian Charter* or ss. 10 and 12 of the Quebec *Charter*. The appeal should therefore be dismissed.

[…]

[30] The appellants are members of the French language majority in Quebec and, as such, their objective in having their children educated in English simply does not fall within the purpose of s. 23. The Ontario Court of Appeal in *Abbey v. Essex County Board of Education* (1999), 1999 CanLII 3693 (ON CA), 42 O.R. (3d) 481, at pp. 488-89, said, with respect to Ontario, that "[a]nglophone parents in Ontario do not have a constitutional right to have their children educated in French as a matter of choice. Their children cannot be admitted to a French language school unless an admissions committee, controlled by members of the minority group, grants them access." See also *Lavoie v. Nova Scotia (Attorney-General)* (1989), 1989 CanLII 5221 (NS CA), 58 D.L.R. (4th) 293 (N.S.S.C. (App. Div.)), at pp. 313‑15. And so it is with the parents who belong to the majority language community in Quebec.

[31] In rejecting "free access" as the governing principle in s. 23, the framers of the *Canadian Charter* were concerned about the consequences of permitting members of the majority language community to send their children to minority language schools. The concern at the time (which the intervener, the Commissioner of Official Languages for Canada, submitted is a continuing concern today) was that at least outside Quebec minority language schools would themselves become centres of assimilation if members of the majority language community swamped students from the minority language community. Within Quebec, the problem has the added dimension that what are intended as schools for the minority language community should not operate to undermine the desire of the majority to protect and enhance French as the majority language in Quebec, knowing that it will remain the minority language in the broader context of Canada as a whole. In the companion appeal *Casimir*, at paras. 49-50, we examine some of the concerns that would arise if minority language schools become the functional equivalents of immersion programs for the majority language community in Quebec. We also took care in Casimir "to emphasize that the application of s. 23 must take into account the very real differences between the situation of the minority language community in Quebec and the minority language communities in the territories and other provinces" (para. 44). If the problems are different, the solutions will not necessarily be the same.

Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14 (CanLII)

[8] When the Canadian Constitution was patriated, the adoption of s. 23 of the *Canadian Charter* confirmed the framers' intention to guarantee rights to instruction that were, in principle, identical for all of Canada's minority language groups (*Arsenault-Cameron*, at para. 26). However, that principle was watered down considerably in the case of Quebec: s. 59 of the *Constitution Act, 1982* provides that s. 23(1)(a) does not apply in Quebec. It may come into force only with the authorization of the National Assembly or the Quebec Government. To date, such authorization has not been given. To this extent, s. 59 limits the classes of rights holders in Quebec to those described in ss. 23(1)(b) and 23(2) (Q*uebec Association of Protestant School Boards*, at p. 82). By so defining the classes of rights holders, which are in theory uniform throughout Canada but are limited in Quebec by the effect of s. 59, the framers also rejected the freedom to choose the language of instruction in Quebec (P. Foucher, "Language Rights and Education", in M. Bastarache, ed., *Language Rights in Canada* (1987), 255, at p. 263; J.-P. Proulx, "Les normes périjuridiques dans l'idéologie québécoise et canadienne en matière de langue d'enseignement" (1988), 19 *R.G.D.* 209, at p. 219; A. Braën, "Les droits scolaires des minorités de langue officielle au Canada et l'interprétation judiciaire" (1988), 19 *R.G.D.* 311, at pp. 317 and 319).

[…]

[29] Section 23(2) of the *Canadian Charter* provides minority language education rights that are concerned with the language of instruction of the child rather than the language of instruction of the parents. As with s. 23(1)(b), the rights holders are the parents even though the language of instruction of the child is the qualifying standard. […]

[…]

[32] The first part of the phrase “has received or is receiving” is also reflected in s. 23(1)(b), which entitles parents who have received their primary school instruction in English or French to have their children educated in that language if it is the minority language in the province. The words “has received” or “have received” connote a reference to one’s “school record” or “educational experience”, or “*parcours scolaire*” if one is referring to the expression used by the Court of Appeal in this case. In both ss. 23(1)(b) and 23(2), the object of the provisions is the same. A similar approach must be used in their interpretation.

A.G. (Que.) v. Quebec Protestant School Boards, [1984] 2 S.C.R. 66, 1984 CanLII 32 (SCC)

[pp. 68-69] The question is whether the provisions regarding instruction in English contained in Chapter VIII of the *Charter of the French language*, R.S.Q. 1977, c. C-11, and in the regulations adopted thereunder, are inconsistent with the *Canadian Charter of Rights and Freedoms* and of no force or effect to the extent of the inconsistency.

[…]

[p. 82] To begin with, the fact that Quebec is the only province in Canada in which, by virtue of s. 59(1) and (2) of the *Constitution Act, 1982*, s. 23(1)(a) of the *Charter* is not yet in force and cannot be brought into force without the consent of Quebec, indicates clearly that the framers of the Constitution had Quebec specially in mind when they enacted s. 23 of the *Charter*. It may be possible to suggest a reason for this exception: so far as Quebec is concerned, s. 23(1)(a) applies to Canadian citizens whose first language is English but who did not receive their primary school instruction in that language in Canada, that is, in practice, largely immigrants whose first language is English and who have become Canadian citizens. It is therefore plausible to think that this particular provision of the *Charter* was suspended for Quebec in part so as to calm the concerns regarding immigration, that, long before *Bill 101* was adopted, were expressed in Quebec because of the minority status of French in North America.

[pp. 82-83] It is above all when we compare s. 23(1)(b) and (2) of the *Charter* with s. 73 of *Bill 101* that it becomes most apparent that the latter is the type of regime on which the framers of the Constitution modelled s. 23. Both in the *Charter* and in *Bill 101*, the criteria that must be considered in deciding the right to instruction in the minority language are the place where the parents received their instruction in the minority language. Both in the *Charter* and in *Bill 101*, that place is where the parents received their primary school instruction. Both in the *Charter* and in *Bill 101*, satisfying this criterion gives a right to primary and secondary school instruction in the minority language, and *Bill 101* adds the right to education at the kindergarten level. Both in the *Charter* and in *Bill 101*, the criteria also include the language of instruction of a child’s brothers and sisters, though *Bill 101* refers to the younger brothers and sisters of children included in a category which is temporary by nature,—a limit not found in the *Charter*.

[…]

[p. 86] The rights stated in s. 23 of the *Charter* are guaranteed to very specific classes of persons. This specific classification lies at the very heart of the provision, since it is the means chosen by the framers to identify those entitled to the rights they intended to guarantee. In our opinion, a legislature cannot by an ordinary statute validly set aside the means so chosen by the framers and affect this classification. Still less can it remake the classification and redefine the classes.

[…]

[pp. 87-88] It goes without saying that in adopting s. 73 of *Bill 101* the Quebec legislature did not intend, and could not have intended, to create an exception to s. 23 of the *Charter* or to amend it, since that section did not then exist; but its intent is not relevant. What matters is the effective nature and scope of s. 73 in light of the provisions of the *Charter*, whenever the section was enacted. If, because of the *Charter*, s. 73 could not be validly adopted today, it is clearly rendered of no force or effect by the *Charter* and this for the same reason, namely the direct conflict between s. 73 of *Bill 101* and s. 23 of the *Charter*.

The provisions of s. 73 of *Bill 101* collide directly with those of s. 23 of the *Charter*, and are not limits which can be legitimized by s. 1 of the *Charter*. Such limits cannot be exceptions to the rights and freedoms guaranteed by the *Charter* nor amount to amendments of the *Charter*. An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the *Charter*, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1. The same applies to Chapter VIII of *Bill 101* in respect of s. 23 of the *Charter*.

Northwest Territories (Attorney General) v Commission Scolaire Francophone, Territoires du Nord-Ouest, 2015 NWTCA 1 (CanLII)

[21] The trial judge erred in her interpretation of section 23 and erroneously inflated the powers of the school board, elevating it to a government institution. The Supreme Court has clearly stated that school boards are malleable and subject to legislative reform: *Ontario English Catholic Teachers' Assn v Ontario* (*Attorney General*), 2001 SCC 15 (CanLII) at paragraph 62, [2001] 1 SCR 470. In our view, even the most generous interpretation of section 23 cannot mean that the school board has the unilateral power to admit anyone to its schools without governmental oversight.

[22] Education falls within the purview of provincial (and, by virtue of legislative extension, territorial) power and each province has a legitimate interest in the provision and regulation of minority language education: *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1 (CanLII), at paragraph 53, [2000] 1 SCR 3, *Solski* at paragraph 10. The Supreme Court has recognized on numerous occasions the importance of governments maintaining the responsibility to meet their constitutional obligations. […]

[24] The rights conferred under section 23 must be applied and interpreted in a uniform manner throughout Canada: *Solski* at paragraph 21. The effect of the trial judge's decision is to permit members of the majority community in the Northwest Territories to attend the minority language institution without any governmental oversight. Given the outcomes in *Solski, Gosselin* and *Nguyen,* this is not possible in Quebec. The framers did not intend that section 23 be applied in such an inconsistent manner across Canada.

[25] Even a contextual consideration of the situation of the Northwest Territories does not lead us to the same conclusion as that of the trial judge. Section 23 has several purposes, one of which is to encourage the development of the minority language community. However, section 23 protects specific, well-defined, categories of rights holders: *Solski* at paragraph 23. Section 23 confers individual rights (*Nguyen* at paragraph 23) and its implementation depends on the number of qualified pupils: *Mahe v Alberta*, 1990 CanLII 133 (SCC), [1990] 1 SCR 342, 68 DLR (4th) 69, *Arsenault-Cameron* at paragraph 32. The focus of section 23 is not to allow children of non-rights holders to learn a second language. Such an interpretation distorts the purpose and "raison d'être" of section 23 and erases the well-marked delineation around the constitutionally protected classes of rights holders.

[26] Section 23 requires a narrower interpretation than that given by the trial judge. The Supreme Court has consistently stated that section 23 is the result of a political compromise. If the framers had intended for minority language schools to be accessible to any member of the majority community, it could have been drafted as a "free choice" section; any child in Canada could select education in either official language. On the other hand, it could have been much more restrictive, protecting for example only children already enrolled in a minority language school. The result is a carefully crafted compromise, which protects the children of those whose first language learned and still understood is the minority language. These rights do not trickle down to the grandchildren or "all descendants", but only the "children".

Northwest Territories (Attorney General) v Association des parents ayants droit de Yellowknife, 2015 NWTCA 2 (CanLII)

[44] The trial judge accepted the argument that non-rights holders could attend the school, and be counted in the "numbers warrant" analysis. That was an error of law, as explained in the companion decision of *Northwest Territories (Attorney General) v Commission Scolaire Francophone, Territoires du*

Nord-Ouest, 2015 NWTCA 1 (CanLII), and in *Commission Scolaire Francophone du Yukon no 23 v Yukon (Procureure Générale)*, 2014 YKCA 4 (CanLII) at paras. 214-29. The reference in s. 23 to "Canadian citizens" excludes the inclusion of immigrants. The precise "first language learned and still understood" wording of s. 23(1)(a) excludes "lost generations" with Francophone roots. Section 23 cannot be interpreted in a way that ignores its fundamental scope: *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 (CanLII) at paras. 9, 29-30, [2005] 1 SCR 238. The approach adopted in the trial reasons would ". . . read out of the Constitution the carefully crafted compromise contained in s. 23 of the *Canadian Charter of Rights and Freedoms.* This is impermissible.": *Gosselin* at para. 2. *Nguyen v Quebec* at para. 29 repeated the warning against ". . . artificial educational pathways designed to circumvent the purposes of s. 23 and create new categories of rights holders at the sole discretion of the parents".

R. v. Conseil Scolaire Fransaskois, 2013 SKCA 35 (CanLII)

[4] I agree that the Government has no obligation to finance the minority language education of students who reside in other jurisdictions. Section 23 of the *Charter* operates on a province-by-province basis. However, as explained below, that principle translates into the bottom line of this appeal in only a limited way. This is because the evidence in relation to the school in Lloydminster does not allow costs to be prorated on the basis of the students' provinces of residence. As a result, the injunctions must remain in place insofar as they concern Lloydminster. The situation in Bellegarde is somewhat different. The costs assumed by the Government in relation to educating the Manitoba students who attend that school are calculable and, as a result, the amounts payable by the Government under the May 28, 2012 injunction must be reduced.

[…]

[17] Section 23 operates against the background of the division of powers prescribed by the *Constitution Act, 1867*. Section 93 of this Act provides that "for each Province the Legislature may exclusively make Laws in relation to Education", subject to certain restrictions not relevant here. It follows that the establishment and administration of schools is a provincial responsibility. From a constitutional perspective, the scheme of education in Canada is organized on a province-by-province basis.

[18] This fundamental jurisdictional framework is not dissolved or suspended by s. 23 of the *Charter*. Indeed, s. 23 itself anticipates that the rights it creates will both arise and be satisfied on an intra-provincial basis. I say this because s. 23(1)(a) and (b) define the classes of citizens who enjoy rights by referring, in turn, to "the English or French linguistic minority population of the province in which they reside" and to "the French or English linguistic population of the province". Section 23(1) then goes on to define the nature of these rights by reference to children receiving "primary and secondary school instruction in that language in that province".

[19] Section 23(3) makes the point even more clearly. It says that the right of citizens to have their children educated in the minority language of a province applies "wherever in the province" the number of children of rights-holding parents warrants the provision of education out of public funds. It reads as follows: […]

[20] Accordingly, I have little difficulty accepting the basic premise on which the Government rests its appeal, *i.e.*, I agree that, as a matter of general principle, Saskatchewan does not have an obligation to pay for the minority language education of students who reside outside of the province.

[…]

[51] The Government asserts, correctly in my view, that this is not a legally proper approach to the matter. By virtue of s. 23 of the *Charter*, the Province of Saskatchewan has minority language education obligations to certain parents who reside in Saskatchewan. By contrast, it has no duty to satisfy the minority language education entitlements of parents who reside in Alberta. Why then should the Government be put in the position of assuming the front-line financial burden of educating Alberta children? The answer to that question is not apparent. If the s. 23 rights of Albertans are not being met,

surely they should look to the Province of Alberta, rather than the Province of Saskatchewan, to satisfy those rights.

[…]

[53] But, notwithstanding all of this, I am unable to see how the failure of Alberta and Saskatchewan to amend the *Lloydminster Charter* so as to reference a minority language education school division, or to reach some other sort of co-operative arrangement on the subject, is *legally* problematic. As noted, the right of Saskatchewan minority language parents to have their children receive instruction in French is a right that both arises in Saskatchewan and is to be satisfied by the deployment of Saskatchewan educational resources. Consequently, it is not apparent why or how, as a matter of law, the Government should be compelled to fund the education of Alberta students on the strength of nothing more than the hope that it will be able to negotiate some arrangement for recouping those costs. This is particularly so because there is no suggestion in the record before us that the quality of education available to students resident in Saskatchewan is somehow dependent on them being able to join or amalgamate with students from Alberta.

[…]

[57] The situation in Manitoba in 1985 was entirely different from the one presently before the Court. There is no legal "void" here. Section 23 of the *Charter* directly grants rights to minority language parents in both Saskatchewan and Alberta. Both provinces have enacted statutory provisions to accommodate minority language education. See: *The Education Act, 1995*, *supra*, (Saskatchewan); the *School Act*, R.S.A. 2000, c. S-3 (Alberta). There is no apparent gap of any sort in relation to s. 23 entitlements. Parents on either side of the border are free to take advantage of all that s. 23 offers and Governments on both sides of the border are obliged to comply with both s. 23 and the relevant features of their governing legislation.

[58] As a matter of *policy*, it might be preferable for Saskatchewan and Alberta to work out an effective way of co-operating in the provision of French language education in Lloydminster. But, and this is the point, the two provinces are under no *legal* obligation to find such an arrangement and their failure to do so does not create a legal void. The absence of an accommodation on French language education means only that minority language education rights will have to play themselves out on one side of the border independently of what is happening on the other side of the border. As the correspondence in the record seems to suggest, this situation might be relatively short run.

K.K. v. Québec (Ministre de l'Éducation, du Loisir et du Sport), 2010 QCCA 500 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[4] The findings of the T.A.Q. [Tribunal administratif du Québec] on the ad hoc and artificial nature of the move to Ontario by the appellant's family, are immune from any reviewable error. Therefore, the real subject of the appeal consists in determining whether the child may be admissible for instruction in English in Quebec as a result of a year of primary school instruction in Ontario, in 2005-2006, as part of a subterfuge carried out solely to gain admissibility.

[5] The appellant argued that he could take any legal steps to qualify his son. This concerns only him. Regardless of the reasons that lead to his temporary move to Ontario, his son received his primary school instruction only in English in Ontario at the time of his admissibility request in Quebec. Consequently the child would have received the major part of his education in English following the principles and criteria identified by the Supreme Court in *Solski (Tutor of) v. Quebec (Attorney General)* (*Solski*); the change in place of residence was not a factor to consider.

[6] The appellant's proposal does not have merit. The T.A.Q. did not make interprovincial mobility a condition for admissibility to English instruction in Quebec. Rather, it found from the evidence that the

appellant wanted to use a distraction to circumvent the *Charter*. In *Solski*, the Supreme Court acknowledged the provincial governments' right to ensure that the applicant's method of gaining admissibility truly qualifies him to benefit from the right of section 23(2) of the *Canadian Charter of Rights and Freedoms* (*Canadian Charter*). The objective and subjective evaluation of the situation [translation] "excludes any artificial ad hoc approach".

[…]

[8] It is true that the circumstances in this case differ from that of *Nguyen*, but the principles set out by the Supreme Court remain valid for the purposes of the analysis of this case. The genuine educational pathway cannot rely on a trick, a subterfuge, an artificial "ad hoc" situation whose only purpose is to circumvent the provisions of the *Charter*. Therefore, the decision of the T.A.Q. fell within the range of possible, acceptable outcomes.

Reference re School Act, 1988 CanLII 1363 (PE SCAD)

[54] A cursory glance at s. 23 of the *Charter* and s. 50(3) of the *School Act* indicates that there are indeed inconsistencies between the two pieces of legislation and that the rights given in the *School Act* do not meet the rights given in the *Charter*. The principal inconsistencies are as follows:

> (1) Section 50(3) alters the beneficiaries of s. 23 rights. Under s. 50(3) of the *School Act* it is only children whose mother tongue is French who are entitled to French language instruction, whereas the Charter stipulates that parents are entitled to have their children receive French language instruction if those parents fall within one of three categories, namely:
>
> (i) citizens whose first language learned and still understood is French (s. 23(1)(a));
>
> (ii) citizens who have received their own primary school instructions in French in Canada (s. 23(1)(b)); and
>
> (iii) citizens of whom at least one child has received or is receiving primary or secondary school instruction in French in Canada (s. 23(2)).

[…]

[58] Legislation which only gives some of the rights guaranteed by s. 23 or which purports to give a right in contravention of the right given in the *Charter* can only lead to confusion. A person reading a particular piece of legislation has the right to assume that it is valid. There is no justification for provincial legislation conforming to one specific right given in the *Charter* and not conforming to other specific rights in the *Charter*. Simply put, the *School Act* cannot be in conflict with a specific right expressly given in the *Charter*. It is incumbent upon the legislature to enact a proper legislative framework which will reflect the rights given by s. 23. In *Hunter v. Southam Inc*., supra, Dickson C.J.C. stated at p. 659:

> While the courts are guardians of the Constitution and of the individuals' rights under it, it is the Legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

[…]

[68] The provision in the *Charter* that minority languge instruction *shall be given* in certain instances would be a worthless gesture if the people to whom it might apply have not been informed of their right to receive it. There is no inconsistency with the *Charter* if the *School Act* requires that a request be made for instruction in French provided adequate notice has first been given of the necessity for the request. It would be illogical to provide minority language instructions without some evidence of demand. It would be illogical and imprudent to provide a teacher, a classroom, equipment or a school facility without knowing if

there existed a demand for the services offered. The cost of education is very high and it is never funded to the extent demanded by teachers or parents. To waste money on an insufficient demand would do an injustice to the whole school system.

[69] The court rejects the proposition that mere demographic data, and nothing more, without regard to documented parental demand for minority language instruction, is, in itself, sufficient to warrant the implementation of such a programme.

[…]

[120] It should be pointed out that the minority rights in s. 23 do not belong exclusively to those persons who are French speaking minorities (or English minorities) but also to citizens who received their primary school instruction in Canada in French even though they do not speak the language (s. 23(1)(b)) and citizens who have a child who received or is receiving primary or secondary education in French in Canada (s. 23(2)). Obviously the French minority language group is not the exclusive user of minority language instructions and educational facilities. Again, at p. 532 in the *Ontario Reference* case, it was stated:

> In our opinion, any legislative provisions pertaining to those who may exercise management and control should include within their scope *all* parents who qualify for s. 23 rights as well as those who benefit from the provision of these rights, but do not qualify. Although the justification as set out earlier for the protection of the linguistic minority would appear not to include this group, fondamental fairness impels the conclusion that those parents whose children use minority language educational facilities should participate in managing and controlling them.

Reference re Education Act of Ontario and Minority Language Education Rights, 1984 CanLII 1832 (ON CA)

[87] It is to be observed that s. 23 of the *Charter*, as it applies to Ontario, accords rights to parents to have their children receive instruction in French, the minority language of the province, if those parents come within one of three distinct categories:

> (i) citizens whose first language learned and still understood is French;
>
> (ii) citizens who have received their own primary school instruction in French in Canada; and
>
> (iii) citizens of whom at least one child has received or is receiving primary or secondary school instruction in French in Canada.

[88] It can be seen that in the *Charter* there is no requirement that children, in order to be entitled to receive instruction in the French language in Ontario, must themselves be French-speaking.

[89] The *Education Act*, however, simply empowers school boards to provide French language instruction for "French-speaking pupils" resident in a particular school division. There is no statutory authority to provide French language education to those pupils who would qualify within the terms of s. 23 of the *Charter*. Under ss. 258(2) and 261(2) of the *Education Act*, it is only the number of French-speaking pupils who elect to be taught in French who are to be taken into consideration when minority language education is to be provided.

[90] In this respect, therefore, the provisions of the *Education Act* are inconsistent with s. 23 of the *Charter*.

Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764 (CanLII)

[454] There are three categories of rightsholders entitled to have their children attend minority language schools. Pursuant to s. 23(1)(a) of the *Charter*, rightsholders include citizens of Canada whose first language learned and still understood is French. Occasionally in this decision I will refer to such individuals as "Mother-Tongue Rightsholders". This group includes any citizens that grew up speaking French that still understand the language, no matter where they grew up, and no matter whether French was the only or one of many languages spoken in the household.

[455] Section 23(1)(b) includes among rightsholders citizens of Canada who received their primary school instruction in Canada in French. From time to time, this decision will refer to this group as "Education Rightsholders". This group includes parents who attended British Columbia's minority language programme that preceded the CSF, the Programme Cadre, as well as parents who attended primary school in French anywhere in Canada.

[456] The third category of rightsholders are those who became rightsholders pursuant to s. 23(2) of the *Charter* by virtue of having a child receive his or her primary or secondary school instruction in French, whether in the past or at present. This group includes parents of children that received French-language education anywhere in Canada, so long as the programme was not a French immersion programme. I will occasionally refer to this group of rightsholders as "Sibling Rightsholders".

[…]

[479] To summarize, there are three categories of rightsholders that are entitled to have their children attend minority language schools: those who are rightsholders because of their mother tongue, their education or their children's education. The relevant number for s. 23 is the number of children of rightsholders who could reasonably be expected to take advantage of a service, which will fall somewhere between the known demand and the total number of rightsholders in an area.

[…]

[577] Section 23 differs from other *Charter* rights, which offer their protection to "everyone", regardless of citizenship: see for example, s. 7 of the *Charter*, which guarantees "everyone" the right to be free from the deprivation of life, liberty and security of the person except when the deprivation is in accordance with the principles of fundamental justice. This makes it a comprehensive right that embraces both citizens and non-citizens alike: *United States of America v. Ferras* (2004), 2004 CanLII 29665 (ON CA), 184 O.A.C. 306, 237 D.L.R. (4th) 645 (Ont. C.A.) at para. 8; aff'd 2006 SCC 33 (CanLII).

[578] I agree with the Court of Appeal for the Northwest Territories that the words chosen by the drafters of the *Charter* ought to be given some meaning. While courts do generally take a purposive approach to interpreting all *Charter* rights, including s. 23, this approach cannot change the precise words of the *Charter* concerning to whom its protection is offered. Like all interpretive principles, the purposive approach should be used to enhance our understanding of inherently malleable rights. In this case, there is no ambiguity about to whom the malleable right of minority language education is afforded. Section 23 clearly only extends minority language education rights to Canadian citizens.

[579] Section 23(3) gives Mother-Tongue, Education and Sibling Rightsholders the right to have their children receive instruction in French where the numbers so warrant. Similarly, the right to have them receive hat instruction in minority language educational facilities is given "where the number of those children so warrants", referring to children of citizen rightsholders. Citizenship is a necessary condition for a person to be a rightsholder. Thus, the children of Immigrant Rightsholders are not to be included among the children that can reasonably be expected to attend the programme.

[…]

[699] The integrity of minority schools is essential to their operation. Minority language education is meant to take place in the language of the minority. It is not intended to teach outsiders the language of the minority.

[…]

[751] The primary issue to be decided is whether the remedial nature of s. 23 requires the Province to enact legislation allowing the CSF the discretion to admit non-rightsholders. I conclude that this question was decided in the negative in Yukon-SCC.

[…]

[765] Thus, in my view, the question whether a minority school board has the unilateral ability to admit non-rightsholders was decided in Yukon-SCC. The line between the minority's rights to management and control and the Province's jurisdiction over education is demarcated by the three classes of rightsholders noted in s. 23. Unless the Province delegates greater authority to the minority to admit non-rightsholders, the question of who is admissible to those schools remains in the Province's jurisdiction. Since the Province only allows the admission of rightsholders and Immigrant Rightsholders, the CSF is not entitled to admit students falling into the Francophile and Grandparent categories unless they would otherwise be the children of rightsholders.

[…]

[1866] While early childhood education programmes are undoubtedly of great benefit to the language skills of children in the linguistic minority in British Columbia, I cannot conclude that they are included within the meaning of "primary … school instruction" in s. 23 of the *Charter*.

[1867] As I explained in Chapter VI, The Respective Roles of the Province and the CSF, s. 23 creates a complete code for minority language education. It establishes the baseline requirements for services that the Province must provide: schools must be funded to accommodate the enumerated classes of rightsholders, and they must include primary and secondary education. It is open to the Province to go beyond those minimums; however, it has no positive obligation to do so.

[1868] Further, while the Province's jurisdiction over education is limited, it continues to have jurisdiction over the composition of the public education system so long as it does not interfere with the minority's linguistic and cultural concerns. Rightsholders are not entitled to any particular design to the education system except to the extent that it guarantees primary and secondary instruction.

[1869] In this case, the Province has chosen to implement an education system in which primary education begins with Kindergarten, and ends with Grade 12. School districts are permitted to use surplus space for early childhood education services, but the Province does not fund those services and they do not form part of the K-12 education programme. The Province could extend the meaning of primary and secondary education to include early childhood education services. However, it has no obligation to do so. Thus, the definition of primary instruction does not include preschool and daycare services.

[1870] The plaintiffs argue that the Province is required to provide the CSF with space for early childhood education services because it has a positive duty to affirm and promote minority language education. As I explained in Chapter VI, The Respective Roles of the Province and the CSF, this argument goes too far. Section 23 ensures a certain form of education rights to give effect to the principle of preserving and promoting the minority language and culture. It does not place a duty on government to achieve those ends through any means other than providing the mandatory minimum level of minority language education.

[1871] There are two caveats to my conclusion.

[1872] First, the K-12 education system now includes Strong Start. The Ministry does not fund space for the programme. Indeed, the evidence shows that some Strong Start programmes, like those in SD8-Kootenay Lake, operate out of elementary school gymnasiums, not in dedicated space. As a result,

where the CSF decides, within its right to management and control over language and culture, that a Strong Start programme is pedagogically appropriate, the Ministry should provide the CSF with operating funding for that programme.

[1873] Second, the Ministry's capital planning system for K-12 Education now includes an allowance for NLC space, which may be used by community service providers like early childhood providers. When the CSF builds new schools, it, too, should be entitled to build NLC space, which it can use to accommodate early learning programmes. For the reasons that I give in Chapter XL, Administrative Requirements of the Capital Funding System, the plaintiffs have not established that a 15% additional space allocation is insufficient for the CSF, particularly since the CSF is also eligible for Federal funding to build additional community space.

N.B. – This decision is currently under appeal.

Saskatchewan v. Conseil scolaire Fransaskois, 2014 SKQB 285 (CanLII)

[79] In the result, it is my view that the correct approach to irreparable harm in this case is to focus primarily on the prospect of harm to the purposes of s. 23 of the *Charter*. A meaningful risk of impacts on recruitment and retention of students and staff, whether arising as a result of lack of sufficient staff, inadequate facilities, or the inability to provide adequate transportation services, for example, could constitute such harm. A meaningful risk that an alleged breach of s. 23 rights would prevent the CSF from providing access to an education of comparable quality could also meet that mark. It is, of course, for the CSF to prove that such harm has occurred or may occur before trial, although the bar it must clear is not high. […]

[85] […] There is an obligation to provide funding under s. 23. The Government accordingly has no right to decide whether it will provide that funding, or whether the amount provided passes constitutional muster. It can only decide how it will do so, to the extent those decisions respect s. 23 rights.

[…]

[103] Based on this statement, and the oral submissions of counsel for the CSF, it was clear that the CSF did not finally claim that it has the right to unilaterally decide the level of funding that it will receive. I agree. It may sometimes be difficult to fully separate the right to management and control from the right to funding, as funding is for programs and services. That does not mean that the Government is obliged to fund any and all programs and services that the CSF decides are necessary to implement s. 23 rights, at the level determined by the CSF. Rather, it is for the CSF to exercise its right to management and control within the level of funding fixed by the Government, as long as that level complies with the Government's funding obligation. The significance of evidence relating to particular programs identified by the CSF in determining whether the Government is providing sufficient funding is, of course, for the trial judge.

Dauphinee v. Conseil Scolaire Acadien Provincial, 2007 NSSC 238 (CanLII)

[41] As I stated, the numbers warrant issue has already been fought and won by Section 23 parents in Nova Scotia, and the present issue boils down to an equality or equivalency question as espoused in the Section 23 jurisprudence. In view of my findings on the state of Tuition Agreements in Nova Scotia, and the lack of clear direction by the Department on the issue, it cannot be said that the failure of the CSAP [Conseil scolaire acadien provincial] to allow or have a policy in place for such agreements violates the Section 23 rights of the plaintiffs. The CSAP students are in the same position as the students of a majority of school boards in the Province.

[42] Therefore, I find that the failure or refusal of the CSAP to provide for Tuition Agreements for students with special needs does not violate Section 23 of the *Charter*. If Tuition Agreement provisions were mandatory for school boards, then my conclusion would probably be different.

Tuition Support

[43] The same cannot be said for the Tuition Support program of the Department. This is a Province wide program eligible to all special needs students in Nova Scotia. Department officials quite frankly admitted that they had never considered the needs of the French-first-language students enrolled in the CSAP. Their needs had apparently not crossed the minds of Department officials. By designating only English private schools as qualifying for Tuition Support, the Department is not treating the CSAP students equal to or equivalent to the English majority. While the program is apparently available to CSAP students (Eg. The Department accorded Samuel $5,500.00 in suppport for 2004 - 2005) it is only available in the English private schools. The Department cannot simply sit back and say, "we took a passive approach" and it is not our fault if there are no French private schools in the Province.

[44] One can understand why the Department designated the three private schools that it did as approved institutions for Tuition Support. It is apparent that they are well equipped to accommodate students with special needs. Nevertheless, the failure of the Department to consider the special needs of Section 23 students enrolled in the CSAP is a violation of the equality or equivalency rights of those families. While this was apparently an oversight by the Department, it is one that should not be condoned.

[…]

[53] The Department did violate or breach the plaintiffs Section 23 Charter rights by failing to consider and provide any accommodation for CSAP families in its Tuition Support program for students with special needs. Such a breach is not justified in the circumstances and it cannot be saved by Section 1. The Department must use its best efforts to incorporate and accommodate CSAP students with special needs in its Tuition Support in a manner that meets their linguistic needs and rights. The best way to achieve this should be worked out between the Department, the CSAP and its parent groups. This does not in the circumstances extend to the creation or establishment of new facilities comparable to the existing English private schools because the numbers do not warrant such measures.

Chubbs, et al v. HMQ et al, 2004 NLSCTD 89 (CanLII)

[18] While in the present case 17 students seems to be the working number, there does not appear to be anywhere in the case law or through legislation a specific or identifiable number of minority language students that would trigger S. 23 *Charter* rights. In some circumstances this number could be much higher while in another a lesser number might be appropriate. Canada is such a large and diverse country that no one solution or circumstance will apply to all regions. To determine whether or not the numbers warrant, it is necessary to review each circumstance on an individual basis within its own geographical, social and cultural context. […]

[68] The agreement entered into between the Province of Newfoundland and Labrador and the Province of Quebec to have the Newfoundland and Labrador students attend school in Quebec is a best effort and does satisfy the "in that province" requirement of S. 23(1)(b) of the *Charter* since the legislation of the Province of Newfoundland and Labrador permits such interprovincial arrangements. Such an arrangement is a novel solution as encouraged by the Supreme Court of Canada in *Mahe* (*supra*) and extends flexibility to S. 23 of the *Charter* to effect its purpose.

ANNOTATIONS – SUBSECTION 23(2)

Nguyen v. Quebec (Education, Recreation and Sports), [2009] 3 S.C.R. 208, 2009 SCC 47 (CanLII)

[24] Section 23(1)(*a*) of the *Canadian Charter* provides that citizens whose first language learned and still understood is that of the linguistic minority population of the province in which they reside have the right to have their children receive instruction in that language in that province. However, this provision does not apply in Quebec for now. Section 59 of the *Constitution Act, 1982* provides that it will not come into force in that province until it has been authorized by the legislative assembly or government of Quebec, and no such authorization has ever been given. Only s. 23(1)(*b*) regarding the parents' language of

instruction applies. It establishes in this regard the categories of rights holders who may demand instruction in the minority language. According to s. 23(1)(*b*), only citizens 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 linguistic minority have the right to have their children receive instruction in that language in that province. As for s. 23(2) of the *Canadian Charter*, it concerns the continuity of a child's language of instruction and family unity. Under it, citizens of Canada of whom any child is receiving or has received instruction in the language of the linguistic minority may have all their children receive primary and secondary school instruction in that same language. This provision is central to these appeals. As can be seen, s. 23(2) relates to the language of instruction of the child rather than that of the parents, although it is in actual fact the parents who are the holders of the guaranteed rights. Finally, s. 23(3) provides that the guaranteed rights apply where the number of children who can benefit from them is sufficient.

[…]

[27] As the Court observed in *Solski*, the specific purpose of s. 23(2) of the *Canadian Charter* is to provide continuity of minority language education rights, to ensure family unity and to accommodate mobility within Canada (para. 30). Although the purpose of s. 23 is to protect and promote both the English-speaking and French-speaking minority language communities, the rights provided for in s. 23(2) apply regardless of whether the parents or the eligible children are members of one of these minority communities or speak one of these languages in the home, or even have a working knowledge of the protected minority language. As this Court stated in *Solski*, "[t]he conditions for qualification under s. 23 reflect the fact that new Canadians in particular will decide to adopt one or the other official languages, or both, as participants in the Canadian language regime" (para. 31). Change of residence from one province to another is not among the conditions for exercising the guaranteed rights either. Finally, in the very words of s. 23(2) — which refers to instruction that the child has received or is receiving for the purpose of determining whether the child has a right to receive instruction in the minority language — no distinction is made between instruction that is public and instruction that is private, whether subsidized or unsubsidized.

[…]

[29] The global assessment of the child's educational pathway, which focusses on quality, is then based on a set of factors that are of varying importance depending on the specific facts of each case. These factors include time spent in different programs of study, at what stage of the child's education the choice of language of instruction was made, what programs are or were available, and whether learning disabilities or other difficulties exist (*Solski*, at para. 33). The qualitative assessment of the child's situation thus makes it possible to determine whether the claimant meets the requirements of s. 23(2) and belongs to one of the recognized categories of rights holders. In this connection, the Court noted that this provision does not specify a minimum amount of time a child would have to spend in a minority language education program in order to benefit from the constitutional rights (*Solski*, at para. 41). However, a short period of attendance at a minority language school is not indicative of a genuine commitment and cannot on its own be enough for a child's parent to obtain the status of a rights holder under the *Canadian Charter*. In this regard, the Court warned against artificial educational pathways designed to circumvent the purposes of s. 23 and create new categories of rights holders at the sole discretion of the parents:

> It cannot be enough, in light of the objectives of s. 23, for a child to be registered for a few weeks or a few months in a given program to conclude that he or she qualifies for admission, with his or her siblings, in the minority language programs of Quebec. [*Solski*, at para. 39.]

[…]

[32] In the protection afforded by the *Canadian Charter*, no distinction is drawn as regards the type of instruction received by the child, as to whether the educational institution is public or private, or regarding the origin of the authorization pursuant to which instruction is provided in a given language. Rather, s. 23(2) of the *Canadian Charter* reflects a factual reality in which language rights are protected when, in

light of the child's overall situation and of an analysis of the child's educational pathway that is both subjective and objective, it is determined that the child is receiving or has received instruction in one of Canada's two official languages. It is therefore the fact that a child has received instruction in a language that makes it possible to exercise the constitutional right. Moreover, this interpretation is compatible with the primary objective of s. 23(2): to promote continuity of language instruction.

[33] The inability to assess a child's educational pathway in its entirety in determining the extent of his or her educational language rights has the effect of truncating the child's reality by creating a fictitious educational pathway that cannot serve as a basis for a proper application of the constitutional guarantees. In *Solski*, this Court stated that the child's entire educational pathway must be taken into account in order to determine whether it meets the requirements of s. 23(2) of the *Canadian Charter*. If an entire portion of the educational pathway is omitted from the analysis because of the nature or origin of the instruction received, it is impossible to conduct the global analysis of the child's situation and educational pathway required by *Solski*.

[34] Where both UPSs [unsubsidized private schools] and special authorizations issued by the province are concerned, the children are in fact receiving or have in fact received instruction in English and fall, in principle, within the categories of rights holders under s. 23(2). According to *Solski*, on a proper interpretation of this provision, it is necessary to conduct a comprehensive analysis of the educational pathways of children whose parents wish to avail themselves of the constitutional guarantees. I accordingly find that paras. 2 and 3 of s. 73 *CFL* limit the respondents' rights in both appeals. But it remains to be determined whether, as the appellants argue, this limit can be justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter*.

[…]

[44] Some of the evidence on the use of bridging schools raises doubts regarding the genuineness of many educational pathways, and regarding the objectives underlying the establishment of certain institutions. In their advertising, some institutions suggested that after a brief period there, their students would be eligible for admission to publicly funded English-language schools (A.R., at pp. 1200-1202). An approach to reviewing files closer to the one established in *Solski* would make it possible to conduct a concrete review of each student's case and of the institutions in question. This review would relate to the duration of the relevant pathway, the nature and history of the institution and the type of instruction given there. For example, it might be thought that an educational pathway of six months or one year spent at the start of elementary school in an institution established to serve as a bridge to the public education system would not be consistent with the purposes of s. 23(2) of the *Canadian Charter* and the interpretation given to that provision in *Solski*. Moreover, as I mentioned above, this Court expressed reservations in *Solski* about attempts to create language rights for expanded categories of rights holders by means of short periods of attendance at minority language schools (*Solski*, at para. 39).

[45] The situations in issue in the *Bindra* case also concern a relatively small number of children. According to the statistics provided by the appellants, it appears that between 1990 and 2002, an average of 7.1 percent of students eligible for English instruction were eligible owing to a special authorization issued by the province under ss. 81, 85 and 85.1 *CFL* (*Rapport sur l'évolution de la situation linguistique au Québec, 2002-2007*, at p. 90). Although it is impossible to determine with any accuracy what proportion of those students subsequently obtained certificates of eligibility under s. 73, para. 1(2) *CFL*, I note that a large majority of them were eligible because they were staying temporarily in Quebec and had obtained special authorizations on that basis under s. 85 *CFL*. Moreover, it must not be forgotten that the special authorizations mechanism remains wholly within the authority of the Quebec government, which can therefore grant authorizations that exceed what it is constitutionally obligated to grant, but cannot, after doing so, deny any rights flowing from the authorizations in question that are guaranteed by the *Canadian Charter*. The provisions added to the *CFL* by Bill 104 that apply to Mr. Bindra's case are not consistent with the principle of preserving family unity provided for in s. 23(2) of the *Canadian Charter*. In fact, they are likely to make it impossible for children of a family to receive instruction in the same school system.

[27] We cannot accept that the strict mathematical approach is consistent with s. 23(2) of the *Canadian Charter*. Section 23(2) is designed to identify a single category of beneficiaries. It must receive a broad interpretation consistent with the constitutional objective of protecting minority language communities.

[28] Based on the proper interpretation of s. 23(2), which we will set out in detail below, we are of the view that in order to comply with this constitutional provision, the *CFL* [*Charter of the French Language*]'s "major part" requirement must involve a qualitative rather than a strict quantitative assessment of the child's educational experience through which it is determined if a significant part, though not necessarily the majority, of his or her instruction, considered cumulatively, was in the minority language. Indeed, the past and present educational experience of the child is the best indicator of genuine commitment to a minority language education. The focus of the assessment is both subjective, in that it is necessary to examine all of the circumstances of the child, and objective, in that the Minister, the ATQ [Administrative Tribunal of Québec] and the courts must determine whether the admission of a particular child is, in light of his or her personal circumstances and educational experience, past and present, consistent with the general purposes of s. 23(2) and, in particular, the need to protect, preserve and reinforce the minority language community by granting individual rights to a specific category of beneficiaries.

B. Section 23(2): Continuity of Language Instruction

[29] Section 23(2) of the *Canadian Charter* provides minority language education rights that are concerned with the language of instruction of the child rather than the language of instruction of the parents. As with s. 23(1)(b), the rights holders are the parents even though the language of instruction of the child is the qualifying standard. Section 23(2) states:

> 23. . . .
>
> (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.

As discussed earlier, the proper interpretation of s. 23(2) must be purposive; it must reflect the remedial nature of the provision and it must be consistent with the intent to adopt a uniform set of minimum rights which in fact restrict provincial jurisdiction over education.

[30] The specific purpose of s. 23(2) is to provide continuity of minority language education rights, to accommodate mobility and to ensure family unity. The framers intended that a child who has received or is receiving his or her education in one official language should be able to complete it in that language when it is the minority language. The Honourable Mr. Jean Chrétien, then Minister of Justice, explained:

> Mr. Speaker, this government holds the view that such rights must be protected in the constitution because they are fundamental to what Canada is all about. When minority language education rights are taken away, the right to take up a job in any part of Canada is seriously impaired. English-speaking Canadians, if they move to Quebec, want to have the right to send their children to school in their own language. . . .
>
> Similarly French-speaking Canadians do not want to move to other parts of Canada unless they can send their children to school in their own language. The only way to achieve this is to guarantee such rights in the constitution. In effect, without a guarantee of minority language education rights, there can be no full mobility rights.
>
> (House of Commons Debates, vol. III, 1st Sess., 32nd Parl., October 6, 1980, at p. 3286)

The title of the provision, "Continuity of language instruction", accords with this interpretation. Further, once one sibling has received or is receiving minority language education, all other siblings are entitled to

receive instruction in the minority language as well. P. Foucher, in "Les droits scolaires des minorités linguistiques", in G.-A. Beaudoin and E. Mendes, eds., *The Canadian Charter of Rights and Freedoms* (3rd ed. 1996), 16-1, at p. 16-12, confirms that family unity is an integral aspect of this provision.

[31] Nevertheless, many persons qualify under s. 23 without being "of the minority", even Francophones in provinces other than Quebec who have chosen English education for their children. In this respect, s. 23(2) applies without regard to the fact that qualified parents or children may not be French or English, or may not speak those languages at home, despite the fact that the ultimate goal of s. 23 is to protect and promote minority language communities. The conditions for qualification under s. 23 reflect the fact that new Canadians in particular will decide to adopt one or the other official languages, or both, as participants in the Canadian language regime. We now consider what interpretation of s. 23(2) accords with this purpose.

[32] The first part of the phrase "has received or is receiving" is also reflected in s. 23(1)(b), which entitles parents who have received their primary school instruction in English or French to have their children educated in that language if it is the minority language in the province. The words "has received" or "have received" connote a reference to one's "school record" or "educational experience", or "*parcours scolaire*" if one is referring to the expression used by the Court of Appeal in this case. In both ss. 23(1)(b) and 23(2), the object of the provisions is the same. A similar approach must be used in their interpretation.

[33] Provincial legislation that establishes criteria regarding the educational experience of the child is helpful. These criteria must, however, accord with the purpose of s. 23. This purpose indicates that s. 23 is both a social and collective right, and an individual and civil right. It must indeed be noted here again that children qualified under s. 23 are not required to have a working knowledge of the minority language, or to be members of a cultural group that identifies with the minority language. The section is remedial. In previous cases, this Court has insisted that s. 23 must be interpreted so as to facilitate the reintegration of children who have been isolated from the cultural community the minority school is designed to protect and develop. Section 23(2) in particular facilitates mobility and continuity of education in the minority language, though change of residence is not a condition for the exercise of the right. As noted, s. 23 is also meant to apply to some members of cultural communities that are neither French nor English. To purposefully assess the requirement for participation in s. 23(2), therefore, all the circumstances of the child must be considered including the time spent in each program, at what stage of education the choice of language of instruction was made, what programs are or were available, and whether learning disabilities or other difficulties exist. In this way, it is possible to determine whether a child's overall educational experience is sufficient to meet the requirements of s. 23(2).

[…]

[35] The pertinent question, then, is whether the "major part" requirement is consistent with the purpose of s. 23(2) and capable of ensuring that the children meant to be protected will actually be admitted to minority language schools. In our view, the "major part" requirement as interpreted by the ATQ is underinclusive; it does not achieve the purpose of s. 23(2) and, therefore, cannot be said to complete it or to act as a valid substitute for it. Thus, the "major part" requirement cannot be saved unless it is interpreted such that the word "major" is given a qualitative rather than a quantitative meaning.

[…]

(1) Scope of Section 23(2)

[38] A number of factors, including those mentioned above (i.e., the time spent in each program, at what stage of education the choice of language of instruction was made, what programs are or were available, and whether learning disabilities or other difficulties exist), may be considered in the course of a qualitative assessment of a child's overall educational experience in order to determine if it is sufficient to meet the requirements of s. 23(2). In the sections that follow, we will discuss the factors mentioned above; however, it must be acknowledged that the relevance of each factor will vary with the facts of each

case and other factors may also arise depending on the circumstances of the particular child and his or her educational experience, past and present.

(2) Factors to Consider

(a) How Much Time Was Spent in Each Program?

[39] Although it is not a conclusive factor, it is nonetheless important to consider the time a child spent in the minority language program, cumulatively, at the primary and secondary levels, where relevant, when determining if that child's total educational experience is sufficient to meet the requirements of s. 23(2). This factor is relevant because the more time a child spends in such a program, the easier it is to find a true intention to adopt that language of instruction over the other; this factor is a marker of an existing affiliation with the official minority language community. It cannot be enough, in light of the objectives of s. 23, for a child to be registered for a few weeks or a few months in a given program to conclude that he or she qualifies for admission, with his or her siblings, in the minority language programs of Quebec.

[40] Since the time spent by a child in the minority language education program may evidence a more significant connection with the language of the minority than that of the majority, the purpose of s. 23(2) to provide continuity of minority language education rights, to accommodate mobility and to ensure family unity is engaged. The question of whether there is a sufficient connection with the language of the minority must therefore be viewed from both a subjective and an objective perspective. Subjectively, do the circumstances show an intention to adopt the minority language as the language of instruction? Objectively, do the educational experiences and choices to date support such a connection?

[41] That being said, it is important to remember that s. 23(2) of the *Canadian Charter* does not specify a minimum amount of time a child must spend in a minority language education program before his or her educational experience can qualify under s. 23(2), nor does it require that the time spent in the minority language education program be greater than the time spent in the majority language education program. Thus, this factor must not be applied in a strict, mathematical matter. Nor should it be considered in isolation. Rather, the time spent in each program must be considered in concert with the other factors discussed below and always in light of the purposes of s. 23(2).

(b) At What Stage of Education Was the Choice of Language of Instruction Made?

[42] Another factor that may be relevant in determining whether a child's educational experience is sufficient to meet the requirements of s. 23(2) will be the stage of education at which the choice of language of instruction was made. It may be important to consider what education came first. In some cases the initial choice of language will be a better indicator of intention to permanently adopt one language rather than the other; in other cases it will not. The reasons behind any change may be revealing. Choosing the minority language as one enters secondary school might also evidence a stronger, more informed commitment to that language than if the choice was made during the early, primary years of schooling, given the more stringent academic demands associated with secondary education, as well as its impact on post-secondary education opportunities. As stated above, once a commitment to instruction in the minority language is shown on the facts of the case, the purpose of s. 23(2) to provide continuity of minority language education rights, to accommodate mobility and to ensure family unity is engaged.

(c) What Programs Are or Were Available?

[43] In determining whether a child's education experience is sufficient to meet the requirements of s. 23(2), it is also important to consider the past and present availability of minority language education programs. For example, if a child completes grade 1 in the minority language but then spends the next three school years in an area where minority language is unavailable, it is clear that he or she has not received the "major part" of his or her education to date in the minority language under the restrictive interpretation of s. 73 of the *CFL*. However, under a purposive interpretation of s. 23(2) of the *Canadian Charter*, the time spent in the majority language educational system, when a minority language school

was unavailable, ought not to be considered as indicative of a choice to adopt the majority language as the child's language of instruction. One aspect of the purpose of s. 23(2) is to accommodate mobility. This purpose would be frustrated and parents and their children, as well as the minority language community as a whole, would be unjustly penalized if children were barred from continuing with instruction in the minority language once they moved to an area in which it was available again simply because they temporarily lived in an area in which it was unavailable. There again it is obvious that the situation of students moving to Quebec will be unique, the availability of instruction in English in the territories and other provinces being unquestioned. As mentioned earlier, the geographical context is always important.

[44] It is also important to consider the availability of minority language education programs from a socio-cultural perspective and with respect to the circumstances of each child. When considering the situation in a province other than Quebec, one must remember that a child could have been sent to a majority language school by assimilated parents who then, in the latter stages of the child's educational experience, have changed their minds and sent the child to a minority language school in order to help the child reintegrate the minority language community and adopt its culture. It may be that the choice to enrol the child in a minority language education program, even though the program may have been available throughout the child's educational experience, did not become a viable choice until the child's assimilated parents decided to help their child reforge a connection with the minority language community and culture. In this context, the remedial purpose of s. 23(2) is engaged, and, as stated above, this right must be interpreted so as to facilitate the reintegration of children who have been isolated from the cultural community the minority school is designed to protect and develop. In these circumstances, it would be beneficial and in line with the purpose of s. 23(2) for the siblings of this child to receive minority language education. All this is to emphasize that the application of s. 23 must take into account the very real differences between the situation of the minority language community in Quebec and the minority language communities in the territories and other provinces. Therefore, while certain educational experiences may not qualify for minority language education under the "major part" requirement, defined qualitatively, in s. 73 of the *CFL*, this does not mean that they could not qualify under other provincial minority language education legislative schemes, which are necessarily responsive to their own province's unique historical and social context.

(d) Do Learning Disabilities or Other Difficulties Exist?

[45] Another relevant factor in some circumstances will be whether the child is having difficulty learning in one language as compared to the other. For example, if a child completes grades 1, 2 and 3 in the minority language and then switches to the majority language for grades 4, 5 and 6 and experiences learning difficulties in that language, it would be unacceptably punitive to force that child to continue in the majority language, especially when it may be that the child has made a more significant connection with the minority language community, given the fact that he or she finds that instruction in that language is more conducive to learning.

[…]

[47] The purpose of the s. 23(2) criteria is to guarantee continuity of minority language education rights and mobility to children being educated in one of the official languages. If children are in a recognized education program regularly and legally, they will in most instances be able to continue their education in the same language. This is consistent with the wording of s. 23(2) and the purposes of protecting and preserving the minority-language community, as well as with the reality that children properly enrolled in minority-language schools are entitled to a continuous learning experience and should not be uprooted and sent to majority-language schools. Uprooting would not be in the interest of the minority language community or of the child. Nevertheless, a qualitative assessment of the situation to determine whether there is evidence of a genuine commitment to a minority language educational experience is warranted, with each province exercising its discretion in light of its particular circumstances, obligation to respect the objectives of s. 23, and educational policies.

[…]

[50] The Quebec legislature does not consider whether the language of instruction was received in the context of an immersion program or a minority- language school. For example, Shanning Casimir received 50 percent of her education in English and 50 percent of her education in French in the context of a French immersion program; she was found not to have completed the "major part" of her education in English. This fails to recognize significant differences between immersion programs and minority language programs. Outside Quebec, immersion programs are designed to provide second language training to children attending schools designed for those adopting the language of the majority. Immersion programs occur in a majority setting where the majority language is spoken in the corridors and during extra-curricular activities. Immersion programs are run in majority schools that are a part of the majority school system. As a result, immersion programs lack the cultural element that is vital to minority language education, as discussed in *Mahe*. There, this Court insisted on the need to identify schools with the minority in coming to the decision that s. 23 guaranteed the right to management to representatives of the minority. Therefore, while there is nothing in the language of s. 23(2) that strictly restricts the nature of the instruction, it would be contrary to the purpose of the provision to equate immersion with minority language education. In our view, recognizing immersion as a branch of minority language education fails to appreciate the fact that Shanning Casimir was actually receiving education for Anglophones and that she has a stronger link with the English linguistic community than the French. As a result, Shanning was entitled to continue her education in Quebec's minority language, English, under s. 23(2) of the *Canadian Charter* and s. 73(2) of the *CFL*.

Northwest Territories (Attorney General) v. Commission Scolaire Francophone, Territoires du Nord-Ouest, 2015 NWTCA 1 (CanLII)

[22] Education falls within the purview of provincial (and, by virtue of legislative extension, territorial) power and each province has a legitimate interest in the provision and regulation of minority language education: *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1 (CanLII), at paragraph 53, [2000] 1 SCR 3, *Solski* at paragraph 10. The Supreme Court has recognized on numerous occasions the importance of governments maintaining the responsibility to meet their constitutional obligations. In interpreting the requirement for participation in subsection 23(2), it has been clearly stated in *Solski*, *Gosselin*, and *Nguyen* that provincial governments must retain the power to ensure that the criteria of section 23 are respected.

> Provincial governments are entitled to verify that registration and overall attendance in the program… are consistent with participation in the class of beneficiaries defined in s. 23(2). (*Solski* at paragraph 48)

[…]

[27] The respondents argue that subsection 23(2) "opens the door" to creating new classes of rights holders. This court does not read it so broadly. Subsection 23(2) is a mobility provision. The heading, "continuity of language instruction", is relevant. The Supreme Court described the purpose of subsection 23(2) in *Solski* at paragraph 30:

> The specific purpose of s. 23(2) is to provide continuity of minority language education rights, to accommodate mobility and to ensure family unity. The framers intended that a child who has received or is receiving his or her education in one official language should be able to complete it in that language when it is the minority language. The Honourable Mr. Jean Chrétien, then Minister of Justice, explained:
>
> > Mr. Speaker, this government holds the view that such rights must be protected in the constitution because they are fundamental to what Canada is all about. When minority language education rights are taken away, the right to take up a job in any part of Canada is seriously impaired. English-speaking Canadians, if they move to Quebec, want to have the right to send their children to school in their own language... .

> Similarly French-speaking Canadians do not want to move to other parts of Canada unless they can send their children to school in their own language. The only way to achieve this is to guarantee such rights in the constitution. In effect, without a guarantee of minority language education rights, there can be no full mobility rights.
>
> (House of Commons Debates, vol. III, 1st Sess., 32nd Parl., October 6, 1980, at p. 3286) (emphasis added)

[28] Thus, if a child is educated in French in New Brunswick, and later the parents move to Yellowknife, the child and siblings can continue in French. If a Greek child is educated in English in Toronto, and the parents move to Montréal, the child and siblings can continue in English. This section also prevents "rolling back". Once a child has started education in the minority language, the province cannot raise the entry standard to disqualify that student or her siblings.

[29] Further, subsection 23(2) must be considered in conjunction with the remainder of section 23. Interpreting subsection 23(2) as intending to create new rights holders would essentially make the "first language learned and still understood" test largely redundant. The Supreme Court has consistently held that the purpose of section 23 is to protect, preserve and develop minority language communities in Canada by providing them with an education consistent with their linguistic and cultural identity. The trial judge's interpretation of section 23 comes close to creating a "free choice" model, which is not consistent with the plain language of section 23. Allowing the school board to create new categories of rights holders, without any governmental oversight, would make the "where numbers warrant" test meaningless. It would then read "where the number of right holders warrant, or where you can admit enough non-right holders to warrant". This cannot have been the intention of our framers and this interpretation cannot be supported.

Northwest Territories (Attorney General) v. Association des parents ayants droit de Yellowknife, 2015 NWTCA 2 (CanLII)

[45] The compromise reflected in s. 23 does result in some interesting consequences. For example, s. 23(2) means that if one sibling (who strictly speaking does not have s. 23 rights) is able to register in a minority language school, then all of his or her siblings will become s. 23 rights holders. This result was designed to promote "linguistic family unity". The respondents regard this as an opportunity to boost their "numbers"; if they can get one sibling into the minority language school, then all of the other siblings become s. 23 rights holders, potentially expanding the "numbers that warrant". Governments, on the other hand, view this phenomenon with some concern. Given the relatively high cost of providing minority language education, governments are naturally concerned with the number of s. 23 rights holders. While governments have a constitutional obligation to provide minority language education to those who have the right to it, governments have no obligation to extend those rights to anyone else. Thus, governments have every justification for carefully controlling enrollment in minority language schools: *Nguyen v Quebec* at para. 36; *Solski (Tutor of) v Quebec (Attorney General)*, 2005 SCC 14 (CanLII) at para. 48, [2005] 1 SCR 201.

Abbey v. Essex County Board of Education, 1999 CanLII 3693 (ON CA)

[1] […] The issue in this appeal is whether this right extends to a parent whose first language is not that of the linguistic minority population of the province in which that parent lives.

[23] Against this background, it is my view that s. 23(1) and (2) set out separate entitlements which are conceptually related, but independent from each other. Minority language educational rights are not merely those of children of citizens whose first language is that of the English or French linguistic minority population of the province in which they reside, or who received their primary school education in that language: s. 23(1). These educational rights are also available to all the children of a Canadian citizen if any of that citizen's children has received primary or secondary school instruction in English or French in Canada. Not only do children who have received - or are receiving - their education in the language of the linguistic minority have the right to continue receiving their primary and secondary school education in that language, their siblings enjoy the same continuous right.

[24] For purposes of s. 23(2), it does not matter whether this prior language instruction originated in another province, another part of a province, or through the kind of admissions committee contemplated by the *Education Act*. However it originated, it is the fact of it having occurred which attracts the protection of s. 23(2).

[27] […] Anglophone parents in Ontario do not have a constitutional right to have their children educated in French as a matter of choice. Their children cannot be admitted to a French Language School unless an admissions committee, controlled by members of the minority group, grants them access: Michel Bastarache, André Braen, Didier Emmanuel, Pierre Foucher, *Language Rights in Canada*, Michel Bastarache ed. (Montreal: Les Editions Yvon Blais Inc. 1989). If, however, one of their children is admitted to a French Language School, then the rest of their children do have such a right.

[28] Even though the overriding purpose of s. 23 is the protection of the language and culture of the linguistic minority through education, this does not preclude interpreting s. 23(2) according to its plain meaning, even if this means that rights accrue to persons who are not members of the linguistic minority. The more fluency there is in Canada's official languages, the more opportunity there is for minority language groups to flourish in the community.

Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764 (CanLII)

[456] The third category of rightsholders are those who became rightsholders pursuant to s. 23(2) of the *Charter* by virtue of having a child receive his or her primary or secondary school instruction in French, whether in the past or at present. This group includes parents of children that received French-language education anywhere in Canada, so long as the programme was not a French immersion programme. I will occasionally refer to this group of rightsholders as “Sibling Rightsholders”.

[579] Section 23(3) gives Mother-Tongue, Education and Sibling Rightsholders the right to have their children receive instruction in French where the numbers so warrant. Similarly, the right to have them receive that instruction in minority language educational facilities is given “where the number of those children so warrants”, referring to children of citizen rightsholders. Citizenship is a necessary condition for a person to be a rightsholder. Thus, the children of Immigrant Rightsholders are not to be included among the children that can reasonably be expected to attend the programme.

N.B. – This decision is currently under appeal before the British Columbia Court of Appeal.

ANNOTATIONS – SUBSECTION 23(3)

Association des parents de l’école Rose-des-vents v. British Columbia (Education), [2015] 2 S.C.R. 139, 2015 SCC 21 (CanLII)

[29] The s. 23 right to equivalent educational facilities for minority language rights holders where numbers warrant provides a means to counteract the assimilation that occurs when the children of rights holders attend majority language schools. In *Mahe*, this Court explained that s. 23 guaranteed a “sliding scale” of minority language education rights (p. 366). At the upper limit of the sliding scale, numbers will warrant the provision of the highest level of services to the minority language community. In such cases, rights holders are entitled to full educational facilities that are distinct from, and equivalent to, those found in the schools of the majority language group (*Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), 1993 CanLII 119 (SCC), [1993] 1 S.C.R. 839, at pp. 854-55; *Mahe*, at p. 378). These facilities must be accessible and, where possible, located in the community where the children reside (*Arsenault-Cameron*, at para. 56). The upper threshold of the sliding scale can include separate minority language school boards (*Mahe*, at p. 374).

[30] In *Mahe*, this Court held that costs and practicalities are relevant to the determination of where, on the sliding scale of s. 23 rights, a given minority language community falls, although pedagogical concerns will generally assume more weight (pp. 384-85). Once it is determined that the number of

children mandates the highest level of services, s. 23 requires that the quality of services be substantively equivalent to that offered to the majority language students. It is also imperative that minority language parents possess a measure of management and control over the educational facilities in which their children are taught (pp. 371-72). This management and control is vital to ensuring that the minority language and culture flourish in the educational setting.

[…]

[33] The focus in giving effect to s. 23 rights, then, should be on substantive equivalence, not on per capita costs and other markers of formal equivalence. In the present case, there is evidence that the CSF receives a 15% premium in its operational funding from the Province, as compared to other school boards in the province. Given economies of scale, higher per capita costs for a minority language board or school are not unexpected (*Mahe*, at p. 378). However, there is no particular per capita number that will satisfy the requirements of s. 23 in any given instance. Rather, what is paramount is that the educational experience of the children of s. 23 rights holders at the upper end of the sliding scale be of meaningfully similar quality to the educational experience of majority language students. As this Court noted in *Arsenault-Cameron*, "[s]ection 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" (para. 31).

[…]

[35] When assessing equivalence, a purposive approach requires a court to consider the educational choices available from the perspective of s. 23 rights holders. Would reasonable rights-holder parents be deterred from sending their children to a minority language school because it is meaningfully inferior to an available majority language school? If so, the purpose of this remedial provision is threatened. If the educational experience, viewed globally, is sufficiently superior in the majority language schools, that fact could undermine the parents' desire to have their children educated in the minority language, and thus could lead to assimilation. The inquiry into equivalence should thus focus on comparisons that would adversely affect the realization of the rights under s. 23 of the *Charter*.

[…]

[37] If rights holders consider which school their child should attend, or whether to withdraw their child from a minority language school, they will look to nearby majority language schools as alternatives. It follows that the comparator group that will generally be appropriate for the assessment of substantive equivalence of a minority language school will be the neighbouring majority language schools that represent a realistic alternative for rights holders. To compare the facilities of a minority language school to facilities outside of the area would not realistically capture the choice available to rights holders, who cannot send their children to a school located across the province. Of course, the precise geographic scope of the comparator group, and the relative usefulness of this sort of comparison, will vary with the circumstances (*Arsenault-Cameron*, at para. 57).

[…]

[39] Thus, the comparative exercise is contextual and holistic, accounting for not only physical facilities, but also quality of instruction, educational outcomes, extracurricular activities, and travel times, to name a few factors. Such an approach is similar to the way parents make decisions regarding their children's education. Of course, the extent to which any given factor will represent a live issue in assessing equivalence will be dictated by the circumstances of each case. The relevant factors are considered together in assessing whether the overall educational experience is inferior in a way that could discourage rights holders from enrolling their children in a minority language school.

[…]

[41] Ultimately, the focus of the assessment is the substantive equivalence of the educational experience. If, on balance, the experience is equivalent, the requirements of s. 23 will be met.

[…]

[50] To summarize, issues of costs and practicalities are considered in determining where a minority language community falls on the sliding scale of rights guaranteed under s. 23. Where the community is entitled to the highest level of educational services, on an equal footing with the majority language community, costs and practicalities will not be relevant to a determination of whether the rights holders are receiving the services to which they are entitled. It may be, however, that costs and practicalities will be relevant in attempts to justify a breach of s. 23, and in attempts to fashion an appropriate and just remedy for a breach.

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 2003 SCC 62 (CanLII)

[37] Returning to this appeal, we believe that LeBlanc J. was duly guided by historical and contextual factors in crafting a remedy that would meaningfully protect, indeed implement, the applicants' rights to minority official language education for their children while maintaining appropriate respect for the proper roles of the executive and legislative branches.

[38] As indicated earlier, the history of French-language education in Nova Scotia has been disappointing, resulting in high rates of assimilation that have continued well into the period when this litigation began. While the situation is not what it was in the eighteenth and nineteenth centuries when French-language education in Acadia was for the most part either expressly prohibited or unavailable, the promise of s. 23 had yet to be fulfilled in the five school districts at issue in this appeal when the appellants brought their application demanding homogeneous French-language facilities before the Supreme Court of Nova Scotia in 1998. Through the mid-1990s, s. 23 parents had pressured the government to provide homogeneous French-language facilities in presentations to Legislative Committees and in written and oral submissions to Ministers of Education. They had submitted petitions, letters, and expert analyses on assimilation to the Province. In 1996, amendments to the *Education Act* provided for a French-language school board, the Conseil scolaire acadien provincial, geared toward the fulfilment of the Province's s. 23 obligations. The school board then decided to provide the facilities at issue in this appeal. From 1997 to 1999, the provincial government announced the construction of homogeneous French-language schools in Petit-de-Grat, Clare, and Argyle. The schools were never built, and the construction projects were officially put on hold in September 1999.

[39] The reason for the delay, broadly speaking, was the government's failure to give due priority to s. 23 rights in educational policy setting. Indeed, LeBlanc J. observed that the real issue between the parties by the time of trial was the date on which the programs ought to be implemented, rather than any question as to whether they were required in the first place. The government cited a lack of consensus in the community, a consequent fear that enrollment would drop, and lack of funds as reasons for its decision to place the previously announced school construction projects on hold pending cost-benefit reviews. LeBlanc J. rightly concluded that none of these reasons justified the government's failure to fulfill its obligations under s. 23. He found that the government had been treating the provision of s. 23 schools no differently from programs or facilities generally, without attention to purposes of s. 23 of the *Charter* and the role that homogeneous schools play in French linguistic and cultural preservation and flourishing (para. 205). Meanwhile, assimilation continued (para. 210) and enrollment in the Conseil's schools was dropping. Programs were in jeopardy (paras. 229-30).

[…]

[87] Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, courts should be mindful of their roles as constitutional arbiters and the limits

of their institutional capacities. Reviewing courts, for their part, must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle.

[88] The remedy crafted by LeBlanc J. [reporting order] meaningfully vindicated the rights of the appellant parents by encouraging the Province's prompt construction of school facilities, without drawing the court outside its proper role. The Court of Appeal erred in wrongfully interfering with and striking down the portion of LeBlanc J.'s order in which he retained jurisdiction to hear progress reports on the status of the Province's efforts in providing school facilities by the required dates.

Arsenault-Cameron v. Prince Edward Island, [2000] 1 S.C.R. 3, 2000 SCC 1 (CanLII)

[31] As discussed above, the object of s. 23 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; see *Mahe*, *supra*, at p. 378. The use of objective standards, which assess the needs of minority language children primarily by reference to the pedagogical needs of majority language children, does not take into account the special requirements of the s. 23 rights holders. The Minister and the Appeal Division inappropriately emphasized the impact of three elements on equality between the two linguistic communities: duration of the bus rides, size of schools and quality of education. 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. Before examining this issue in more detail, however, it is important to deal briefly with the "numbers warrant" analysis which was discussed in both the trial and appeal divisions.

C. The Determination of Numbers Under Section 23

[32] The province has a duty to provide official minority language instruction where the numbers warrant. As Dickson C.J. pointed out in *Mahe*, *supra*, the "sliding scale" approach to s. 23 means that the numbers standard will have to be worked out by examining the particular facts of each case that comes before the courts. The relevant number is the number who will potentially take advantage of the service, which can be roughly estimated as being somewhere between the known demand and the total number of persons who could potentially take advantage of the service; see *Mahe*, at p. 384. Lamer C.J. defined the number in *Reference re Public Schools Act (Man.)* in this way, at p. 850: "the number of persons who can eventually be expected to take advantage of a given programme or facility".

[…]

[34] Although the plaintiffs must establish their rights under s. 23, including the sufficiency of numbers, it is not possible for minority right holders to obtain more accurate and complete information with regard to enrolment projections than what was made available here, nor is it reasonable to impose more on them. The province has the duty to actively promote educational services in the minority language and to assist in determining potential demand. This duty is in effect enshrined in the *School Act* at s. 7(1)(b) and recognized in Reference re Public Schools Act (Man.), supra, at pp. 862-63. The province cannot avoid its constitutional duty by citing insufficient proof of numbers, especially if it is not prepared to conduct its own studies or to obtain and present other evidence of known and potential demand.

[…]

[38] […] The pedagogical requirements established to address the needs of the majority language students cannot be used to trump cultural and linguistic concerns appropriate for the minority language students.

[…]

[42] In *Mahe*, the Court decided that, where numbers warrant the creation of facilities, the representatives of the official language community have the right to a degree of governance of these facilities. This right of management and control is present independent of the existence of a minority language board, which, in effect, is required at the upper end of the sliding scale of rights. In the present case, where there is a French Language Board, it is essential to analyse the right to a facility in Summerside in light of the role and powers of that Board.

[43] […] Where a minority language board has been established in furtherance of s. 23, it is up to the board, as it represents the minority official language community, to decide what is more appropriate from a cultural and linguistic perspective. The principal role of the Minister is to develop institutional structures and specific regulations and policies to deal with the unique blend of linguistic dynamics that has developed in the province […]

[45] […] Second, the right to management and control furthers the remedial goals of s. 23. Empowerment is essential to correct past injustices and to guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns.

[…]

[51] In our view, the Appeal Division erred in deciding that the sliding scale approach was governed by the "reasonable accessibility" of services without considering which services would best encourage the flourishing and preservation of the French language minority; see *Reference re Public Schools Act (Man.)*, *supra*, at p. 850. It also erred in accepting that the Minister could unilaterally decide the issue. We would instead affirm the conclusion of Hallett J. in the similar case of *Lavoie v. Nova Scotia (Attorney-General)* (1988), 50 D.L.R. (4th) 405 (N.S.S.C.T.D.), at p. 415, where he said: "Sending elementary school children on bus trips of 30 to 45 minutes each way when it is not necessary, is unreasonable if appropriate priorities are kept in mind." The question is also, whose priorities? Obviously, it has to be the priorities of the minority community because the determination of such priorities lies at the core of the management and control conferred on the minority language rights holders and their legitimate representatives by s. 23. Of course, these priorities must be determined and exercised in light of the role of the Minister.

[…]

[53] The province has a legitimate interest in the content and qualitative standards of educational programs for the official language communities and it can impose appropriate programs in so far as they do not interfere with the legitimate linguistic and cultural concerns of the minority. School size, facilities, transportation and assembly of students can be regulated, but all have an effect on language and culture and must be regulated with regard to the specific circumstances of the minority and the purposes of s. 23.

[54] […] When a minority language board has been established, the definition of the area is subject to the minority's exclusive powers of management and control over minority language instruction and facilities, subject to objective provincial norms and guidelines that are consistent with s. 23. Otherwise, the remedial and protective potential of s. 23 would be greatly impaired. As noted above, a number of complex and subtle factors go into the equation beyond counting the number of students and measuring travel distances to other schools. The representatives of the majority cannot be expected to fully appreciate the ramifications and consequences of the choices made by the minority in this regard.

[…]

[56] The duty to promote French language and culture in Prince Edward Island cannot mean that the government can impose the concentration of all minority language students in one predominantly French region. Both a textual and purposive analysis of s. 23(3) of the *Charter* indicate that when the numbers of s. 23 children in a specific area warrant the provision of minority language instruction, that instruction should take place in facilities located in the community where those children reside. Section 23(3)(a) states that the right to minority language instruction applies "<u>wherever</u> in the province" (emphasis added)

the number of children is sufficient to warrant such instruction. The words “wherever in the province” link the right to instruction to the geographic place where the conditions for the exercise of that right are present. […]

[59] The number of students that triggered the provision of instruction and facilities under the terms of s. 23 of the *Charter* was somewhere between 49 and 155. The potential demand for services could be determined by inferring that the established demand would increase after the services actually became available, as had been the case in Charlottetown. The Appeal Division erred in its application of the numbers warrant test in concluding that only 65 children would eventually take advantage of primary French language instruction in Summerside in the 1996-97 school year.

Reference re Public Schools Act (Man.), s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, 1993 CanLII 119 (SCC)

[25] Finally, the Court held that the phrase "where numbers warrant" does not provide an explicit standard that can be used to determine the appropriate facilities in every given situation (at p. 385). A rigid formula for implementing s. 23 is therefore to be avoided.

[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):

> 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.

[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.

[…]

[49] I do wish to emphasize, however, that in implementing such a scheme of minority language education, the province must expressly address a number of issues in order to satisfy its constitutional obligations and remain true to the purposive, remedial nature of s. 23. A proper implementation will require the fullest understanding of the needs of the French-language minority. As pointed out in *Mahe*, at p. 372:

> ... minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority.

The participation of minority language parents or their representatives in the assessment of educational needs and the setting up of structures and services which best respond to them is most important.

[50] The rights provided by s. 23, it must be remembered, are granted to minority language parents individually. Their entitlement is not subject to the will of the minority group to which they belong, be it that of a majority of that group, but only to the "numbers warrant" condition.

[51] The province has the obligation to offer the educational services, make them known and accessible to minority language parents so as to provide a quality of education on a basis which, in principle, is one of equality with the majority, keeping in mind that, as stated in *Mahe* (at p. 378):

> ... the specific form of educational system provided to the minority need not be identical to that provided to the majority. The different circumstances under which various schools find themselves, as well as the demands of a minority language education itself, make such a requirement impractical and undesirable. It should be stressed that the funds allocated for the minority language schools must be at least equivalent on a per student basis to the funds allocated to the majority schools. Special circumstances may warrant an allocation for minority language schools that exceeds the per capita allocation for majority schools.

Arrangements and structures which are prejudicial, hamper, or simply are not responsive to the needs of the minority, are to be avoided and measures which encourage the development and use of minority language facilities should be considered and implemented. For instance, if the province chooses to allow minority language parents a choice of school for instruction in the minority language, this should not be at the expense of the services provided by a French-language school board or hamper this board in its ability to provide services on a basis of equality as described above. Likewise, it would not be open to the Government of Manitoba to carve school districts which unduly hampered such a school board from attracting students.

Mahe v. Alberta, [1990] 1 S.C.R. 342, 1990 CanLII 133 (SCC)

[38] It appeared to be common ground between the parties that if a right to management and control is provided by s. 23, it must be found in the right to "minority language educational facilities" set out in subs. (3)(b). Before this particular subsection can be examined, however, it is essential to consider two general matters: (1) the purpose of s. 23; and (2) the relationship between the different subsections and paragraphs which comprise s. 23. In interpreting s. 23, as in interpreting any provision of the *Charter*, it is crucial to consider the underlying purpose of the section. As to the second matter, the structure of s. 23 makes it imperative that each part of the section be read in the context of all of the constituent parts.

[…]

2) The Context of s. 23(3)(b): An Overview of s. 23

[46] The proper way of interpreting s. 23, in my opinion, is to view the section as providing a general right to minority language instruction. Paragraphs (*a*) and (*b*) of subs. (3) qualify this general right: para. (*a*) adds that the right to instruction is only guaranteed where the "number of children" warrants, while para. (*b*) further qualifies the general right to instruction by adding that where numbers warrant it includes a right to "minority language educational facilities". In my view, subs. (3)(*b*) is included in order to indicate the upper range of possible institutional requirements which may be mandated by s. 23 (the government may, of course, provide more than the minimum required by s. 23).

[47] Another way of expressing the above interpretation of s. 23 is to say that s. 23 should be viewed as encompassing a "sliding scale" of require ment, with subs. (3)(*b*) indicating the upper level of this range and the term "instruction" in subs. (3)(*a*) indicating the lower level. The idea of a sliding scale is simply that s. 23 guarantees whatever type and level of rights and services is appropriate in order to provide minority language instruction for the particular number of students involved.

[48] The sliding scale approach can be contrasted with that which views s. 23 as only encompassing two rights — one with respect to instruction and one with respect to facilities — each providing a certain level of services appropriate for one of two numerical thresholds. On this interpretation of s. 23, which could be called the "separate rights" approach, a specified number of s. 23 students would trigger a particular level of instruction, while a greater, specified number of students would require, in addition, a particular level of minority language educational facilities. Where the number of students fell between the two threshold numbers, only the lower level of instruction would be required.

[49] The sliding scale approach is preferable to the separate rights approach, not only because it accords with the text of s. 23, but also because it is consistent with the purpose of s. 23. The sliding scale approach ensures that the minority group receives the full amount of protection that its numbers warrant. Under the separate rights approach, if it were accepted, for example, that "X" number of students ensured a right to full management and control, then presumable "X — 1" students would not bring about any rights to management and control or even to a school building. Given the variety of possible means of fulfilling the purpose of s. 23, such a result is unacceptable. Moreover, the separate rights approach places parties like the appellants in the paradoxical position of forwarding an argument which, if accepted, might ultimately harm the overall position of minority language students in Canada. If, for instance, the appellants succeeded in persuading this court that s. 23 mandates a completely separate school board — as opposed to some sort of representation on an existing board — then other groups of s. 23 parents with slightly fewer numbers might find themselves without a right to *any* degree of management and control — even though their numbers might justify granting them some degree of management and control

[…]

(4) Management and Control — The Text of s. 23(3)(b)

[56] In my view, the words of s. 23(3)(b) are consistent with and supportive of the conclusion that s. 23 mandates, where the numbers warrant, a measure of management and control. Consider, first, the words of subs. (3)(b) in the context of the entire section. Instruction must take place somewhere and accordingly the right to "instruction" includes an implicit right to be instructed in facilities. If the term "minority language educational facilities" is not viewed as encompassing a degree of management and control, then there would not appear to be any purpose in including it in s. 23. This common sense conclusion militates against interpreting "facilities" as a reference to physical structures. Indeed, once the sliding scale approach is accepted, it becomes unnecessary to focus too intently upon the word "facilities". Rather, the text of s. 23 supports viewing the entire term "minority language educational facilities" as setting out an upper level of management and control.

[…]

(5) Management and Control — The Purpose of s. 23

[60] The foregoing textual analysis of s. 23(3)(b) is strongly supported by a consideration of the overall purpose of s. 23. That purpose, as discussed earlier, is to preserve and promote minority language and culture throughout Canada. In my view, it is essential, in order to further this purpose, that, where the numbers warrant, minority language parents possess a measure of management and control over the educational facilities in which their children are taught. Such management and control is vital to ensure that their language and culture flourish. It is necessary because a variety of management issues in education, e.g., curricula, hiring, expenditures, can affect linguistic and cultural concerns. I think it incontrovertible that the health and survival of the minority language and culture can be affected in subtle but important ways by decisions relating to these issues. To give but one example, most decisions pertaining to curricula clearly have an influence on the language and culture of the minority students.

[61] Furthermore, as the historical context in which s. 23 was enacted suggests, minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority. In commenting on various setbacks experienced by the francophone minority in Ontario, the Court of Appeal of that province noted that "[l]ack of meaningful participation in management and control of local school boards by the francophone minority made these events possible": *Ref re Educ. Act of Ont.*, at p. 531.

A similar observation was made by the Prince Edward Island Court of Appeal in *Ref. re Minority Language Educ. Rights (P.E.I.)*, *supra*, at p. 259:

> It would be foolhardy to assume that Parliament intended to ... leave the sole control of the program development and delivery with the English majority. If such were the case, a majority language group could soon wreak havoc upon the rights of the minority and could soon render such a right worthless.

I agree with the sentiments expressed in these statements. If s. 23 is to remedy past injustices and ensure that they are not repeated in the future, it is important that minority language groups have a measure of control over the minority language facilities and instruction.

[…]

(8) The "Numbers Warrant" Provision

[95] What is being considered when a court addresses the "numbers warrant" question — existing demand, potential demand, or something else? The appellants' position was that the existing demand for francophone services is not a reliable indicator of demand because the demand for any service will to some extent follow the provision of that service. The respondent, on the other hand, argued that the courts cannot simply use the total number of potential s. 23 students as a gauge, since it is highly unlikely that all of these students will take advantage of a proposed service. There is some force to both of these arguments; accordingly, the approach I have taken mediates between the concerns which they raise. In my view, the relevant figure for s. 23 purposes is the number of persons who will eventually take advantage of the contemplated program or facility. It will normally be impossible to know this figure exactly, yet it can be roughly estimated by considering the parameters within which it must fall — the known demand for the service and the total number of persons who potentially could take advantage of the service.

[96] The numbers warrant provision requires, in general, that two factors be taken into account in determining what s. 23 demands: (1) the services appropriate, in pedagogical terms, for the numbers of students involved; and (2) the cost of the contemplated services. The first, pedagogical requirements, recognizes that a threshold number of students is required before certain programs or facilities can operate effectively. There is no point, for example, in having a school for only ten students in an urban centre. The students would be deprived of the numerous benefits which can only be achieved through studying and interacting with larger numbers of students. The welfare of the students, and thus indirectly the purposes of s. 23, demands that programs and facilities which are inappropriate for the numbers of students involved should not be required.

[97] Cost, the second factor, is not usually explicitly taken into account in determining whether or not an individual is to be accorded a right under the *Charter*. In the case of s. 23, however, such a consideration is mandated. Section 23 does not, like some other provisions, create an absolute right. Rather, it grants a right which must be subject to financial constraints, for it is financially impractical to accord to every group of minority language students, no matter how small, the same services which a large group of s. 23 students is accorded. I note, however, that in most cases pedagogical requirements will prevent the imposition of unrealistic financial demands upon the state. Moreover, the remedial nature of s. 23 suggests that pedagogical considerations will have more weight than financial requirements in determining whether numbers warrant.

Northwest Territories (Attorney General) v. Association des parents ayants droit de Yellowknife, 2015 NWTCA 2 (CanLII)

[79] Section 23 provides rights to “primary and secondary school instruction”. The respondents argued that this included pre-school daycare and pre-kindergarten, because it was closely connected to the recruitment of students for the minority language school. The trial judge rejected this argument (reasons, paras. 758-9), and the respondents have cross-appealed that finding.

[80] Exactly what is covered by “primary education” might evolve from time to time. If the government legislated pre-kindergarten (or part-time kindergarten) as part of primary education for the majority language schools, it is likely that similar levels of education would be protected under s. 23 for the

minority language schools. The superior courts would be the ultimate arbiter should any dispute exist, but so long as the decisions were made in good faith, and were within a constitutionally acceptable meaning of "primary", judicial intervention would not be warranted. That issue does not arise here, because the appellants do not dispute that the present kindergarten to grade 12 schooling offered at École Allain St-Cyr is protected.

[81] Section 23 only covers "primary and secondary" education. It specifically does not cover pre-primary or post-secondary education. There is no basis upon which the section can be interpreted to include pre-school or daycare; the drafters of the *Charter* clearly excluded those rights. The respondents argue that pre-school francization is a very important component in limiting assimilation. That may be so, but from a legal perspective it simply amounts to arguing that s. 23 should have covered more than it does.

[…]

[85] As a general rule, the s. 23 rights holders are required to marshal their resources. Governments have a constitutional obligation to provide minority language facilities at public expense where numbers warrant. However, when that infrastructure is provided, it must be used for that purpose; the school boards cannot reallocate those resources to other uses, and then claim that they are receiving inadequate funding or facilities. Thus, the respondents cannot reallocate space to community or preschool uses, and then argue that the remaining space is inadequate.

[…]

[87] The appellants' uncontradicted evidence was that the capacity of the school is 160, with an enrollment of 110. The trial judge never challenged that figure, but concluded that "ÉASC [École Allain St-Cyr] currently has insufficient space" (reasons, para. 695). The trial judge reasoned that "the building housing ÉASC is intended for both educational and community use", and that the appellants' calculation of capacity ignored the "important community purpose served by the building that houses the school" (reasons, paras. 683, 687). The trial judge held that it was logical to exclude some of the available space from the calculations because it served an "important community purpose" (reasons, para. 686). This analysis reflects an error of law. Section 23 only protects facilities for minority language education. It does not enable the court to order the government to provide facilities for other community purposes, even if those other community purposes have some relationship to promotion of the minority language community. The building may well serve important community purposes, but they are not purposes protected by s. 23, and they cannot drive a s. 23 remedy. The respondents are not entitled to divert resources provided for minority language education to community purposes, and then claim that the educational facilities are inadequate. The Court has no jurisdiction to order the government to provide community facilities, no matter how important they may be.

[…]

[101] It is also well established that the "numbers warrant" standard is not just a threshold test. It is not just a test that must be met to determine if a minority language school must be established. The "numbers warrant" standard is ever-speaking, and it must be applied at every level in determining if particular facilities or programs are "warranted": *Mahe* at p. 366. In *Arsenault-Cameron* the test was primarily used to determine if a school was warranted. In this appeal, the test is primarily being used to determine if the particular facilities claimed by the respondents are warranted. Merely because the "numbers warrant" the establishment of École Allain St-Cyr does not mean that all of the requested facilities are also warranted.

[…]

[121] The text of s. 23(3) clearly does not provide an absolute entitlement to separate minority language schools or separate facilities. That section provides the right to "instruction" in the minority language where "numbers warrant". The right particularly "includes, where the number of those children so warrants, the right to have them receive that instruction <u>in minority language educational facilities</u> provided out of public funds." As was pointed out in *Mahe* at p. 366, this envisions a sliding scale where

separate facilities will only be constitutionally required where the community is large enough to warrant them.

[122] The respondents appear to take the position that sharing of space with the majority language schools is constitutionally unacceptable. That cannot be the proper interpretation of s. 23. It would mean that the minority language schools are entitled to the construction of separate schools, and specialized facilities of every type found in the majority language schools, or else the minority language schools would simply have to “do without” those facilities. That cannot have been the intention of the drafters of the *Charter*, and it is inconsistent with the wording of s. 23(3)(b) and the sliding scale test.

[…]

[130] Section 23 only mandates such separate facilities as are warranted by the numbers, based on the sliding scale test in *Mahe*. The *Charter* does not guarantee freestanding minority language schools or facilities, unless the “numbers warrant”. Even though the sharing of space with the majority language schools is not ideal, it does not follow that the respondents have a constitutional right to completely freestanding facilities. In Yellowknife the appellants have provided a freestanding Francophone school, to act as the anchor of the minority language education program. It is not per se constitutionally unacceptable to provide some collateral facilities in neighbouring schools. It does not follow, however, that sharing of neighbouring facilities is ipso facto an acceptable solution. Each situation must be determined on its facts, having regard to all the components of the sliding scale analysis: the number of students, the cost of providing separate facilities, the practicality of sharing facilities, the pedagogical needs of the students, the homogeneity of the program, etc.

[…]

[171] […] The wording of s. 23 creates rights in specific categories of parents, allowing them to send their children to the minority language school, and remedies must be directed to them: *Doucet-Boudreau* at paras. 55, 58. The generic remedy to create more daycare spaces is not tied to any *Charter* breach against any rights holder. No potential rights holder can show that but for extra space in the daycare, their children would have been able to attend the minority language primary education program (*supra*, para. 164). Since daycare is not protected by s. 23, the absence of daycare spaces could not possibly be a breach of the *Charter*. Section 23 does not place any obligation on the government to create more s. 23 rights holders, or persons interested in a minority language education, by creating more daycare spaces or other linguistic opportunities. The trial reason’s justification of this remedy as promoting “recruitment and francization” (reasons, para. 787) represents an error of law, because the *Charter* does not protect such rights. Institutions, programs and facilities established to create more s. 23 rights holders are not part of a constitutionally genuine educational pathway: *Nguyen v Quebec* at para. 36.

Reference re School Act, 1988 CanLII 1363 (PE SCAD)

[60] Section 50(3) of the *School Act* is to be contrasted with s. 23 of the *Charter* which uses the words "wherever in the province" when referring to those who are entitled to instructional services or facilities, therefore only using the geographical boundaries of the province itself.

[61] The intervenors submitted that, because the regional school boards' duty was only to provide French language instructions *within their respective boundaries*, that constituted an inconsistency with the Charter which requires the provision of minority language instructions *wherever in the province* certain requirements are met. Because there is no provision that requires a school board to reach an agreement with a neighbouring school board to provide educational instruction, the intervenor submitted that any provision restricting a school board to its own territorial boundaries created an inconsistency. In other words, the right given by s. 23(3)(a) of the Charter was only qualified by "numbers" and not by geographical boundaries.

[62] The *Ontario Reference* case reached the conclusion that strict geographical boundaries of school boards have no bearing on *Charter* obligations to provide French language instruction wherever in the province numbers warrant.

[63] The terminology "wherever in the province" when used in conjunction with the "numbers warrant" test will limit a particular area within the province in which minority language education will have to be provided. Such a particular area may cross over the present school unit boundaries and in that sense the strict geographical limitations imposed by the school units are inconsistent with the *Charter*.

[64] Although in that context such strict geographical boundaries of the school units are inconsistent with the *Charter*, it does not follow that, in an extreme situation, a group of children assembled from throughout the whole province, whose parents wish them to be instructed in the minority language, would necessarily constitute a number that would warrant the provision of minority language education. This is so because the words "wherever" and "warrant" indicate a limitation both as to location and number on the provision of educational rights. The *Charter* only guarantees minority language instruction wherever in the province "numbers warrant".

> (3) *Request from a group of parents*. The requirement in s. 50(3) of the *School Act* that the duty imposed upon a school board to provide French language instuctions if a *request* is received from a *group* of parents was argued to be a further inconsistency with the *Charter* for two reasons.

[…]

[68] The provision in the *Charter* that minority languge instruction *shall be given* in certain instances would be a worthless gesture if the people to whom it might apply have not been informed of their right to receive it. There is no inconsistency with the *Charter* if the *School Act* requires that a request be made for instruction in French provided adequate notice has first been given of the necessity for the request. It would be illogical to provide minority language instructions without some evidence of demand. It would be illogical and imprudent to provide a teacher, a classroom, equipment or a school facility without knowing if there existed a demand for the services offered. The cost of education is very high and it is never funded to the extent demanded by teachers or parents. To waste money on an insufficient demand would do an injustice to the whole school system.

[…]

[100] Section 23 of the *Charter* does not demand that all of the eduational opportunities available to students in a large facility, including such things as libraries, laboratories, shops and similar amenities, in the case of an institution populated principally by students of the majority linguistic group, must necessarily be equally available in an educational facility entirely populated by a minimum number of students of the minority linguistic group.

[101] In addition, the present requirement in the regulations, s. 5.32(2), that the school board provide minority language education for not less than three years, if the number of children enjoying such education falls below the required number, is not sufficient.

[102] It cannot be said at this time that s. 5.31 of the regulations is inconsistent with the *Charter*. There was no evidence presented to establish that 25 children within three consecutive grade levels is unreasonable in providing minority language education.

[…]

[107] In other words, if the number of children are insufficient to warrant the provision of minority language instruction, then it would be acceptable for a school board to provide alternatives similar to what is set out in s. 5.32(3). It is correct to say that immersion programmes are not an authorized alternative to French language instruction under s. 23; however, if the rights given by s. 23 do not apply, then the

provision of an alternative French language programme is an acceptable alternative if the person does not wish to participate in the English programme.

[…]

[114] In our opinion, the right of the French language minority to participate in French language programme development and delivery is implicit in s. 23 of the *Charter*. Section 23 of the *Charter*, under certain conditions, gives parents the right to have their children receive education in the language of the linguistic minority. Depending on numbers, a child may receive minority language instructions (s. 23(3)(a)) and, depending on other numbers, may receive the instruction in minority language educational facilities (s. 23(3)(b)).

[115] Overall, by s. 23, the linguistic minority become entitled to a minority language education. Parliament having been so explicit in setting forth this right, it is inconceivable that it would not have meant to include the right of the linguistic minority to participate in the programme development and delivery of such a right. It would be foolhardy to assume that Parliament intended to give the French linguistic minority the right to receive their instruction in French but leave the sole control of the programme development and delivery with the English majority. If such were the case, a majority language group could soon wreak havoc upon the rights of the minority and could soon render such a right worthless. The words "minority language instruction" in s. 23(3)(a) must imply the right to participate in programme development and delivery thereof.

[…]

[128] There can be no question that where s. 23 rights become effective the quality of education to be provided to the minority should be equal to that provided to the majority, taking into consideration the varying degrees of education received by the majority.

[129] It is obvious from reading the *School Act* and regulations that no special provision has been made for the French language minority to actively participate in a dominantly English environment. There are no guarantees set forth for the French minority. They must depend on the goodwill of the English majority. Such a system cannot be said to be in compliance with s. 23.

[130] In conclusion the *School Act* and the regulations are inconsistent with the *Charter* as they do not recognize the right of the French languge minority to participate in French language programme development and its delivery.

Reference re Education Act of Ontario and Minority Language Education Rights, 1984 CanLII 1832 (ON CA)

[84] The two rights conferred by s. 23 on citizens who qualify to have their children receive minority language instruction are as follows:

(1) The parents who qualify under s. 23 have the right to have their children receive publicly funded primary and secondary school instruction in the minority language subject only to the requirement that the number of children of such citizens must warrant the provision of minority language instruction.

(2) The same parents who qualify in s. 23 have the right, where the numbers warrant, to have their children receive that instruction in minority language facilities provided out of public funds.

[85] Clearly, both rights are made subject to the requirement that numbers must warrant their provision.

[…]

[94] The discretion conferred on school boards under s. 261(4) to provide French language secondary schools "where practicable" is inconsistent with the *Charter* provisions. Section 23 indicates that French

language schools must be provided wherever in the province the number of pupils qualifying within its provisions are sufficient to warrant the provision of that instruction and those facilities out of public funds.

[…]

[101] If any number is to be fixed as the minimum before French language instruction is provided, that number should be justified by the legislature. It is uniquely qualified to demonstrate and provide the substantiation for the fixed number as being the appropriate one for the various districts in the province. To fix, without any justification, an arbitrary figure such as that of 25 and 20 set out by the *Education Act* contravenes the provisions of s. 23 of the *Charter*.

[102] It must be remembered that s. 23 imposes a duty upon the legislature to provide minority language instruction "*wherever* in the province the number of children of citizens who have such a right is sufficient" (emphasis added). Since the numbers test should be applied on a local basis throughout the province, any arbitrary limitation applied across the province without any qualification or exemption may be difficult to justify. The numbers fixed will not always be immutable. They may vary with geographic regions and the type of instruction to be provided. It is interesting to note that in 1863, it was determined that wherever five families could be assembled, separate school boards and schools could be established: see *Scott Act*, 1863.

[…]

[122] Thus, it would appear that where educational facilities are to be provided to assure the realization of the rights accorded by s. 23(3)(b), the facilities to be provided must appertain to or be those of the linguistic minority. Both the English and the French versions of s. 23(3)(b) must be read together and, in our opinion, they accord in their meaning to support that interpretation.

[…]

[151] The judiciary is not the sole guardian of the constitutional rights of Canadians. Parliament and the provincial Legislatures are equally responsible to ensure that the rights conferred by the *Charter* are upheld. Legislative action in the important and complex field of education is much to be preferred to judicial intervention. Minority linguistic rights should be established by general legislation assuring equal and just treatment to all rather than by litigation.

[…]

[156] On the wording of s. 23, the right of citizens to have their children receive minority language instruction "applies wherever in the province the number of children ... is sufficient". No distinction is drawn between denominational and non-denominational education, and the section, on its face, applies to both. It is to be noted also that the right applies whenever the number of children is sufficient to warrant the provision of minority language instruction or educational facilities "out of public funds". Since both elementary schools, including separate schools to Grade X, and secondary schools are and have been publicly funded in Ontario, the use of the phrase "out of public funds" is further indication of a legislative intent that s. 23 apply equally to both the separate and public school systems of education.

[157] Is there anything in s. 93 to prevent s. 23 from being applied with equal force to denominational education? In our opinion, there is not. Language of instruction, as the cases establish, is a matter of linguistic and not denominational concern; its choice has not been judged a right or privilege within the purview of s. 93. Quite apart from the *Charter*, the province would be entitled, on the basis of *Mackell*, supra, to enact laws according a right to minority language instruction in denominational schools without violation of s. 93. By the same token, the conferral of such a right by force of the *Charter* does not constitute an abrogation or derogation of any of the constitutionally protected rights or privileges.

Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764 (CanLII)

[30] Section 23 requires governments to provide the linguistic minority with minority language educational facilities where the numbers so warrant. Since the seminal case of *Mahe v. Alberta*, [1990] 1 S.C.R. 342, it has been clear that the scope of appropriate facilities to which the minority is entitled falls on a sliding scale depending on the number of children likely to participate in the programme.

[31] This case explores, for the first time, the full range of that sliding scale. It addresses what facilities are warranted when there are barely enough students to justify offering minority language instruction. Its reach extends through the centre of the sliding scale to consider when the Province must expend public funds to construct new facilities for a modest and dispersed Francophone population. It reaches to the upper echelons of the sliding scale to investigate what is meant by the guarantee of substantively equivalent minority language educational facilities.

[32] At its core, this case is also about jurisdiction. Section 23 requires the Province to cede its broad and plenary jurisdiction over education to the minority in limited circumstances to allow the minority to exercise a measure of control over matters going to the minority language and culture. This case explores the boundaries of the minority's right to management and control. It asks when the Province may question the minority's decisions and continue to exert its control over the education system. It examines when the Province must do more than cede jurisdiction, and act as an advocate for the concerns of the linguistic minority.

[…]

[373] To ensure that schools can fulfill their role enhancing the Vitality for British Columbia's minority language community, s. 23 guarantees the minority language community a degree of management and control over minority language educational facilities. Additionally, the Province has a positive duty to ensure that minority language educational facilities are provided out of public funds where the numbers so warrant. Those rights temper the Province's broad, plenary jurisdiction over education.

[…]

[377] The Province's jurisdiction pursuant to s. 93 is limited by both the right to minority language education in s. 23 of the *Charter* and the rights to denominational schools in s. 93(1) of the *Constitution Act, 1867*. There are interesting parallels between the rights given to the linguistic minority in s. 23 and the rights given to denominational schools in s. 93(1). In *Adler v. Ontario*, 1996 CanLII 148 (SCC), [1996] 3 S.C.R. 609, a majority of the Court drew an analogy between the rights conferred on denominational schools by s. 93 and those guaranteed in s. 23. The majority commented that both were founded in political compromise, and granted special status to particular classes of people for the purpose of education (at para. 31).

[378] Further, the rights to denominational schools limit the Province's jurisdiction over education in a similar manner to s. 23. Denominational schools have a right to control the denominational aspects of their education programmes and the right to a measure of equality in the education services they are entitled to: *Ontario Catholic Teachers* at para. 60 citing *Adler* at para. 45. Section 23 affords the linguistic minority similar rights: a right to management and control over matters pertaining to the language and culture of the linguistic minority, and a positive right to facilities on the basis of equality to the majority.

[…]

[387] A school board's right to management and control gives it a measure of control over those aspects of educational facilities that go to the core of its mandate: the minority language and culture. In *Mahe*, the Court wrote that, in order to further the purpose of s. 23, where the numbers warrant the minority must "possess a measure of management and control over the educational facilities in which their children are taught" (at 371-372). What is essential, the Chief Justice wrote, "is that the minority language group have

control over those aspects of education which pertain to or have an effect upon their language and culture" (at 375). In suggesting that the minority need not have control over all aspects of the minority language education, he commented that the minority should have "exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns" (at 375-376).

[…]

[392] To summarize, to ensure that the minority language and culture flourish, and past injustices are remedied, where the numbers so warrant, the minority community is entitled to exclusive control over aspects of minority language education that pertain to or have an impact on language and culture. This is necessary because the majority cannot be expected to understand and appreciate how certain practices might bear on the minority's language and culture.

[393] As I see it, the right to management and control is limited to matters going to the minority's linguistic and cultural concerns. Given the remedial nature of s. 23, context will be important: what matters pertain to the language and culture will depend on the unique circumstances of the minority group in question.

[394] Generally, some factors identified in *Mahe* will often tend to relate to language and culture: expenditures of funds for minority language instruction and facilities, the administration of those facilities, establishment of new programmes, recruiting and assigning teachers and personnel, and entering into agreements for education services for minority language pupils.

[395] Other times, the context and need for remediation may bring other factors within the ambit of language and culture. For example, in Arsenault-Cameron, the geographical distribution and concentration of a minority language community brought decisions about catchment areas, transportation and the location of schools within the ambit of language and culture. This was necessary to ensure that the language and culture of the particular community would flourish.

[396] Matters that are outside the scope of language and culture (for example, the right to tax) will fall outside the minority's right to management and control. They remain within the Province's plenary jurisdiction over education pursuant to s. 93.

[…]

[405] Taking these principles together, I find that where a matter falls within the minority's exclusive right to management and control over matters going to language and culture, the minority school board is entitled to some deference. As suggested in *Arsenault-Cameron*, to the extent that the Province interferes with the minority's management and control over matters going to language and culture, those actions or regulations will be invalid.

[406] On the other hand, the Province is entitled to develop institutional structures and regulations governing the minority's right to management and control. The linguistic minority is not entitled to any particular design of the education system. The Province continues to enjoy the jurisdiction to alter the education system pursuant to its plenary power over education. So long as those structures do not interfere with the minority's linguistic and cultural concerns, the minority is required to comply with those regulations, and must exercise their right of management and control consistently with them.

[…]

[444] British Columbia enjoys broad, plenary power over education pursuant to s. 93 of the *Constitution Act, 1867*. That jurisdiction is limited by s. 23 in two ways.

[445] Section 23 places a unique positive duty on governments to ensure that appropriate minority language educational facilities are made available where the numbers so warrant. To that end, it must make expenditures out of public funds and to act promptly to prevent assimilation. At the same time, the

duty on government is limited by the words of s. 23, which set a baseline requirement of services that the government must provide. While it is open to Government to exceed those standards, it is not required to do so.

[446] Government's jurisdiction is also limited by the requirement that it cede to the minority language community management and control over those aspects of the education system that concern the minority language and culture, where the numbers so warrant. What, exactly, goes to the linguistic and cultural aspects of minority language and culture will depend on the context: whether the matter in questions (sic) relates to the pursuit of the remedial objectives of s. 23. If the CSF is acting within that jurisdiction, s. 23 requires that the Province not interfere.

[447] The Province does, however, continue to have a legitimate interest in crafting an appropriate, constitutionally-compliant framework within which the minority must exercise both its statutory and constitutional duties. The minority is not entitled to any particular education system, and must operate within constitutionally compliant structures set by Government: those structures that do not trench on its right to management and control or fail to provide the minority with the educational facilities to which it is entitled.

[…]

[473] In my view, the relevant number for the purpose of s. 23 should include an allowance for reasonably foreseeable future growth, as established by expert evidence and evidence of the broader context. Whether the number should also include a view to prospective growth farther into the future depends entirely on the evidence that the parties can marshal. The evidence from experts and lay witnesses in this case suggested that enrolment projections tend to be reasonably accurate in the short term, and less accurate in the long term. As the parties look farther into the future, they are less able to prove on a balance of probabilities what the numbers will be.

[474] As a result, in most cases, the numbers will be those that are reasonably foreseeable based on demographic population projections and the broader context. However, if there is some evidence to prove that the number is likely to increase far into the future, then it may lead a court to conclude that a school should be built with a view to future growth. On the other hand, if the projections are purely speculative and far into the future, then there is no evidence to suggest that the future numbers will warrant any particular facilities.

[475] Given the prospective nature of the numbers warrant question, in my view there is also a temporal aspect to the question. The evidence may show that the number of children will grow gradually. When a programme first begins, it may only have a few children enrolled. Ten years into the future, it may have dozens more. The numbers will warrant different levels of instruction and different facilities depending on the programme's stage of development.

[476] Likewise, very little has been said about the geographic boundaries within which the numbers must reside. In *Mahe*, the Court stated at 386 that since s. 23 speaks "wherever in the province" the numbers warrant facilities, "the calculation of the relevant numbers is not restricted to existing school boundaries (although the redrawing of school boundaries will often involve a certain cost which must be taken into account)."

[477] In *Arsenault-Cameron*, the Court observed that "the determination of the appropriate area … is something that has to be decided in each case with due consideration to the numbers involved as well as all of the important factors specific to the case" (at para. 57). I also note that in *Arsenault-Cameron*, the context was such that the minority board was owed some deference with respect to its decisions concerning catchment area boundaries, as that issue related to the language and culture of the minority and was within the minority's exclusive jurisdiction.

[478] There is no question that when assessing numbers, the geographic distribution of the programme's target population must be taken into account. The extent to which it is relevant will once again depend on

the context. In many instances, a minority language community might be concentrated within a clear geographic area. In those instances, the geographic boundaries for the purposes of the numbers will be straightforward. However, in other instances, a catchment area may be drawn so large that it encompasses some children who could not reasonably be expected to take advantage of a programme or service. In such an instance, the Court must take that into account when determining what number of students within the range would reasonably be expected to take advantage of a programme.

[…]

[2124] Before the minority reaches the equivalence threshold, the minority is not entitled to fully equivalent programmes, amenities and services. That would not be practical. Instead, the minority is entitled to proportionate programmes, amenities and services. When performing the proportionality analysis, courts may consider per capita space, but must be cautious not to unduly emphasize such factors lest they fall into the trap of a formal equivalence analysis. The proportionality analysis should mirror the perspective used in the equivalence analysis: it should adopt a substantive equivalence analysis, from the perspective of the reasonable rightsholder parent, while making a local comparison of the global educational experience. Costs and practicalities are bound up with this question, as the government could meet the appropriate entitlement standard by funding any range of amenities and services.

[…]

[2126] After selecting the appropriate comparator schools, I will compare the sizes of majority and minority schools and consider the overall context to situate the number of children on the sliding scale and determine the standard of entitlement: instruction, equivalence or something less than equivalence, but proportionate.

[…]

[5589] The Province retains some of its jurisdiction over the education provided to the linguistic minority pursuant to s. 93 of the *Constitution Act, 1867*. Matters that are outside the scope of language and culture (for example, the right to tax) fall outside the minority's right to management and control. Additionally, the Minister has a residual role to play developing institutional structures, regulations and policies to deal with the Province's linguistic dynamics (*Arsenault-Cameron* at para. 43). In particular, the Minister may fix "legitimate parameters of the exercise of the right of management by the Board", and enforce provincial norms (at para. 58). The linguistic minority is not entitled to any particular design of the education system. British Columbia continues to enjoy the jurisdiction to alter educational institutions of the education system pursuant to its plenary power over education. So long as those structures do not interfere with the minority's linguistic and cultural concerns, the minority is required to comply with those regulations, and must exercise its right of management and control consistently with them.

[…]

XLIV. Conclusion

[6834] To summarize, I order the following relief. With respect to the Community Claims, I declare as follows:

a) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish a secondary school programme (for children age 14-17) in Whistler with heterogeneous instructional space for about 30 students (or such other numbers and facilities as the parties agree to).

b) Rightsholders under s. 23 of the *Charter* living in Squamish are entitled to have their elementary-age children (age 5-13) receive minority language education in homogeneous facilities with space for

135 students (or such other numbers as the parties agree to) that provide them with a global educational experience that is proportionate to the experience at comparator elementary schools.

c) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish an elementary school programme in Squamish (for children age 5-13) with homogeneous instructional space offering a global educational experience proportionate to the experience at comparator elementary schools for about 135 students (or such other numbers and facilities as the parties agree to).

d) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish a secondary school programme in Squamish (for children age 14-17) with heterogeneous instructional space for about 35 secondary students (or such other numbers and facilities as the parties agree to).

e) Rightsholders under s. 23 of the *Charter* living in the catchment area of École Élémentaire du Pacifique are entitled to have their elementary-age children (age 5-13) receive minority language education in homogeneous facilities with space for 90 children (or such other numbers as the parties agree to) that provide them with a global educational experience that is equivalent to that in smaller elementary schools in SD46-Sunshine Coast, and proportionate to the facilities in larger comparator schools.

f) The school facility presently housing École Élémentaire du Pacifique does not allow the CSF to offer a global educational experience that is equivalent to that in smaller elementary schools in SD46-Sunshine Coast, and proportionate to the facilities in larger comparator schools.

g) Rightsholders under s. 23 of the *Charter* living in the catchment area of École Élémentaire Entre-lacs are entitled to have their elementary/middle school age children (age 5-14) receive minority language education in homogeneous facilities with space for 175 students (or such other numbers as the parties agree to) that provide them with a global educational experience that is equivalent to that in comparator elementary schools in Penticton, Summerland and Okanagan Falls, and proportionate to the educational experience in comparator middle schools.

h) The school facility presently housing École Élémentaire Entre-lacs does not allow the CSF to offer a global educational experience that is equivalent to that in comparator elementary schools and proportionate to the experience in comparator middle schools.

i) Rightsholders under s. 23 of the *Charter* living in Vancouver (West) are entitled to have their elementary-age children (age 5-12) receive minority language education in homogeneous facilities with space for 500 elementary-age children (or such other numbers as the parties agree to) that provide them with a global educational experience that is equivalent to that in comparator elementary schools.

j) The school facility presently housing École Élémentaire Rose-des-Vents does not allow the CSF to offer a global educational experience that is equivalent to that in comparator elementary schools.

k) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish an elementary programme (for children age 5-12) in Northeast Vancouver with heterogeneous instructional space for about 25 to 45 students in the short term and homogeneous facilities with space for up to 270 students in the long term (or such other numbers as the parties agree to).

l) Rightsholders under s. 23 of the *Charter* living in the Central Fraser Valley (Abbotsford, Mission and Chilliwack) are entitled to have their secondary-age children (age 13-17) receive a minority language education in facilities that provide them with space for 29 to 40 students in the short term and up to 120 students in the long term (or such other numbers as the parties agree to) that provide them with a global educational experience that is proportionate to the educational experience offered at majority-language secondary schools in the Fraser Valley.

m) Rightsholders under s. 23 of the *Charter* living in Abbotsford are entitled to have their elementary-age children (age 5-12) receive a minority language education in facilities with space for 10 to 30 students in the short term and 85 students in the long term (or such other numbers as the parties agree to) that provide them with a global educational experience that is proportionate to the educational experience offered at majority-language elementary schools in SD34-Abbotsford.

n) The lack of minority language school facilities in Abbotsford prevents the CSF from offering a global educational experience that is proportionate to the educational experience offered at majority-language secondary schools in the Fraser Valley and at elementary schools in SD34-Abbotsford.

o) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish an elementary programme in Burnaby with heterogeneous instructional space for about 15 to 40 students in the short term and homogeneous instructional space for up to 175 students in the long term (or such other numbers and facilities as the parties agree to).

[6835] With respect to the breaches concerning the Ministry's capital planning framework, I declare as follows:

a) Section 166.25(9) of the *School Act* is a valid exercise of the Province's constitutional jurisdiction over education.

b) The Ministry's policy freezing CSF lease funding at 2013/14 levels is contrary to s. 23 of the *Charter*, and therefore of no force and effect.

c) The Ministry's policy requiring the CSF to negotiate leases without Ministry assistance unjustifiably infringes s. 23 of the *Charter*.

d) The Ministry's policies of not funding Expansion Projects and evaluating the CSF's requests for capital projects against those of Majority School Boards with greater capital resources than the CSF unjustifiably infringes s. 23 of the *Charter*.

e) The Ministry's policy requiring the CSF to identify and negotiate for site acquisitions without Ministry assistance unjustifiably infringes s. 23 of the *Charter*.

f) The Ministry's failure to collect information regarding the potential demand for minority language education in British Columbia, including the numbers of and geographical distribution of children who could enrol in a school of the CSF, constitutes an unjustifiable violation of s. 23 of the *Charter*.

[6836] To ensure that the various declarations I make are effective I also make the following orders:

a) The Province must exercise its legal powers to create a long-term, rolling Capital Envelope to provide the CSF with secure funding to address its need for capital projects across the Province.

b) The Province and/or the Ministry must craft a policy or enact legislation to either resolve or ensure the Ministry's active participation in the resolution of issues concerning the CSF's need for space and the types of disputes that arise between the CSF and majority school boards: site identification; implementation and operation of the transfer of assets; the co-management of shared assets; lease negotiations of any facilities that are not transferred; and any other dispute that may arise between the CSF and a majority school boards.

[6837] I additionally order the defendants to pay to the CSF $6 million in *Charter* damages over 10 years to compensate it for the chronic underfunding of the CSF's transportation system between 2002/03 and 2011/12.

N.B. – This decision is currently under appeal before the British Columbia Court of Appeal. Due to the length of this judgment, the conclusions are reproduced without the supporting reasoning found elsewhere in the judgment.

Assn. des parents francophones de la Colombie Britannique v. British Columbia, 1998 CanLII 3969 (BC SC)

[45] This case is a microcosm of the larger Canadian constitutional question. It puts to the test the limits of the majority's ability and willingness to accommodate the concept of official bilingualism. Most Canadians reject formal equality and are quick to grasp the concept of differential treatment in the context of disability. They understand the need to provide wheelchair access, to lower buttons on elevators, to ramp curbs and provide a host of other accommodations to achieve, as near as possible, an equal outcome. In the same fashion, differential treatment and accommodation are central to the preservation of language and culture. It is clear from the evidence that if language and culture are to be preserved, segregation of Francophone students – and not assimilation – must be the goal. Thus, stand alone schools are preferred where numbers warrant. Where numbers dictate a shared facility, every effort must be made to provide sufficient management and control of its program to the C.S.F. [Conseil scolaire francophone]

[46] Ownership of a facility, in whole or in part, is not the only way to provide for management and control of a school program. It is extremely difficult to see how the use of 25 per cent of a facility and the consequent transfer of 25 per cent ownership in the land and physical structure would do anything to ensure better management and control of a school program.

[47] For these reasons, I have concluded that failure to provide for ownership of school property, in whole or in part, does not mean the legislation is flawed. A precise legislative scheme need not provide for the transfer of schools or the joint ownership of schools. In the end, it may be that flexibility on the issue of ownership would serve the parties in a better way.

[…]

[52] What is required is a process or mechanism that will insure both a successful start up and the long term stability for Francophone education programs. Such a mechanism is absent from the current legislation. Instead, Francophone parents are once again asked to trust government officials who are only now responding to a constitutional obligation under the *Charter*. Indeed, a decade and a half and two court cases later, Francophone parents continually struggle to achieve the promise of s. 23. I have no doubt that without some improvement to the current legislation, further litigation, most likely involving individual school boards, the C.S.F., and the provincial government will continue to form part of the historical record.

L'Association des parents francophones de la Colombie-Britannique, la Fédération des francophones de la Colombie-Britannique v. Woods, 1996 CanLII 1455 (BC SC)

[28] The words of s. 7(1) of the Regulation [*Regulation 475/95*, *The Francophone Education Regulation*] are that "the minister may provide to the Francophone Education Authority a grant." […]

[32] It is the use of the word "may", the discretion by itself, and not the manner in which the discretion is exercised which makes the choice of words inappropriate. I do not assume the minister would exercise his discretion in an unconstitutional manner. The plaintiffs do not complain that he has done so. However they should not have to wait for an inappropriate use of ministerial discretion to challenge a word that in and of itself makes the provision unconstitutional. In my view the use of the word "may" does not meet the constitutional obligation of the Province to provide funding to meet its s. 23 obligations.

[…]

[36] The *School Act*, ss. 114-115, allows a school board to acquire and dispose of land and improvements, in its own name, with ministerial approval. Bearing in mind the need for funding equivalency, it is difficult to see how denying the Authority access to capital funds while allowing such access to the majority can fulfil the constitutional obligation of the Province. In addition, it seem to me that the fact the Authority may only use federal government money for capital expenditure is a clear attempt to shift that responsibility.

[37] The Authority is denied the opportunity to share in funds that might be allocated by the Province for education capital expenses and to that extent I conclude the Province has not met the responsibility imposed upon it by s. 23. That is particularly so when one takes into account the fact that the minority may only lease, unless federal funds are provided, while the majority may purchase as well as lease. It seems to me that this lack of flexibility goes to the heart of management and control. Restricting the measure of management and control of the minority fails to meet the obligation of equivalency and equality mandated by s. 23.

[38] The scheme envisioned by the Regulation is that the Authority would enter into leasing arrangements with the approval of the minister, to meet its accommodation needs: s. 11. The difficulty here lies in the absence of the opportunity to acquire land and improvements in its own name. The fact that it has the ability to enter into leases would not offend s. 23. It is the restriction to that form of tenure which sets it apart.

[…]

[40] […] In the absence of some mechanism to resolve an impasse in negotiations, the Authority is at the mercy of school boards. In my view, that does not afford the authority with the measure of management and control envisioned by s. 23 as explained in *Mahe*. In some respects, it parallels the situation of Edmonton parents who were left, without any protection, to negotiate as best they could with either the Edmonton Roman Catholic Separate School Board or the Edmonton Public School Board.

[…]

[48] In my view the legislature of British Columbia has failed to discharge the obligation imposed by s. 23 of the *Charter*. Section 5 of the *School Act*, which predates *Mahe*, is not a legislative scheme as contemplated by s. 23 and explained in *Mahe* and the *Manitoba Reference*. As was the case in Alberta and Manitoba, the Legislature of British Columbia can no longer delay putting in place an appropriate minority language education scheme.

[49] Apart from what has been said by the Supreme Court of Canada, it is my view that legislation, as opposed to regulation, is the manner in which this constitutional commitment should be met. Language rights are rights of a fundamentally different nature. Their realization may require creative or innovative measures. The burden of ensuring that the obligations imposed by s. 23 is a burden placed on both the government and the legislature of each province. Provincial legislation provides a measure of security beyond a regulatory scheme. Amending a statute is far more onerous than amending a set of regulations. As well, the presentation of legislation is more likely to ensure a better public understanding of this significant Canadian solution for the protection of language and culture, afforded to both French and English speaking Canadians. With debate in the Legislative Assembly comes the opportunity to advance a better understanding of our national heritage and the unique place it holds in the family of nations.

[…]

[53] I believe the court must fashion a remedy that leaves the Legislative Assembly with the freedom it must have to create a comprehensive legislative scheme to meet the obligations imposed upon it by s. 23. […]

Griffin v. Commission scolaire régionale Blainville Deux-Montagnes, 1989 CanLII 5176 (QC SC)

[81] The foregoing judgments do not suggest that the rights granted by s. 23 to children of minority language parents should be interpreted as granting to such parents the right to require that the minority language educational facilities reflect and teach the religious belief of these parents. The right entrenched is that to receive instruction in minority *language* facilities, not in minority *denominational* facilities.

SEE ALSO:

Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission), [2012] 1 S.C.R. 364, 2012 SCC 10 (CanLII)

Adler v. Ontario, [1996] 3 S.C.R. 609, 1996 CanLII 148 (SCC)

British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City), 2015 BCCA 142 (CanLII) [décision disponible en anglais seulement]

Fédération des parents francophones de Columbie-Britannique v. British Columbia (Attorney General), 2012 BCCA 422 (CanLII)

Commission Scolaire Francophone du Yukon v. Procureure Générale du Yukon, 2011 YKCA 10 (CanLII)

Szasz v. Lakeshore School Board, 1998 CanLII 12919 (QC CA) [judgment available in French only]

Assoc. Francaise des Conseils Scolaires de l'Ontario v. Ontario (Ont. C.A.), 1988 CanLII 4759 (ON CA)

Commission des Ecoles Fransaskoises Inc. v. Saskatchewan, 1991 CanLII 7999 (SK CA)

Commission Scolaire Francophone du Yukon v. Tribunal d'Appel de l'Éducation du Yukon, 2015 YKSC 24 (CanLII)

Conseil Scolaire Fransaskois v. Government of Saskatchewan, 2012 SKQB 217 (CanLII)

Conseil Scolaire Fransaskois v. Saskatchewan, 2011 SKQB 210 (CanLII)

East Central Francophone Education Region No. 3 v. Alberta (Minister of Infrastructure), 2004 ABQB 428 (CanLII) [judgment available in French only]

Conseil des écoles séparées catholiques romaines de Dufferin et Peel v. Ontario (Ministre de l'éducation et de la formation), 1996 CanLII 11789 (ON SC)

Colin v. Québec (Commission d'appel sur la langue d'enseignement), [1995] R.J.Q. 1478, [1995] J.Q. no 1874 (QC SC) [hyperlink not available]

Marchand v. Simcoe County Board of Education et al. (No. 2), 1987 CanLII 4129 (ON SC)

Marchand v. Simcoe County Board of Education et al., 1986 CanLII 2671 (ON SC)

Re Ottawa Board of Education et al. and Attorney-General of Ontario, 1986 CanLII 2773 (ON SC)

Marchand v. Simcoe (1984), 10 C.R.R.169, [1984] O.J. No. 282 (ON SC) [hyperlink not available]

Re Ottawa Board of Education et al. and Attorney General of Ontario (1987), 57 O.R. (2d) 722, [1986] O.J. No. 1374 (ON SC) [hyperlink not available]

Stopnicki v. Québec (Éducation), 2004 CanLII 64045 (QC ATQ)

Enforcement (section 24)

24. (1) Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

24. (2) Exclusion of evidence bringing administration of justice into disrepute

24. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[LAST UPDATE: JUNE 2017]

ANNOTATIONS – SUBSECTION 24(1)

Association des parents de l'école Rose-des-vents v. British Columbia (Education), [2015] 2 S.C.R. 139, 2015 SCC 21 (CanLII)

[49] It may be that costs and practicalities again become relevant if a responsible party seeks to justify a violation of s. 23 under s. 1 of the *Charter*. As well, costs and practicalities may be relevant where a court seeks to fashion a remedy that is "appropriate and just" in the circumstances, pursuant to s. 24(1) of the *Charter*. Thus, it does not automatically follow from a finding of a s. 23 breach that rights holders will receive a new school. There is a perpetual tension in balancing competing priorities; between the availability of financial resources and the demands on the public purse. In fashioning a remedy, the court will take into account the costs and practicalities that form part of the provision of all educational services — for both majority and minority language schools. However, this issue is not before us on this appeal.

[50] To summarize, issues of costs and practicalities are considered in determining where a minority language community falls on the sliding scale of rights guaranteed under s. 23. Where the community is entitled to the highest level of educational services, on an equal footing with the majority language community, costs and practicalities will not be relevant to a determination of whether the rights holders are receiving the services to which they are entitled. It may be, however, that costs and practicalities will be relevant in attempts to justify a breach of s. 23, and in attempts to fashion an appropriate and just remedy for a breach.

Thibodeau v. Air Canada, [2014] 3 S.C.R. 340, 2014 SCC 67 (CanLII)

[112] Section 77(4) of the *OLA* [*Official Languages Act*] is certainly part of a quasi-constitutional statutory scheme designed to both reflect and to actualize the "equality of status" of English and French as the official languages of Canada and the "equal rights and privileges as to their use in all institutions of the Parliament and government of Canada" as declared in s. 16(1) of the *Charter*: see, *e.g.*, *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768; *Lavigne*, at para. 23. Like s. 24(1) of the *Charter*, s. 77(4) of the *OLA* confers a wide remedial authority and should be interpreted generously to achieve its purpose. These factors, however, do not alter the correct approach to statutory interpretation which requires us to

read “the words of an Act . . . in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Lavigne*, at para. 25, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. As I see it, the *OLA*, read in its full context, demonstrates that Parliament did not intend to prevent s. 77(4) from being read harmoniously with Canada’s international obligations given effect by another federal statute.

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 2003 SCC 62 (CanLII)

[25] Purposive interpretation means that remedies provisions must be interpreted in a way that provides “a full, effective and meaningful remedy for *Charter* violations” since “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach” (*Dunedin*, *supra*, at paras. 19-20). A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.

[…]

[37] Returning to this appeal, we believe that LeBlanc J. was duly guided by historical and contextual factors in crafting a remedy that would meaningfully protect, indeed implement, the applicants’ rights to minority official language education for their children while maintaining appropriate respect for the proper roles of the executive and legislative branches.

[…]

[40] It is in this urgent context of ongoing cultural erosion that LeBlanc J. crafted his remedy. He was sensitive to the need for timely execution, the limits of the judicial role, and the desirability of allowing the government flexibility in the manner of fulfilling its constitutional obligations when he ordered the government to make best efforts to provide facilities by particular dates and retained jurisdiction to hear progress reports. However, the urgency of the context does not by itself create jurisdiction in a superior court to issue a remedy of unlimited scope under s. 24(1) of the *Charter*. We now turn to the question of whether LeBlanc J.’s order was within the jurisdiction of a superior court.

(2) The Jurisdiction of a Superior Court to Issue a Remedy Under Section 24(1) of the Charter

[41] Section 24(1) entrenches in the Constitution a remedial jurisdiction for infringements or denials of *Charter* rights and freedoms. The respondent makes various arguments suggesting that LeBlanc J. exceeded his jurisdiction by violating constitutional norms, statutory provisions, and common law rules. We will first deal with the extent of the remedial jurisdiction in s. 24(1) and the constitutional limits to that jurisdiction proposed by the respondent. Later we will discuss how statutes and common law rules might be relevant to the choice of remedy under s. 24(1).

[42] Clearly, if there is some constitutional limit to the remedial power either in s. 24(1) or in some other part of the Constitution, the judge ordering a remedy must respect this boundary. As a basic rule, no part of the Constitution can abrogate or diminish another part of the Constitution (*New Brunswick Broadcasting*, *supra*, at p. 373, McLachlin J. citing *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, 1987 CanLII 65 (SCC), [1987] 1 S.C.R. 1148). For example, a court could not compel a provincial government to do something pursuant to s. 24(1) which would exceed the jurisdiction of the province under s. 92 of the *Constitution Act, 1867*.

[43] A remedy under s. 24(1) is available where there is some government action, beyond the enactment of an unconstitutional statute or provision, that infringes a person’s *Charter* rights (see *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679, at pp. 719-20). In the present appeal, the difficulty does not lie with the legislation: no provision or omission in the *Education Act* prevented the government from providing minority language education as required by the *Constitution Act, 1982*. On the contrary,

the *Education Act*, as amended in 1996, establishes a French-language school board to provide homogeneous French-language education to children of s. 23 entitled parents. Neither is the problem rooted in any particular government action; rather, the problem was inaction on the part of the provincial government, particularly its failure to mobilize resources to provide school facilities in a timely fashion, as required by s. 23 of the *Charter*. Section 24(1) is available to remedy this failure.

[…]

[45] The purposive reading of s. 24(1) and also the ordinary meaning of the drafter's language make it clear that s. 24(1) guarantees that there must always be a court of competent jurisdiction to hear anyone whose rights or freedoms have been infringed or denied (see *Nelles v. Ontario*, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170, at p. 196, and *Mills*, *supra*, at p. 881). The default court of competent jurisdiction is a superior court established under s. 96 of the *Constitution Act, 1867*. It is also plainly contemplated in s. 24(1) that a court of competent jurisdiction will have the authority to grant a remedy that it considers appropriate and just in the circumstances.

[…]

[51] The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law. We note, however, that statutes and common law rules may be helpful to a court choosing a remedy under s. 24(1) insofar as the statutory provisions or common law rules express principles that are relevant to determining what is "appropriate and just in the circumstances".

(3) The Meaning of "Appropriate and Just in the Circumstances"

[52] What, then, is meant in s. 24(1) by the words "appropriate and just in the circumstances"? Clearly, the task of giving these words meaning in particular cases will fall to the courts ordering the remedies since s. 24(1) specifies that the remedy should be such as the court considers appropriate and just. Deciding on an appropriate and just remedy in particular circumstances calls on the judge to exercise a discretion based on his or her careful perception of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles. Once again, we emphasize McIntyre J.'s words in *Mills*, *supra*, at p. 965:

> It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

[53] With respect, the approach to s. 24 reflected in the reasons of LeBel and Deschamps JJ. would tend to pre-empt and reduce this wide discretion. Their approach would also, in this case, pre-empt and devalue the constitutional promise respecting language rights in s. 23. In our view, judicial restraint and metaphors such as "dialogue" must not be elevated to the level of strict constitutional rules to which the words of s. 24 can be subordinated. The same may be said of common law procedural principles such as functus officio which may to some extent be incorporated in statutes. Rather, as LeBel and Deschamps JJ. appear to recognize at paras. 135 and following, there are situations in which our Constitution requires special remedies to secure the very order it envisages.

[54] While it would be unwise at this point to attempt to define, in detail, the words "appropriate and just" or to draw a rigid distinction between the two terms, there are some broad considerations that judges should bear in mind when evaluating the appropriateness and justice of a potential remedy. These general principles may be informed by jurisprudence relating to remedies outside the *Charter* context, such as cases discussing the doctrine of *functus* and overly vague remedies, although, as we have said, that jurisprudence does not apply strictly to orders made under s. 24(1).

[55] First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore not appropriate and just (see *Dunedin*, *supra*, at para. 20, McLachlin C.J. citing *Mills*, *supra*, at p. 882, per Lamer J. (as he then was)).

[56] Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.

[57] Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.

[58] Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.

[59] Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

[…]

[67] Our colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases. The threat of contempt proceedings is not, in our view, inherently more respectful of the executive than simple reporting hearings in which a linguistic minority could discover in a timely way what progress was being made towards the fulfilment of their s. 23 rights. More importantly, given the critical rate of assimilation found by the trial judge, it was appropriate for him to grant a remedy that would in his view lead to prompt compliance. Viewed in this light, LeBlanc J. selected a remedy that reduced the risk that the minority language education rights would be smothered in additional procedural delay.

(b) The Reporting Order Respected the Framework of our Constitutional Democracy

[68] The remedy granted by LeBlanc J. took into account, and did not depart unduly or unnecessarily from, the role of the courts in our constitutional democracy. LeBlanc J. considered the government's progress toward providing the required schools and services (see, e.g., paras. 233‑34). Some flexibility was built into the "best efforts" order to allow for unforeseen difficulties. It was appropriate for LeBlanc J. to preserve and reinforce the Department of Education's role in providing school facilities as mandated by

s. 88 of the *Education Act*, as this could be done without compromising the entitled parents' rights to the prompt provision of school facilities.

[69] To some extent, the legitimate role of the court vis-à-vis various institutions of government will depend on the circumstances. In these circumstances, it was appropriate for LeBlanc J. to craft the remedy so that it vindicated the rights of the parents while leaving the detailed choices of means largely to the executive.

[70] Our colleagues LeBel and Deschamps JJ. appear to consider that the issuance of an injunction against the government under s. 24(1) is constitutionally suspect and represents a departure from a consensus about *Charter* remedies (see para. 134 of the dissent). With respect, it is clear that a court may issue an injunction under s. 24(1) of the *Charter*. The power of courts to issue injunctions against the executive is central to s. 24(1) of the *Charter* which envisions more than declarations of rights. Courts do take actions to ensure that rights are enforced, and not merely declared. Contempt proceedings in the face of defiance of court orders, as well as coercive measures such as garnishments, writs of seizure and sale and the like are all known to courts. In this case, it was open to the trial judge in all the circumstances to choose the injunctive remedy on the terms and conditions that he prescribed.

[…]

(5) Conclusion

[87] Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, courts should be mindful of their roles as constitutional arbiters and the limits of their institutional capacities. Reviewing courts, for their part, must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle.

R. v. Tran, [1994] 2 S.C.R. 951, 1994 CanLII 56 (SCC)

[74] Section 14 guarantees the right to interpreter assistance without qualification. Therefore, it would be wrong to introduce into the assessment of whether the right has been breached any consideration of whether or not the accused actually suffered prejudice when being denied his or her s. 14 rights. The *Charter* in effect proclaims that being denied proper interpretation while the case is being advanced is in itself prejudicial and is a violation of s. 14. Actual resulting prejudice is a matter to be assessed and accommodated under s. 24(1) of the *Charter* when fashioning an appropriate and just remedy for the violation in question. In other words, the "prejudice" is in being denied the right to which one is entitled, nothing more.

[…]

[97] While denial of a *Charter* right constitutes an error of law, it is by its very constitutional nature a serious error of law, and certainly not one which, for *Criminal Code* purposes, can be characterized as minor or harmless, or as a "procedural irregularity". Therefore, I find as a matter of law that a violation of s. 14 of the *Charter* precludes application of both s. 686(1)(b)(iii) and s. 686(1)(b)(iv) of the *Code*. To the extent that a particular *Charter* violation is more or less serious and/or prejudices an accused to a greater or lesser degree, this raises remedial issues which fall squarely to be decided under s. 24(1) of the *Charter*, not under the *Criminal Code*.

[98] Importantly, s. 24(1) of the *Charter* offers the advantage of remedial flexibility, something which has not always been the case with the right to be present under s. 650 of the Code, where the remedial consequences of a breach of this right have tended to be more rigidly defined: *Vézina*, supra, per Lamer J. (as he then was), at pp. 13-14. That is, denials of the right to be present under s. 650 of the Code have

generally been considered to be fatal errors depriving courts of their jurisdiction, thereby precluding application of s. 686(1)(b)(iii) of the Code: *Barrow*, *supra*, per Dickson C.J., at pp. 718-19, *Meunier*, *supra*, at pp. 16-17, and *Proulx*, *supra*, at pp. 182-84. (However, without commenting one way or the other on the correctness of their decisions, I note that several courts of appeal have relied on the new procedural irregularity proviso, s. 686(1)(b)(iv), to avoid having to order new trials in cases involving breaches of s. 650: see, *e.g.*, E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (2nd ed. 1987), vol. 2, at 23:8105.)

[99] As a general rule, the appropriate remedy under s. 24(1) of the *Charter* for a breach of s. 14 of the *Charter* will be the same as it would be under the common law and under statutory guarantees, such as s. 650 of the Code or s. 2(g) of the *Canadian Bill of Rights* -- namely, a re-hearing of the issue or proceeding in which the violation occurred. For example, where the violation takes place within the trial proper, it will generally be necessary to quash the conviction being appealed from and to order a new trial. Where, on the other hand, the violation takes place in some discrete and severable part of the proceedings, such as in a bail or sentencing hearing, a new hearing of the issue will usually be the fitting remedy under s. 24(1). However, it is important to recognize that s. 24(1) empowers a court to do what it considers to be "appropriate and just" in the circumstances. The remedial flexibility which is provided for in s. 24(1) may allow a court, in the right circumstances, to grant a remedy which either exceeds or falls short of the remedy I have suggested will normally be appropriate in cases where s. 14 of the *Charter* has been violated (*i.e.*, a re-hearing of the issue).

[100] One of the relevant considerations in adjusting the remedy to fit the circumstances of a particular violation of s. 14 will be that of prejudice. For instance, where an accused is able to demonstrate that he or she has suffered or will suffer prejudice over and above that which flows directly from the violation itself, such as having to incur the financial costs associated with a new trial, a court may find it appropriate to award an additional remedy under s. 24(1), such as damages. Likewise, where a violation of the right to interpreter assistance has occurred but has already been remedied in the course of the proceedings themselves, such as where a break in interpretation occurred and the court was able to "cure" the error by having the court reporter read back the missing parts to allow the interpreter to translate them, a court may decide that it is not necessary under s. 24(1) to order a new hearing of the issue.

[101] In sum, recourse should be had to s. 24(1) of the *Charter*, not to the curative provisos of the Code, when dealing with an infringement of the right to interpreter assistance. While the remedy for a violation will normally be an order directing a new hearing of the issue or proceeding in which the violation occurred, s. 24(1) allows a court to tailor the remedy to the particular circumstances of the violation. In light of the fact that the violation of s. 14 of the *Charter* in this case occurred in the trial proper, and not in some discrete and severable part of the proceeding, I find that the appropriate and just remedy under s. 24(1) of the *Charter* is to grant the appellant's request for an order allowing the appeal, quashing the conviction and directing that a new trial be held.

R. v. Munkonda, 2015 ONCA 309 (CanLII)

[140] Historically, it was very rare for court costs to be awarded against the Crown in criminal cases, and such awards were used to call attention to bad faith on the part of the Crown or intentional misconduct by the prosecution (*R. v. C.A.M.*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, at para. 97). As explained in *R. v. 974649 Ontario Inc.*, 2001 SCC 81 (CanLII), [2001] 3 S.C.R. 575, the Supreme Court made that approach more flexible if costs are awarded as a remedy under s. 24(1) of the *Charter*. There, the Supreme Court held that the courts may require that the Crown reimburse the accused for costs incurred as a constitutional remedy if they find “marked and unacceptable departure from the reasonable standards [of conduct] expected of the prosecution” (*974649 Ontario*, at para. 87). The Supreme Court stated: “In recent years, costs awards have attained more prominence as an effective remedy in criminal cases” (*974649 Ontario*, at para. 81).

[141] The Supreme Court considers that awarding costs can often constitute the most appropriate remedy to sanction the prosecution’s marked and unacceptable departures from reasonable standards that do not

rise to the threshold required for a stay of proceedings but that are nonetheless very serious (*974649 Ontario*, at para. 80). The fact that the accused must be tried a second time because of a *Charter* violation is a factor that operates in favour of awarding costs or even awarding damages (974649 Ontario, at paras. 99-100).

[142] Apart from *Charter* violations, cost awards in a criminal case remain rare. Costs are typically awarded as a consequence of acts of bad faith on the part of the Crown. However, the categories of circumstances in which costs may be awarded in a criminal context are never closed (*R. v. King* (1986), 1986 CanLII 1156 (BC CA), 26 C.C.C. (3d) 349 (B.C.C.A.)). The Supreme Court has confirmed that in "remarkable" (*R. v. Trask*, 1987 CanLII 24 (SCC), [1987] 2 S.C.R. 304, at p. 308) or "unique" circumstances (*R. v. Curragh Inc.*, 1997 CanLII 381 (SCC), [1997] 1 S.C.R. 537, at p. 546), a court may award costs even in the absence of bad faith on the part of the Crown.

Northwest Territories (Attorney General) v. Association des parents ayants droit de Yellowknife, 2015 NWTCA 2 (CanLII)

[33] When a breach is shown, s. 24 of the *Charter* contemplates "such remedy as the court considers appropriate and just in the circumstances". This wide wording gives a significant amount of discretion to the court: *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII) at para. 52, [2003] 3 SCR 3. *Charter* remedies must be granted on a principled basis, and the formulation of the remedy is not unfettered or without limits. A remedy based on an error of law, or an error of principle, or a remedy that is disproportionate and unreasonable, will not be just in any circumstances: *Doucet-Boudreau* at para. 87; *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 (CanLII) at para. 43, [2003] 3 SCR 371.

[…]

[171] Finally, this remedy for "inaction" is misdirected; it essentially grants rights to the community, not any s. 23 rights holder. The wording of s. 23 creates rights in specific categories of parents, allowing them to send their children to the minority language school, and remedies must be directed to them: *Doucet-Boudreau* at paras. 55, 58. The generic remedy to create more daycare spaces is not tied to any *Charter* breach against any rights holder. No potential rights holder can show that but for extra space in the daycare, their children would have been able to attend the minority language primary education program (*supra*, para. 164). Since daycare is not protected by s. 23, the absence of daycare spaces could not possibly be a breach of the *Charter*. Section 23 does not place any obligation on the government to create more s. 23 rights holders, or persons interested in a minority language education, by creating more daycare spaces or other linguistic opportunities. The trial reason's justification of this remedy as promoting "recruitment and francization" (reasons, para. 787) represents an error of law, because the *Charter* does not protect such rights. Institutions, programs and facilities established to create more s. 23 rights holders are not part of a constitutionally genuine educational pathway: *Nguyen v Quebec* at para. 36.

[172] Clearly the respondents La Garderie Plein Soleil and Fédération Franco-Ténoise are not rights holders, and are not entitled to any such remedy. The individual respondent Yvonne Careen has no children who would potentially attend the daycare (the individual respondent Claude St-Pierre does not appear to have participated in the trial). The respondent Association des parents ayants droit de Yellowknife at best appears in a representative capacity.

[173] In any event, even if a remedy for past "inaction" was justified, the remedy granted was disproportionate. Any inaction was clearly tied up in the litigation, and must be measured against the history of the GNWT in supporting minority education between 1989 and 2003. The trial reasons essentially granted a perpetual remedy against the appellants, requiring the provision of non-constitutionally protected daycare space in the school forever. While a trial judge has a considerable discretion in crafting a constitutional remedy, the one granted here was unreasonable.

[174] In summary, the record does not disclose any constitutional misconduct that would justify granting the respondents daycare and pre-kindergarten space that is not protected by the constitution. In any event, the remedy granted was disproportionate to any constitutional delict.

[…]

[176] Costs awards, and remedies under s. 24 of the *Charter*, are highly discretionary, and are entitled to considerable deference. Nevertheless, the foundation for the exercise of discretion in this case has been largely undermined. Errors of principle "may and should" result in appellate intervention: *Okanagan Indian Band* at para. 43.

[177] Costs in *Charter* cases may sometimes be a form of s. 24(1) remedy, but the remedial aspect of a costs award must not be confused with a punitive costs award designed to remedy litigation misconduct. Merely because the defence of a constitutional claim was partly unsuccessful does not justify solicitor client costs. "Costs as a *Charter* remedy" should not be turned into an automatic or default rule that solicitor client costs are always awarded in constitutional cases: *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 (CanLII) at para. 86, [2002] 1 SCR 405. The presence of the government as a defendant, with its deep pockets, does not justify such an award. The mere importance of the subject matter of the litigation is not determinative: *Mackin* at para. 87; *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue*), 2007 SCC 2 (CanLII) at para. 35, [2007] 1 SCR 38. Indemnifying the (partially) successful party is not the primary purpose of costs, whether awarded as costs or as some other type of remedy: *Okanagan Indian Band* at paras. 22-4.

[178] The trial reasons are unreasonably critical of the appellants' alleged insistence on "formal equality". They fail to note the equally unacceptable position of the respondents, namely that the minority language school was entitled to any facilities that the majority language schools had. The trial judge, in fact, rejected both of these approaches as unreasonable (*supra*, paras. 115-6), yet found that the respondents' unreasonable approach should be enabled by an award of solicitor and client costs. The trial judge acknowledged that the appellants ". . . did not deny or ignore their constitutional obligations arising under section 23. They simply gave them an unduly narrow interpretation." (reasons, para. 824; even that assessment is undermined by the results of this appeal). The trial judge rejected any suggestion of bad faith (reasons, para. 818). Notwithstanding the numerous breaches found, the trial judge declined to award punitive damages, or indeed any damages (reasons, paras. 796-806). Given all these findings, it was unreasonable to then award solicitor and client costs as an "appropriate and just" *Charter* remedy: *Okanagan Indian Band* at para. 25.

[179] The "success" in an action is an important component in an award of costs. The respondents' success at trial has been significantly diminished on appeal. Even though one issue may have been "facilities", the calculation of whether "numbers warranted" those facilities rested on some basic principles. The respondents were singularly unsuccessful on those equally central issues: a) whether non-rights holders can be admitted in the schools, b) whether the Commission scolaire has exclusive control over admissions, c) whether daycare and preschool programs were covered by s. 23. On the other hand, the appellants have been successful in arguing that the respondents are required to marshal the space provided for minority language education. In terms of specific relief, the respondents have established the claim for a gymnasium, but have been unsuccessful in arguing that they are entitled to the construction of a separate secondary wing, a separate classroom for each grade, and other specialized facilities. The appellants have been successful in establishing that constitutionally appropriate space sharing arrangements would be satisfactory.

Northwest Territories (Attorney General) v. Commission Scolaire Francophone, Territoires du Nord-Ouest, 2015 NWTCA 1 (CanLII)

[44] With respect to the constitutional status of the pre-kindergarten program, we adopt the reasoning in the companion case and accordingly, the cross-appeal is dismissed. The appellants argue that the trial judge erred in granting, as a section 24(1) remedy, sufficient space to ensure that the pre-kindergarten program had a capacity of 15 children. For the reasons set out in the companion case, we allow this

ground of appeal. The trial judge ought not to have used section 24(1) in granting a remedy that effectively awarded the pre-kindergarten program constitutional status.

D. Solicitor-Client Costs

[45] In awarding solicitor-client costs to the respondents, the trial judge was critical of the directive and the manner in which it was enacted. Given our conclusion regarding the constitutionality of the directive, the award of solicitor-client costs order is unreasonable. The issues were novel. As stated in the companion case, the government was entitled to advance its position in order to better understand its constitutional obligations under section 23 in a situation where a school existed and the question was its expansion. For these reasons, this ground of appeal is allowed.

VII. Conclusion

[46] In conclusion, the trial judge erred in determining that the government had breached its obligation under section 23 of the *Charter*. She erred in declaring the ministerial directive to be invalid and her analysis of whether the numbers warranted the expansion of École Boréale was flawed as a result. For the reasons given in the companion appeal, the trial judge also erred in awarding a remedy under section 24 of the *Charter* in relation to the pre-kindergarten space. The appeal is also allowed with respect to the award of solicitor-client costs.

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

[56] This ground of appeal includes several sub-issues attracting different standards of review:

> […]
>
> 4. Generally, choice of remedy involves the exercise of discretion by the trial judge and will not be interfered with absent a misdirection on the law or a palpable error on the facts: *Bowlen v. Digger Excavating* (1983) Ltd., 2001 2001 ABCA 214 (CanLII), ABCA 214, 286 A.R. 291 at paras. 10-12, citing *Harris v. Robinson* (1892), 1892 CanLII 14 (SCC), 21 S.C.R. 390 and *Soulos v. Korkontzilas*, 1997 CanLII 346 (SCC), [1997] 2 S.C.R. 217, 32 O.R. (3d) 716. As is discussed at para. 60, the language in the *OLA* [Northwest Territories *Official Languages Act*]'s remedial provision is similar to the language in s. 24(1) of the *Charter* and should therefore be interpreted in a similar manner. Section 32(1) of the *OLA*, like s. 24(1) of the *Charter*, provides a superior court with wide and unfettered discretion to grant remedies: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3 at para. 50 ("*Doucet-Boudreau*"), citing *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863 at 965. Those remedies are subject to challenge only where the party seeking to do so can establish that the order is not "appropriate and just in the circumstances": *Doucet-Boudreau* at para. 50.

[…]

[357] The principles governing the standard of review of a trial judge's decision concerning a s. 24(1) *Charter* remedy have been discussed earlier at para. 56 and are applicable in this quasi-constitutional context. Simply put, deference is owed and the exercise of a trial judge's discretion must be respected.

[…]

[361] The trial judge accepted that damages could be awarded for breaches of language rights but considered that such awards were generally much more conservative than those sought by FFT [Fédération franco-ténoise] : at para. 928. She noted FFT's failure to adduce evidence as to the losses it suffered, adding that there was an insufficient causal link between the alleged breaches and the proposed trust fund: at para. 929. In her view, "an effective solution" would be to require the GNWT [Government of the Northwest Territoires] to define and implement the rights guaranteed by the *OLA*. She also

considered that FFT's claim for $23 million in damages was more properly treated as an application for punitive or exemplary damages. That matter is considered below beginning at para. 366.

[362] The trial judge's reason for rejecting the payment to FFT under both heads of damages was largely based on her view that the declarations she granted would be "appropriate and just". Absent an error of law, we should not second-guess her assessment of this matter. The cross-appellants have not established any error that would justify our interference in this aspect of the trial judge's decision.

Commission des Ecoles Fransaskoises Inc. v. Saskatchewan, 1991 CanLII 7999 (SK CA)

[13] In our respectful view, the Government's analysis as outlined above is the correct one. The appellants are indeed now seeking a new and different remedy -- a remedy under s. 24 of the *Charter* as opposed to a remedy in the form of declarations under s. 52 of the *Charter*. We agree with the Government's contention that the issue of a mandatory order was never before Mr. Justice Wimmer. That is amply evidenced by the documentation and by the stark fact that the remedy is based exclusively on events that occurred after the judgment. In our view, the new remedy, if it is available at all, should not be given as a "correction" to Mr. Justice Wimmer's judgment but as the subject matter of a separate and independent order.

[14] A new remedy based on new facts is perhaps all that is needed to convince that it is this Court's original not its appellate jurisdiction that would have to be invoked. There is, however, a clinching circumstance. It is this. The whole trial and the two appeals, as founded on the respective notices of appeals, were geared to obtaining remedies under s. 52 of the *Charter*. All of the appellants had status to request and obtain those remedies. The new request for a s. 24 remedy changes all of that. Only those persons whose *Charter* rights have been violated are entitled to a remedy under s. 24. A corporation has no s. 23 rights and therefore cannot apply for a s. 24 remedy based on a violation of s. 23 rights. The two individual appellants are in a position different from the ten appellants who are corporations. But even the two individuals take on a different task when they ask for a s. 24 remedy in the nature of a mandamus (as opposed to a s. 52 remedy) based upon a violation of a s. 23 right. It is, to put it in the vernacular, "a different ball game", likely requiring new evidence and certainly requiring a different focus.

[15] The appellants are in effect attempting to graft onto their existing appeal their request for a new remedy based on new facts by relying on virtually nothing more than the incidental reference in their 26 January 1987 brief to a "mandatory order", a reference, it should be noted, in terms substantially different from those now being used as part of their request for a mandatory order. That incidental reference is simply not enough to dispel the compelling nature of the evidence and the analysis favouring a conclusion that it is the Court's original not its appellate jurisdiction which would need to be invoked to grant such a remedy.

Paquette v. Canada, 1987 ABCA 228 (CanLII)

[52] Section 24 does not mandate the remedy that is to be provided. Even constitutional invalidation of conflicting laws has, been withheld: *Reference re Languages Rights under the Manitoba Act* (1985), 1985 CanLII 33 (SCC), 19 D.L.R. (4th) 1 S.C.C. where invalidation would product legal chaos (a case not arising under s.24). In the U.S. unequal treatment has been met with the requirement that governments act with "all deliberate speed": *Brown v. Board of Education*, 349 U.S. 294.

[53] The case at bar is not, of course, a case of the majority's discriminating against a minority; it is a case of the majority's advancing minority rights (those of French and English speakers, as the case may be) in a gradual way. The attack is on the method chosen. Immediate implementation was clearly impractical and I would not apply the *Charter* to compel, for example, the Francophones of Ontario, with a much larger minority and broader resource base, to await trial in French until the same arrangements can be made in Alberta or Newfoundland. To strike down the legislation would, in Professor Gibson's words (Gibson, *The Law of the Charter: General Principles*, p.190), give equality of detriment. It would allow s.15 to override s.16(3):

> "(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French."

To read into the legislation is to frustrate Parliament's plain (and sensible) intention to assure provincial response before implementation, leaving itself free to take further legislative action.

[54] Assuming a breach, the proper remedy would, in my view, be a declaration coupled, perhaps, with a requirement of proclamation but allowing an appropriate time for coming into force. I would not have ordered immediate implementation, with the effect of prohibition on the preliminary hearing judge.

Reference re Education Act of Ontario and Minority Language Education Rights, 1984 CanLII 1832 (ON CA)

[183] We do not agree with the submission that no structural changes should be made in separate school boards and that the enforcement of the minority's right to French language education should be left to the Courts on applications alleging infringement of *Charter* rights under s. 24(1) which provides:

> 24. — (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The judiciary is not the sole guardian of the constitutional rights of Canadians. Parliament and the provincial Legislatures are equally responsible to ensure that the rights conferred by the *Charter* are upheld. Legislative action in the important and complex field of education is much to be preferred to judicial intervention. Minority linguistic rights should be established by general legislation assuring equal and just treatment to all rather than by litigation.

Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings, 1987 CanLII 204 (SK CA)

[pp. 79-80] While the practical effect may very well be the same, we do not regard the grant of a remedy of this nature to be beyond the authority of the Court as tantamount to legislating Part.XIV.1 of the *Code* into existence in Saskatchewan. The only adequate remedy for a s. 15(1) infringement (of the nature of that raised by this case) is to accord to a Saskatchewan accused the same rights as are enjoyed by his counterparts in each of Ontario, Manitoba, New Brunswick, and the two Territories, and we see no reason why orders of the kind which Halvorson J. made in *R. v. Tremblay*, and which are suggested here, cannot be made under s. 24(1) of the *Charter*.

Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764 (CanLII)

[1104] Pursuant to s. 24(1) the plaintiffs seek a range of remedies: declarations of positive rights; mandatory declarations requiring the Minister to transfer school board property to the CSF [Conseil Scolaire Francophone de la Colombie-Britannique]; a reporting order requiring the Province to account for its progress implementing remedies; an Expanded Admissions Policy; *Charter* damages; a trust remedy; and a duty to consult.

[…]

[1113] The two provisions differ in their application and in the types of remedies they offer. Section 52(1) applies to the entire Constitution, including the *Charter*. A supremacy clause, s. 52(1) results in any law that is inconsistent with the Constitution being declared of no force and effect to the extent of that inconsistency. Section 24(1) only applies to breaches of the *Charter*. It gives courts a wide discretion to provide an appropriate and just remedy to any person whose rights have been infringed.

[1114] There are two preliminary issues: whether remedies can be sought pursuant to ss. 24 and 52 concurrently; and whether the plaintiffs have standing to seek s. 24 remedies.

[…]

[1117] The plaintiffs urge that the remedies they seek pursuant to s. 24 rest on a different footing than those they seek pursuant to s. 52. Thus, they say that this is not a case where the plaintiffs seek remedies under ss. 24 and 52 in conjunction. They suggest that the s. 24(1) remedies are directed at rectifying the injustices of the past, while the s. 52(1) declarations are designed to prevent future injustices.

[…]

[1119] The court's comments in *Ferguson* echo the comments in Mr. Justice Lebel's concurring reasons in *R. c. Demers*, 2004 SCC 46 (S.C.C.), where he suggested that it might be appropriate, in some circumstances, to combine remedies pursuant to ss. 24 and 52 (at para. 104). In reaching that conclusion, he articulated the distinction between the aims of public law and private law litigation. Remedies in private law litigation are targeted to compensating a plaintiff for a loss suffered at the hands of a defendant, while remedies in public law litigation seek to ensure compliance with the Constitution to the benefit of the rights and freedoms of all citizens. Private law seeks to compensate an individual for losses suffered due to past events, while public law remedies focus on future compliance and reach beyond the individual actors (at paras. 99-100).

[1120] However, given that public law actions are brought by an individual or group seeking redress, he also emphasized the importance of providing the complainant in a public law action with an appropriate remedy (at para. 101):

> Nevertheless, public law actions share a necessary commonality with private litigation: an individual or group is seeking to redress a wrong done to *them*. The larger public dimensions of a constitutional challenge piggyback on the claimant's pursuit of his or her own interests, particularly in criminal law cases. Courts should not lose sight of this symbiosis; they should not forget to provide a remedy to the party who brought the challenge. This is not a reward so much as a vindication of the particularized claim brought by this person in assertion of his or her rights. Corrective justice suggests that the successful applicant has a right to a remedy. There will be occasions where the failure to grant the claimant immediate and concrete relief will result in an ongoing injustice. That is the case here.
>
> [Underline emphasis added. Italics emphasis in original.]

[1121] In this case, there are real corollaries between private law and public law litigation. As I explained in *Chapter VI, The Respective Roles of the Province* and the CSF, s. 23 is unique among *Charter* rights in that it places a positive duty on government to provide minority language education facilities out of public funds where the numbers so warrant. An unconstitutional failure by a government to provide the facilities to which a group is entitled manifests as a loss to rightsholders suffered at the hands of the defendants. I also note the real risk that generations of rightsholders might be lost if the government does not act expeditiously to meet its obligations. The need for concrete relief warrants a remedy pursuant to s. 24(1).

[…]

C. Section 24(1)

[1134] There is no doubt that the Court's jurisdiction to make orders pursuant to s. 24(1) is very broad. It allows courts to order whatever remedy it considers "appropriate and just in the circumstances". In *R. v. Mills*, [1986] 1 S.C.R. 863 (S.C.C.), Mr. Justice McIntyre (for the majority) commented on the wide and generous scope of the Court's discretion (at 965):

> It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

[1135] In *Ward v. Vancouver (City)*, 2010 SCC 27 (S.C.C.) [*Ward*], the court cited McIntyre J.'s comments in *Mills*, and offered that the grant of discretion is fettered only by the concern of what is "appropriate and just", and should not be reduced to a binding formula for general application in all cases. However, the Court also noted that prior cases and judicial guidance might offer some assistance in assessing what is appropriate and just in given circumstances (at paras. 18-19).

[1136] In *Doucet-Boudreau*, the Court offered some assistance for courts to take into account when deciding whether a remedy is just and appropriate in the circumstances. The Court articulated five principles relevant to the question, which may be informed by jurisprudence relating to remedies outside the *Charter* context. To summarize them, an appropriate and just remedy should meaningfully vindicate the rights and freedoms of the claimants, and address the circumstances in which the right was infringed or denied. It must also apply means that are legitimate within the framework of our constitutional democracy, respecting the separation of functions between the legislature, executive and the judiciary. Third, the remedy should invoke the functions and powers of a court; the remedy should be a judicial one. Fourth, the remedy should be fair as against the party that it is made. Finally, it should be allowed to develop novel and creative features to be flexible and responsive to the needs of a given case (at paras. 54-59).

[1137] The plaintiffs seek a number of remedies pursuant to s. 24(1), which they say are appropriate and just in this case: declarations, reporting orders, an Expanded Admissions Policy, *Charter* damages, a trust remedy and a duty to consult.

1. Declarations

[1138] Courts may issue declarations pursuant to s. 24(1). The principles concerning the granting of a declaration were stated in *Solosky v. R.*, [1980] 1 S.C.R. 821 (S.C.C.) at 830-833. Where an issue falls to be determined between persons sharing a legal relationship, a declaration is available provided that real, rather than fictitious or academic issues are raised, and provided that a declaration will have the practical effect of determining the matter between the parties.

[1139] With respect to any failure by the Province to meet its positive obligations in particular communities in this case, in my view declarations under s. 24 will typically afford an appropriate remedy as a means of determining a very real legal matter between the parties.

[…]

2. Reporting Orders

[1158] The plaintiffs also ask the Court to retain jurisdiction in this matter to do two things: (1) receive periodic reports regarding the defendants' progress in providing the relief ordered by the Court; and (2) make declarations and orders regarding temporary relief. The plaintiffs suggest there is a significant risk the declarations and orders sought would prove ineffective, pointing to what they say is a history of delay by the Province. The plaintiffs are particularly concerned about reporting orders concerning the relief sought in several communities, where they say poor conditions and lengthy delays require it: Vancouver (West), Vancouver (East), Burnaby, Abbotsford, Squamish, Whistler, Pemberton, Sechelt, Penticton, Richmond, Nelson, and Victoria (East).

[…]

[1179] Taking into account the totality of the evidence in this case, I am unable to conclude that the context makes a reporting order necessary or appropriate. This is not a case like *Doucet-Boudreau* where the government has accepted that a school is necessary and willfully delayed building a new school. To the contrary, there are minority language schools to serve the students living in all the claim areas. Even students from Burnaby and Abbotsford, where there are no schools in the communities themselves, have access to reasonably proximate schools by way of transportation. Moreover, I am not persuaded that a

lack of minority language schools is contributing to the high rate of assimilation in British Columbia, or that they will slow its strong pull.

[1180] I do not find evidence of inappropriate delay by the province implementing s. 23 in any communities. Rather, it is appropriate in this case to presume that the government will act expeditiously to comply with any declarations that I may grant. It would go beyond the competencies of this court to delve into the intricacies of school planning by way of reporting conferences. Against that back drop, and given that the parties may always return to court by way of application, I find that a reporting order is not appropriate or just in this case.

3. Expanded Admissions Policy

[1181] The plaintiffs also seek, as a remedy, the right to admit non-rightsholders to CSF schools. The plaintiffs say the remedial purpose of s. 23 protects the admission of non-rightsholders pursuant to a Descendant Clause as a remedy for delay implementing s. 23 of the *Charter*. The plaintiffs urge that otherwise, the Province would be able to benefit from a reduction in the number of rightsholders caused by its failure to implement s. 23 of the *Charter* between 1982 and 1996. The plaintiffs suggest that children who were of school-age in those years are now of child-bearing age, and their children would be eligible to attend CSF schools if the Province had acted sooner.

[1182] The defendants counter that given the number of Francophones in the participation rates in the province, it is not clear how many rightsholders have lost the right for their children to attend minority language schools in British Columbia. The defendants also suggest it would be inappropriate for the Court to grant such a remedy in the face of valid legislation restricting admissions. The defendants take the position that it exceeds the role of a court to allow a law to be broken for a period of time as a remedy without at least striking down that law.

[1183] I have already concluded that the defendants have validly restricted admission to CSF schools. For the plaintiffs' proposed remedy to be appropriate, a number of conditions precedent would need to be fulfilled: evidence that the minority was not receiving what it was entitled to in a given community; an ongoing breach for a sufficient period of time as to create a generation of lost rightsholders; and evidence that members of the minority were actually deterred from sending their children to minority language schools. The plaintiffs did not tender this type of evidence.

[1184] Moreover, given that the Province has validly restricted the admission of rightsholders, I do not find that this is an appropriate remedy. In *Doucet-Boudreau*, the majority explained that an appropriate and just remedy is one that employs means legitimate within the framework of a constitutional democracy. Courts must respect the appropriate functions of the legislature, executive and judiciary (at para. 56). Acting within its powers to do so, the Province has validly chosen to restrict admissions to the children of s. 23 rightsholders and Immigrant Rightsholders. Declaring otherwise valid laws invalid as a remedy would require the court to inappropriately stray into the proper sphere of the legislature. I therefore decline to grant the plaintiffs an Expanded Admissions Policy regardless of whether they could establish that individuals have lost their rightsholder status as a result of substandard facilities.

4. Charter Damages

[1185] The plaintiffs seek *Charter* damages to recognize the harm done to members of the French-language community individually, and at large. The defendants submit that this is not an appropriate case for *Charter* damages.

[1186] The plaintiffs rely on the test for *Charter* damages set out in *Ward*, which outlines (at paras. 25-29) the three purposes of granting *Charter* damages: compensation, vindication and deterrence. In their submission, granting damages would further all three purposes in this case.

[1187] The plaintiffs submit that awarding *Charter* damages would help to compensate for the Province's failure to live up to its constitutional obligations for more than 30 years, and what they say is the

consequent acceleration of the assimilation rate. The plaintiffs also suggest that *Charter* damages would serve the objects of vindication and deterrence, and engage the seriousness of the state conduct by sending a strong message that governments cannot delay the implementation of s. 23. It would also, they say, deter future violations by imposing an economic incentive on the defendants to comply with their constitutional obligations.

[1188] In *Ward*, the Court held that s. 24 is broad enough to include the remedy of damages for a *Charter* breach, a distinct public law remedy that would require society to compensate an individual for a breach of their rights (at paras. 20-22). The court articulated four steps for the test: proof of a breach, functional justification of damages, a lack of countervailing factors and quantum (at paras. 23-57).

[1189] The plaintiffs' argument for *Charter* damages focuses on the functional justification for damages. They leave aside the countervailing factors, which are important in this case.

[1190] In *Ward*, the Court confirmed that even where damages are functionally justified, other considerations might render *Charter* damages inappropriate or unjust (at para. 33). The Court pointed to two such considerations: the existence of alternative remedies and concerns for good governance.

[1191] As a countervailing factor, in some situations, an award of damages might not be appropriate "unless the state conduct meets a minimum threshold of gravity" (at para. 39). The principle, recognized prior to *Ward* in *Mackin v. New Brunswick (Minister of Justice)*, 2002 SCC 13 (S.C.C.), "recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform" (*Ward* at para. 40). […]

[1192] In many instances, the "public good" countervailing factor will negate the plaintiffs' claims for *Charter* rights. The plaintiffs ground their claims in the application of a valid law — the capital funding system — that might subsequently be found to be invalid because of its effects on the CSF. There is value in ensuring that public officers can act to apply those laws without fear of prosecution. Absent bad faith, an abuse of power or clearly wrong decisions, government actors should not be held liable in damages for actions taken to apply those laws.

[1193] I have already explained that I see no intent or malice on behalf of the defendants. They were justified in operating at the speed they did when implementing s. 23 of the *Charter*. I do not find any evidence of bad faith, an abuse of power or clearly wrong decisions following *Vickers #2*, as the Province has worked steadily at providing the CSF with facilities where the numbers warrant.

[1194] Additionally, in many instances the other countervailing factor noted in *Ward*, the availability of other remedies, will be at play. In particular declarations are likely to spur the defendants to provide the CSF with needed space, where appropriate.

[…]

5. Trust Remedy

[1197] The plaintiffs suggest that the creation of a trust fund would be an effective and constructive means of remedying deficiencies in the defendants' capital planning system.

[1198] The plaintiffs tendered expert evidence concerning how a trust remedy might work based settlements of Aboriginal land claims. I will discuss that evidence before addressing the plaintiffs' argument that a trust remedy is just and appropriate in the circumstances.

[…]

[1217] As I explain above, pursuant to *Schachter* and *Ferguson*, a remedy for unconstitutional laws is typically found in a declaration of invalidity pursuant to s. 52(1) of the *Charter* (sic). Occasionally, a

positive remedy might be available in conjunction to ensure an effective remedy. A trust would fall in that category.

[1218] In this case, though, I am not persuaded that a trust for the linguistic minority is a just and appropriate remedy as it would trench on the role of the legislative and executive branches of government: *Doucet-Boudreau* at para. 56. The legislature and executive have established law and policy for ensuring that capital projects are justified, built to standards that ensure equity across the system and that ensure the distribution of scarce resources across the Province. They have the authority to do so pursuant to their continued jurisdiction to oversee the structures of the education system pursuant to s. 93.

[1219] Granting a trust remedy would allow the CSF to operate outside those laws and policies. It would therefore have the effect of invalidating those processes as they apply to the linguistic minority. Meanwhile, the Province would be deprived of their right to craft a new system that is responsive to s. 23 and responsive to the Province's pressing and substantial objectives. It would deprive the defendants of their remaining jurisdiction over minority language education pursuant to s. 93 of the *Constitution Act, 1867*, as well as their right to supervision over the CSF.

[1220] In the result, I do not find that a trust remedy is a just and appropriate remedy in the circumstances.

[1221] However, that is not to say that the plaintiffs might not require some flexible funding to remedy deficiencies with the capital planning system. As I develop in Chapter XLII, Lack of Funds and a Capital Envelope for the CSF, this can be achieved by requiring the Province to craft a Capital Envelope to address the CSF's needs. Such an envelope would provide the CSF with some financial security and flexibility while respecting the proper role of the legislature and the executive by allowing them to oversee the CSF's capital decisions using valid capital planning tools.

N.B. – This decision is currently under appeal before the British Columbia Court of Appeal.

Conseil des écoles publiques de l'est de l'Ontario v. Ontario Federation of School Athletics Associations, 2015 ONCS 5328 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

62] Section 24(1) of the *Charter* provides that a court of competent jurisdiction may grant the remedy that the tribunal considers appropriate and fair given the circumstances in the case of infringement of the rights and freedoms protected by the *Charter*.

First element – Existence of a serious question

[63] The threshold to be met to establish the existence of a serious constitutional question is relatively low. For the purposes of this first element, the author of the motion is not required to show that he has a strong chance to win the litigation; it is sufficient to show that the issues or subject of the litigation are not frivolous or vexatious.

[64] According to the Supreme Court in *RJR-Macdonald*, given the complex nature of most of the rights guaranteed by the Constitution, the court considering an injunction application would seldom have the time to make an in-depth analysis on the merits required. Furthermore, the Supreme Court has pointed out that even if the judge considers that there is a chance that the applicant would fail at trial, this is not a factor in the analysis of the first element.

[65] I find that there is a serious issue to consider in this matter, and this is whether the students affected by the new regulations of the OFSAA [Ontario Federation of School Athletics Associations] receive an education truly equivalent to that received by the Anglophone majority.

[66] In the *Saskatchewan v. Conseil scolaire Fransaskois*, 2014 SKQB 285 (CanLII), 244 A.C.W.S. (3d) 926, the Court granted a fifth interlocutory injunction requiring that the provincial government award funding to the school board pending the resolution of the dispute on the merits. The Court found that the respondents had indeed satisfied the first element of the test, i.e. that there was a "serious question", despite that in this matter, the Court had doubts about certain aspects of the respondent's file.

Second element – Existence of irreparable harm

[67] The second element consists in deciding whether the party who seeks to gain an interlocutory injunction would be subjected to irreparable harm if it is not granted. In *RJR-MacDonald*, the Supreme Court specified that the assessment of irreparable harm would typically be more complex in a *Charter* dispute, given the fact that award of damages is not the principal relief in these cases.

[…]

[70] The courts have generally agreed that a potential breach of section 23 of the *Charter* represented irreparable harm. In *Commission Scolaire Francophone, Territoires du Nord-Ouest et al. v Attorney General of the Northwest Territories*, 2008 NWTSC 53 (CanLII) [2008] 11 W.W.R. 312, the Court granted an interlocutory injunction based on the insufficiency of the facilities, including the absence of a science lab and a gymnasium which affected the education of students and created a risk that the students chose to enrol in a majority-language school because of the poor building facilities.

[…]

[74] The evidence shows that Louis-Riel high school expects a total decrease in enrollment of 91 students for the 2015-2016 school year compared to the previous year. As of September, 47 students will be prohibited from participating in sports competitions sanctioned by the OFSAA.

[75] I find that the new by-laws of the OFSAA have an impact on the capacity of Louis-Riel high school to draw, welcome and retain children from parents who have rights thus favouring the assimilation of the linguistic minority in Ontario and that the applicants will experience irreparable harm.

Third element - The balance of convenience

[76] It remains to be determined which of the two parties will experience the greater harm if the court grants or refuses the interlocutory injunction pending a decision on the merits.

[…]

[81] The OFSAA claimed that the suspension of its by-laws would have an undesirable effect on the results of competitions if Louis-Riel high school is not excluded. In addition, the OFSAA pointed out that a suspension of the by-laws will prevent the other students of Louis-Riel high school from participating in competitions. I find that the only harm that the OFSAA would have is in rescheduling the implementation of its new by-laws, only for a sport-study school for the Francophone minority in the Eastern Ontario Region. If the applicants do not succeed on the merits, the OFSAA can strike the outcome of the competitions of Louis-Riel high school.

[82] Overall, the balance of probabilities, considering the public interest, favours an interlocutory injunction since it would suspend the enforcement of by-laws for the Francophone minority and would maintain the status quo until the Court has settled the legal issues on the merits of the dispute.

Association des parents ayants droit de Yellowknife et al v. Attorney General of the Northwest Territories et al, 2012 NWTSC 43 (CanLII)

[791] Subsection 24(1) of the *Charter* grants courts a broad discretion in the choice of remedies and does not exclude making an award of damages in addition to declaratory relief.

[792] Here, the Plaintiffs are claiming compensatory and punitive damages and have requested that they be paid to the CSFTN-O [Commission scolaire francophone des Territoires du Nord-Ouest] even though they are not a party to this dispute.

[793] The principles concerning the award of damages in a dispute involving language rights were reviewed by this Court in *Fédération Franco-Ténoise v. Canada (Attorney General)*, 2006 NWTSC 20 (CanLII). That proceeding was based on the *Official Languages Act*, RSNWT 1988, c O-1, not on the *Charter*, but the provision of that statute concerning relief uses language very similar to that of subsection 24(1), and the Court found that the same principles applied. The Court's analysis of the principles governing the awarding of compensatory damages (paragraphs 902–8) and punitive damages (paragraphs 937–38) was upheld by the Court of Appeal. (*Northwest Territories (Attorney General) v. Fédération Franco-Ténoise*, 2008 NWTCA 5 (CanLII), 2008 NWTCA 05, pages 93–94.) Those are the principles that I have applied in this case.

[794] As a general rule, the courts do not award damages for harm sustained as a result of the adoption of a statute that is later declared unconstitutional, unless the evidence reveals conduct that is clearly wrong, an abuse of power or in bad faith. In other words, the government enjoys a limited immunity, as long as it acts in good faith. *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 (CanLII), [2002] 1 S.C.R. 405.

[795] This principle also applies when a government action, rather than a statute, is declared unconstitutional. *Wynberg v. Ontario*, (2006) 2006 CanLII 22919 (ON CA), 269 D.L.R. (4th) 435 (Ont. C.A.).

[…]

[803] I am not calling into question the very concrete negative consequences of the delays for the members of the linguistic minority in Yellowknife. Parents were forced to make extremely difficult choices for much longer than they should have been. They should not have been forced to choose between sending their children to school in French, to preserve their language and culture, and sending them to a school with a gymnasium. And it is unfair that they were forced to make this same choice again and again for years.

[804] I am not calling into question the harmful effects, for the linguistic minorities, of the government's delays in implementing section 23, nor the fact that such delays contribute to assimilation. I also acknowledge that the reduction in numbers can potentially be harmful to the community when it attempts to assert its rights.

[805] I have kept that reality in mind in my decision regarding relief. Its purpose is not only to render the existing school compliant with section 23 and to ensure that it meets the present and future needs of the minority, but also to repair past harms by supporting the vitality of the minority community, in particular by providing extensive support to the preschool programs.

[806] However, taking into consideration the criteria for awarding damages, the whole of the evidence and the other remedies that I have decided to grant to the Plaintiffs, I find that an order compelling the Defendants to pay damages is not called for.

R. v. Furlotte, 2010 NBQB 228 (CanLII)

[43] The police breach of Ms. Furlotte's *Charter* right, in this case the assumed "duty of active offer" of language rights choice, is, as noted in *Taillefeur* and *Duguay*, not the only component of the analytic framework that must be considered in determining whether a stay of proceedings should be entered in this criminal trial. Societal interests are also an important aspect of that analysis. When a trial judge is deciding whether to permanently halt a criminal proceeding by imposing a stay of proceedings for a breach of a *Charter* right he or she must balance the nature and seriousness of the *Charter* violation(s)

against the societal interest in having a case adjudicated on its merits. See: *R. v. Regan* (*supra*) at paragraph 69. The trial judge made no reference to that competing societal interest in this case.

[44] That societal interest in having a trial on the merits is an important component not just of an analysis under s. 24(1) of the *Charter* but permeates all decisions made under s. 24 except those that halt an unfair trial. As the Supreme Court recently noted in recasting the analytic framework to be used to determine whether to exclude evidence obtained in breach of a *Charter* protected right pursuant to s. 24(2) of the *Charter*, a consideration of that societal interest is a vital and mandatory part of the decision to admit or exclude evidence. […]

[57] Against that evidentiary and legal backdrop, to allow Ms. Furlotte to use her assumed *Charter* right to "a duty of active offer" of a choice of language in dealing with Cst. Allain at the time of her arrest on September 4, 2007 as a legal sword to halt the proceedings in these matters seriously risks bringing the administration of justice into disrepute. An objective analysis of the evidence and principles relevant to the issue at hand thus leads to the opposite conclusion to that which the trial judge determined was appropriate when he halted proceedings on the basis that allowing them to continue constituted an abuse of the court's process.

[58] The imposition of a stay of proceedings requires the application of a stringent test that is difficult for the party requesting such a remedy to meet under s. 24(1) of the *Charter*. The application of the relevant legal principles to the evidence leads to the conclusion that the test for implementation of a s. 24(1) remedy set out previously as well as in *Doucet-Boudreau v. Nova Scotia (Minister of Education)* 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3 at paragraphs 55-9 have not been met.

R. v. Gaudet, 2010 NBQB 27 (CanLII)

[65] In the case at bar, there is nothing in the facts to allow for the conclusion that there was a *Charter* violation other than the failure to inform the accused that he had a choice to be served in English or French. Trial fairness and principles of natural justice were never raised. There was no suggestion of unlawful interception or illegal detention. There is no evidence that the action was pursued in an unfair or vexatious manner. There is nothing to indicate that the accused was the victim of discriminatory police practices. The trial judge had no way of knowing whether the peace officer's omission was inadvertent or, on the contrary, abusive, serious and done deliberately to infringe Mr. Gaudet's linguistic rights. Without such evidence, it was impossible for the trial judge to determine its significance to the Attorney General's case or its reliability.

[…]

[69] Was it appropriate and just in the circumstances for the trial judge to order a stay of proceedings in this instance?

[70] As previously stated, the judge ordered a stay of proceedings under s. 24(1) of the *Charter* as the evidence had already been accepted by the accused. A stay of proceedings amounts to an acquittal. This is a serious charge. We are all aware of the harmful consequences of driving while intoxicated. The Attorney General steadfastly argued that public safety must not be sacrificed for language rights.

[71] Section 24(1) gives the trial judge discretionary power to decide what is appropriate and just in the circumstances. The judge must base his decision on the alleged violation, the facts and the application of relevant legal principles.

[…]

[75] Authority to stay proceedings is reserved for the "clearest of cases". I cannot characterize this case as the "clearest of cases". A stay is only for cases that meet a very stringent preliminary threshold. The requirements for a stay of proceedings have not been met. A stay of proceedings was not an appropriate and just remedy under the circumstances. It is not just and proper to allow an accused a complete

defence whenever a violation of language rights is established before a court of criminal justice. An automatic stay of proceedings whenever a violation of language rights is established in a court of criminal justice does nothing to safeguard the integrity of the judicial system.

Doucet v. Canada, [2005] 1 F.C.R. 671, 2004 FC 1444 (CanLII)

[73] In the case at bar, however, the infringement is real and the [*Official Languages*] *Regulations* are too seriously flawed to stand as drafted. The Court has the duty to intervene when it finds a constitutional breach. That being said, it is not my place to decide for the executive on how the *Regulations* should be amended. In my opinion, that is not the Court's role and, in any event, such a decision is not within its expertise. […]

[80] I allow the plaintiff's claim in part. I declare subparagraph 5(1)(h)(i) of the *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48, adopted pursuant to section 32 of the *OLA* [*Official Languages Act*], inconsistent with paragraph 20(1)(a) of the *Charter* in that the right to use French or English to communicate with an institution of the Government of Canada should not solely depend on the percentage of Francophones in the census district. Consideration must also be given to the number of Francophones who use or might use the services of the institution, as illustrated by the circumstances in this case, along Highway 104 near Amherst, Nova Scotia. In my view, it is reasonable to give the Governor in Council 18 months to correct the problem identified in the *Regulations*.

Costs

[81] The plaintiff will be entitled to his costs, since his *Charter* rights have been infringed and since he is successful in his action. In view of the fact that the impact of this case extends beyond the plaintiff's personal situation and affects the right of all Francophones travelling in the Amherst area, this is to some extent a precedential case. For this reason, the plaintiff will be entitled to an upward adjustment of his costs (*R. v. Manitoba Fisheries Ltd.*, [1980] 2 F.C. 217 (C.A.)). Costs shall accordingly be set in accordance with the top of column IV of the table to Tariff B of the *Federal Court Rules*, 1998 [SOR/98-106], as amended.

Assn. des parents francophones de la Colombie Britannique v. British Columbia, 1998 CanLII 3969 (BC SC)

[56] What then is the remedy that would ensure active participation by the Province in promoting and enhancing these linguistic and cultural rights? The *Charter* has provided many remedies to protect minority groups. This situation calls for some creative remedy to protect the rights of the Francophone minority in British Columbia.

[57] I conclude that by legislation or regulation some provision must be made requiring the parties to a dispute to engage in a dispute resolution process. By parties, I mean the C.S.F. [Conseil Scolaire Francophones de la Colombie-Britannique], any majority school board, and appropriate representatives from the Ministry of Education, upon whom the Minister will ultimately rely in the exercise of his discretion. The Ministry of Education, which is the responsible provincial authority, has a role to play. It cannot sit back and decline to become involved unless invited.

[58] I do not propose to define the process. It must involve negotiation between the parties concerned. Third party assistance may be involved as well, although I am not saying government must abdicate its duty to decide to a third party tribunal. If s. 166.29 [of the *School Act*] is not amended, it is the Minister who will be called upon to exercise his discretion to approve an agreement of the parties relating to the operation and use of facilities. Ultimately, the court will always retain its power to review the issue of whether decisions made meet the constitutional duty imposed by s. 23. Hopefully, a well-considered dispute resolution process will avoid any further referrals to the court. It is certainly in the interests of the minority and the majority to resolve their differences by agreement rather than having to resort to litigation.

Conseil scolaire fransaskois de Zenon Park v. Saskatchewan, 1998 CanLII 13468 (SK QB)

[16] This situation arose because of an administrative failure on the part of the Minister of Education to do some forward planning in respect of facilities when the Conseil Scolaire was created. As the *Act* [*Education Act*, 1995, S.S. 1995, c. E-0.2] contemplates negotiations it should have mandated a sharing of the existing facilities. […]

[18] The Court's right to issue a mandatory interlocutory injunction was the subject of representations at the hearing of the motion. There appears to be some agreement that the Court must conclude that there has been a breach of the *Charter* rights, that there is a serious question to be tried and a likelihood of irreparable harm to the applicant in the event that the injunction is not granted. At this stage of the proceedings there is often considered to be a disability on the part of the Court due to the fact that *viva voce* testimony has not been received. There is no particular disability in this matter arising from the fact that evidence was presented in affidavit form. The facts are not in dispute, only the manner of resolution of the problem is before me and it is clearly of an urgent nature. The 1998-99 school year begins in less than two months and there is much to be done even if all parties concur and cooperate in resolving the problem.

[19] In the sense that constitutional rights have been violated (through deprivation of equal facilities with the immersion school) and soon may be further violated if action is not taken immediately, irreparable harm may be said to be likely if an injunction is not issued. This statement is now subject to one qualification--if TSD [Tisdale School Board]'s latest proposal were accepted and if the construction could be completed, no irreparable harm could be anticipated thus eliminating the basis for an interim injunction. The negotiations which have gone on before the Court should have taken place about a year ago and these proceedings would not have been necessary. I must, however, regard the flurry of proposals and counter-proposals to be more in the nature of a negotiating process than is normal before a court. While taking note of the flexibility of the parties the role of the Court has become that of mandating a solution having regard to the negotiating positions of the parties, a solution which will avoid financial folly. This is a role which the Court accepts reluctantly, the parties having shown no particular concern in respect to the costs to the taxpayer of the various solutions available.

[20] Because the *Act* contemplates the vesting of facilities on creation of a conseil scolaire and because the inclusion of the French school in the Zenon Park School facility is so obviously the most socially and economically efficient arrangement, I would risk bringing the judicial system into disrepute if I were to decline to order the sharing of not only the offered gymnasium, laboratory and library facilities but also classrooms which I am informed are sufficient in number for both school populations. There will therefore be an order requiring TSD forthwith to make available to CSF [Conseil scolaire Fransaskois] those facilities outlined in red upon a sketch annexed hereto along with all necessary access, egress, parking, playground space, etc., the same to be available for its exclusive use. […] Should difficulties arise in this connection, the parties may reapply.

R. v. Lavoie, 2014 NBPC 43 (CanLII)

[122] However, the infringement of the defendant's language rights should be considered at the sentencing hearing as a mitigating circumstance justifying a reduced sentence for the offence under s. 18(2) of the *SPCA* [*Society for the Prevention of Cruelty to Animals*] *Act*. I am of the view that, pursuant to s. 24(1) of the *Charter*, and having regard to the principles that emerge from *R. v. Nasogaluak*, 2010 SCC 6 (CanLII), [2010] 1 S.C.R. 206, this would be an appropriate and just remedy for the infringement of the defendant's language rights as guaranteed under s. 20(2) of the *Charter*. This issue was also raised during the parties' closing arguments. I further note that the Court of Queen's Bench of New Brunswick recently applied those principles in *R. v. Martin* 2013 NBQB 322 (CanLII) at para. 39.

R. v. Boudreau, 2008 NSPC 78 (CanLII)

[10] Mr. Boudreau is seeking a remedy under section 24(1) of the *Charter* because the license pursuant to which he was fishing was issued only in English when his first language is French. For Mr. Boudreau to secure a remedy under section 24(1) of the *Charter*, he has to demonstrate that his constitutionally-

protected language rights have been infringed. As stated by the Crown in its brief: “A remedy under s. 24(1) is available where there is some government action (beyond the enactment of an unconstitutional statutory or regulatory provision) that infringes a person’s own *Charter* rights.” In support of its argument that it is the individual’s rights that must be implicated, the Crown cites *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588 at paragraph 62; *Borowski v. Canada*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 at paragraph 54; *Schacter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679 at paragraphs 84 - 89; and Hogg in *Constitutional Law of Canada*, 5th ed., 2007, at pages 40 - 43.

[…]

[13] Mr. Boudreau’s challenge is not against a potentially unconstitutional law. The fact that he is facing charges and comes before the Court involuntarily does not confer standing on him to seek a section 24(1) remedy. Merely being compelled by charges to face prosecution does not entitle an accused to claim a section 24(1) remedy. If that were the case then Mr. Edwards (*R. v. Edwards*, *supra*) and *Ms. Lawrence (R. v. Belnavis*, *supra*) would have been automatically entitled to seek section 24(1) relief as a consequence of being charged, without having to show a reasonable expectation of privacy in relation to the search.

[14] An automatic right of standing to obtain relief pursuant to section 52 of the *Constitution Act* is granted where the defence being advanced is that the statutory provision under which the accused is charged is itself unconstitutional. *Big M Drug Mart* is an example of this, where the corporate defendant sought a declaration that the *Lord’s Day Act* was inoperative on the basis that it violated a *Charter*-protected right. Another example emerges from *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] S.C.J. No. 1 where Dr. Morgentaler sought a declaration that the abortion prohibitions in the *Criminal Code* were constitutionally invalid as an infringement on women’s *Charter*-protected rights to life, liberty and security of the person. A defendant is entitled to seek a section 52 declaration that the legislation under which s/he is charged is unconstitutional without having to show an infringement of his or her own *Charter*-protected rights. However, automatic standing to claim a section 24 *Charter* remedy has been emphatically rejected by the Supreme Court of Canada with the Court noting that the automatic standing rule has been “discredited”. (*Edwards*, *supra*, at paragraphs 53 - 56)

[15] Section 52(1) of the *Constitution Act 1982* is not engaged by this case. Section 52(1) is engaged “when a law is itself held to be unconstitutional, as opposed to simply an action taken under it.” (*Schacter*, *supra*, at paragraph 84) Section 24(1) is resorted to “where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person’s *Charter* rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.” (*Schacter*, *supra*, at paragraph 87)

[16] Millbrook First Nation could have invoked section 20(1) of the *Charter* to require the Department of Fisheries and Oceans to produce the fishing license in French. It did not. It obtained a fishing license in English and was apparently content with that. It designated Mr. Boudreau to fish that license. This is not a case like *R. v. Saulnier* (1989), 90 N.S.R. (2d) 77 which dealt with the language rights of a fisherman charged with violating a variation order made in relation to a license issued to him directly. There is no connection here between the issuance of the license, and any constitutional or legislated requirements for a fishing license to be in one of the two official languages, and Mr. Boudreau. There is no evidence that Mr. Boudreau had any dealings with the Department of Fisheries and Oceans concerning the license or the language in which it was issued. There is no evidence that the Department even knew Mr. Boudreau was designated to fish the license that had been issued to Millbrook. Mr. Boudreau’s language rights entitlements are not animated by the issuance of the English-only fishing license to the Millbrook First Nation. Mr. Boudreau is not entitled to an automatic grant of standing to claim a remedy under section 24(1) of the *Charter* and I find, in the circumstances of this case, he does not have standing to advance a language rights claim in respect of this prosecution.

Lavoie v. Nova Scotia (Attorney-General), 1988 CanLII 5684 (NS SC)

[13] After five days of evidence and three and a half days of argument, I am convinced there is great merit in a registration to ascertain whether the number of children who will actually enrol in a minority language educational facility warrants a declaration that it is to be established by the school board. The court must ensure that Canadian citizens whose rights are guaranteed under the provisions of s. 23 of the *Charter* are, if such rights are found to have been infringed, entitled to be granted relief. It would appear from the evidence that the rights of the Canadian citizens in the district to have minority language instruction in a facility to be paid for out of public funds may be infringed, but the evidence is still inconclusive, despite the plaintiffs' diligent efforts. As I previously stated, the reason why the evidence is inconclusive is that at the time the questionnaire was responded to, there was no specific programme offered nor was a location for delivery of the programme designated. The answer to the question whether the plaintiffs and other Canadian citizens have had their s. 23 rights to a facility infringed upon depends on those citizens having an opportuity (sic) to see specifically what is to be offered by way of a programme and where. Without knowing the numbers who will actually enrol in such a facility, the court cannot determine, not only whether the facility is warranted, but also determine the degree of control over the programme that the minority linguistic group should be entitled; that could range from the complete control exercised by a board to the mere power to make recommendations to a board that is exercised by the traditional trustees of a public school.

[…]

[15] In my opinion, this is the only way a responsible decision can be made in these proceedings in fairness to both the plaintiffs and the Canadian citizens who may be eligible for minority language instruction in the district and who wish to avail themselves of those facilities pursuant to s. 23 of the *Charter* and, at the same time, be fair to the defendants who must bear the reasonable costs of providing such facilities. To put the defendants by order of this court to the expense of providing a separate facility for say, 200 plus children from Grades P to VIII, and then find only 50 actually enrolled is an order that I am not prepared to make on the evidence before me. If after the registration and further hearing, the numbers warrant the establishment of such a facility, such an order can be made and further orders made as to the degree of control that should be accorded to the minority language citizens. In my opinion, the order that I shall sign, with such refinements that the parties may agree to and I approve of, is an appropriate and just remedy under the circumstances and the jurisdiction of the court under s. 24 of the *Charter*.

[16] I will meet with counsel on Monday, January 18th, that's this coming Monday, at two o'clock in the afternoon to hear submission on the terms of the order. In the meantime, I presume counsel can meet and negotiate as to what might be some appropriate changes or additions so that the objective of this order can be achieved without any more problems than no doubt can be envisaged already by counsel. The court, the school board, the province, the plaintiffs have been thrust by the *Charter* into unfamiliar waters. A spirit of co-operation between all will be necessary to ensure *Charter* rights are not infringed while at the same time, acting in a responsible manner. The issues raised in this case cannot be decided within the strict confines of the traditional lawsuit; the problems simply do not lend themselves to resolution by such a structure without modification. This is implicitly recognized by the scope of the remedies given to the court by s. 24 of the *Charter*. There is no reason not to interpret that section liberally to achieve the purpose of seeing that guaranteed rights, if infringed, are remedied, while at the same time acting in a responsible manner. Thus, I am making this order, which is somewhat out of keeping with the type of order one makes in a conventional lawsuit.

SEE ALSO:

R. v. MacKenzie, 2004 NSCA 10 (CanLII)

Lavigne v. Canada (Human Resources Development), 1998 CanLII 7820 (FCA)

Sonier v. Ambulance New Brunswick Inc., 2016 NBQB 218 (CanLII)

Saint-Quentin (Municipality) v. New Brunswick, 2015 NBQB 169 (CanLII)

Saskatchewan v. Conseil scolaire fransaskois, 2014 SKQB 285 (CanLII)

L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique, 2011 BCSC 89 (CanLII)

Association des parents ayants droit de Yellowknife v. Territoires du Nord Ouest (Procureur général), 2005 NWTSC 58 (CanLII) [judgment available in French only]

N.B. – This list is not exhaustive due to the great volume of decisions applying subsection 24(1) of the *Canadian Charter* in the context of language rights.

ANNOTATIONS – SUBSECTION 24(2)

R. v. Losier, 2011 NBCA 102 (CanLII)

[1] This application for leave to appeal involves the decision of a judge of the Court of Queen's Bench to confirm the respondent's acquittal on two charges, one of operating a motor vehicle while his blood alcohol level exceeded the legal limit (s. 253(1)(b) of the *Criminal Code*), the other of operating a vehicle while his ability to do so was impaired by alcohol (s. 253(1)(a)): 2011 NBQB 177 (CanLII), [2011] N.B.J. No. 240 (QL). These acquittals were entered following the exclusion, pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms*, of a qualified technician's certificate purporting to establish the blood alcohol level in question. According to the trial judge, exclusion was justified because the respondent's rights to be served in the official language of his choice and to be informed of this right had been violated. Again according to the trial judge, the right to this information, which is expressly recognized in s. 31(1) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, arises by implication from s. 20(2) of the *Charter*.

[…]

[9] The police officer who stopped the respondent was under a duty to comply with the obligations imposed on institutions of the government of New Brunswick by s. 20(2) of the *Charter* (see *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15 (CanLII), [2008] 1 S.C.R. 383; *R. v. Gautreau* (1989), 101 N.B.R. (2d) 1, [1989] N.B.J. No. 1005 (Q.B.) (QL), rev'd on other grounds (1990), 1990 CanLII 4014 (NB CA), 109 N.B.R. (2d) 54, [1990] N.B.J. No. 860 (C.A.) (QL), leave to appeal refused [1991] 3 S.C.R. viii, [1990] S.C.C.A. No. 444 (QL); and *R. v. Gaudet*, 2010 NBQB 27 (CanLII), [2010] N.B.J. No. 25 (QL)).

[…]

[11] Finally, while there is no question that language rights under the *Charter* are "infrangible" (see *R. v. McGraw*, 2007 NBCA 11 (CanLII), 312 N.B.R. (2d) 142 and *Bujold v. R.*, 2011 NBCA 24 (CanLII), 369 N.B.R. (2d) 262) and that s. 24 must be interpreted in a way that upholds "*Charter* rights by providing effective remedies for their breach" (see *R. v. 974649 Ontario Inc.*, 2001 SCC 81 (CanLII), [2001] 3 S.C.R. 575 at para. 19), it bears underscoring that exclusion of evidence essential to the prosecution is not necessarily the appropriate remedy for every violation of language rights, regardless of the circumstances. The analysis required under s. 24(2) must be carried out.

[12] The trial judge's analysis in this case is, in all respects, harmonious with s. 24(2) and the instructions provided by McLachlin C.J.C. in *R. v. Grant*, 2009 SCC 32 (CanLII), [2009] 2 S.C.R. 353. Given the circumstances and the applicable standard of review (see *R. v. Silveira*, 1995 CanLII 89 (SCC), [1995] 2 S.C.R. 297, [1995] S.C.J. No. 38 (QL) and *R. v. Buhay*, 2003 SCC 30 (CanLII), [2003] 1 S.C.R. 631), we are of the view, like the judge of the Court of Queen's Bench, that the trial judge's decision to exclude the qualified technician's certificate should not be reversed.

R. v. Allen Brideau, 2016 NBQB 197 (CanLII)

[28] Did the trial judge properly apply the constitutional analytic framework principles to the conservation officers' obligations to accord any New Brunswick citizen the right to deal with the institutions of government in their choice of French or English pursuant to the Act and the *Charter*? If the rights of Mr. Brideau were breached did the trial judge properly apply the discretion accorded him to exclude both the identity evidence as well as the real evidence in the form of the seized exhibits from the evidence?

[…]

[40] With the greatest respect to the late trial judge I cannot agree with the manner in which he disposed of this matter. It is trite that the trial judge possesses a great deal of discretion to exclude evidence under the *Charter*, a discretion not to be lightly interfered with by an appeal judge in a summary conviction appeal. Grant, at para. 86; *R. v. Beaulieu* 2010 SCC 7 (CanLII), [2010] 1 S.C.R. 248 (S.C.C.) at para. 5; *Côté* at paragraph 44.

[41] I am keenly aware of the principles set down in *Losier* at paragraph 10 relying on *R. v. Beaulac* 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768 (S.C.C.) where our Court of Appeal stated:

> As the majority pointed out in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, [1999] S.C.J. No. 25 (QL), it is incumbent upon courts to eschew a restrictive interpretation of legislative and constitutional provisions dealing with language rights. We draw additional guidance from that landmark decision. Indeed, among the interpretations that might reasonably be given to such provisions, courts must favour the one that is more likely to reflect the application of the following principles: (1) the right to use one or the other official language requires acknowledgement of a duty on the part of the state to take positive steps to promote the exercise of that right; and (2) the objective of the entrenchment of this right in the *Charter* was none other than to contribute to "the preservation and protection of official language communities":…

[42] However, what I believe differentiates this case from *Losier* is principally the officers continued to gather evidence against the detained defendant in that case while the violation of the accused's language continued and secondly the violation continued for thirty minutes. In this case that did not happen and indeed the officers appeared to be attempting to respect Mr. Brideau's right to be served in the language of his choice before any steps were taken to continue their investigation. In this instance the violation went on for only half that time and the officers made a deliberate decision not (sic) gather evidence against the defendant during that period of time.

[…]

[54] In the instant case the exclusion of the evidence of identity as well as to a lesser extent the electronic moose calls basically caused the collapse of the case for the Crown and predetermined the verdict of not guilty. Thus, the identification evidence and to a lesser extent the electronic calls were crucial evidence in the case.

[55] Applying all of the legal principles, I can come to no other conclusion than that despite considering the "considerable deference" to be accorded the decision to exclude the impugned evidence under s. 24(2) as called for in *Côté* the decision to exclude the evidence of identity and the two electronic moose calls was unreasonable in the circumstances. See: *Côté* at paragraph 44 and *Couturier* at paragraph 66.

[56] For the above reasons, I find that the evidence of identity should not have been excluded, nor should the electronic moose calls have been excluded pursuant to s. 24(2) of the *Charter* even although the language rights guaranteed by the Act and the *Charter* were violated if only for a short time.

R. v. Mathieu, 2014 ONCS 6124 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[160] The evidence is indicated in *R. v. Grant*, 2009 SCC 32 (CanLII), [2009] 2 S.C.R. 353.

A. The seriousness of the Charter-infringing state conduct

> In the analysis required by subs. 24(2), "a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law". (*Grant*, par. 72)

[161] The Crown recognized the seriousness of the first *Charter* breach involving officer Neilson and the need to exclude this evidence. The subsequent breaches relating to the right of the accused to consult an attorney and remain silent and to the possibility of communicating during the interrogation are also serious. The rights granted to the accused and any other person in our multicultural society, which involves clear limited language abilities, require the disapproval of this conduct unbecoming the police. Our Court should not excuse the police's negligence to ensure that the accused understood clearly and that he could communicate effectively in response to criminal charges against him.

B. Impact of breach on Charter-protected interests of the accused

> This inquiry focusses on the seriousness of the impact of the Charter breach on the Charter-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a Charter breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute. (*Grant*, par. 76)

[162] These are fundamental breaches of the *Charter*-protected interests of the accused.

C. Society's interest in an adjudication on the merits

> The importance of the evidence to the prosecution's case is another factor that may be considered in this line of inquiry. Like Deschamps J., we view this factor as corollary to the inquiry into reliability, in the following limited sense. The admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution. (*Grant*, par. 83)

[163] The Crown has the testimony of the plaintiff and an eyewitness regarding the events that occurred outside of the apartment and that implicated the accused. The exclusion of the interrogation is not fatal to the charges brought by the Crown.

[164] By admitting into evidence the interrogation, there is a risk of seeing the jury "interpret" the very unclear statements of an accused who demonstrated his lack of understanding on several occasions and who was unable to communicate in English satisfactorily. This risk could have easily been avoided if the police had taken measures—that were clearly warranted—to offset the accused's linguistic obstacles. The rights of Canadians should not be subject to their ability to understand English and communicate in this language with unilingual Anglophone police officers that disregard the obvious need to use the services of an interpreter.

[165] The examination is excluded from the evidence under subs. 24(2).

R. v. Arjun, 2013 BCSC 2076 (CanLII)

[110] Having found that the police breached Ms. Arjun's rights under ss. 7, 9 and 10(b) of the *Charter*, I must go on to determine whether the evidence obtained as a result of those breaches should be excluded pursuant to s. 24(2) of the *Charter*.

[111] Section 24(2) provides a remedy for *Charter* breaches. While the section allows evidence to be excluded, exclusion is not compelled by the finding that there was a breach: *R. v. Bacon*, 2012 BCCA 323 (CanLII) at para. 18.

[112] Whether or not evidence should be excluded under s. 24(2) is guided by the considerations set out by the Supreme Court of Canada in *Grant*. The overarching consideration is whether the admission of the evidence would bring the administration of justice into disrepute. In order to make that assessment, there are three lines of inquiry that must be considered: 1) the seriousness of the *Charter*-infringing state conduct; 2) the impact of the breach on the accused's *Charter*-protected interests; and 3) society's interest in the adjudication of the case on its merits: *Grant* at para. 71. The Crown relied on *R. v. Goldheart*, [1996] 2 S.C.R. 263, for the proposition that, if a s. 9 breach was found because Constable Eng's arrest was unlawful, Ms. Arjun's statements should not be excluded because the connection between that breach and the statements is too remote.

[…]

[114] In respect of Ms. Arjun's rights under s. 10(b) of the *Charter*, it is my view that this was a serious breach of Ms. Arjun's *Charter*-protected interests. Where, as here, English is not the first language of an accused, it is objectively determined that the accused has a limited understanding of the English language, an interpreter is requested by the accused and the accused did not sufficiently comprehend her rights, the result is as if the accused had no *Charter*-protected rights under s. 10(b).

[115] For the same reason, the impact of not using an interpreter on the accused rights under s. 10(b) is profound. The purpose of s. 10(b) is to ensure that a person in legal jeopardy understands that jeopardy and the options available to them when dealing with the police. The comments of Marin J. in Shmoel, set out above, are apposite here. I find it is unlikely, in the absence of an interpreter, that Ms. Arjun was capable of explaining to an English-speaking counsel the jeopardy she was in or in understanding the advice she received. As such, she was never given the opportunity to meaningfully exercise her right to counsel.

[116] As to society's interest in adjudicating this case on its merits, while the statements of Ms. Arjun made during her interviews by the police are relevant to the charge against her, a trial of this case on its merits will proceed even if they are excluded. It should be noted that there was no admission of culpability by Ms. Arjun contained in any of the statements tendered by the Crown. Excluding the statements will not gut the Crown's case against Ms. Arjun. Additionally, I note that it may well bring the justice system into disrepute to admit statements obtained from an accused person who was not given the opportunity to speak to counsel in a language that is comprehensible to her. It is in society's interest that Charter rights be meaningfully explained and exercised to and by all accused persons, regardless of their language skills. This is especially true given Canada's multicultural composition and increasing linguistic diversity, to which police in large urban centres like Vancouver should be particularly sensitive.

[117] Having considered the breach of s. 10(b) in light of the considerations noted in *Grant*, the evidence consisting of the accused statements to the police during her interviews will not be admitted as their admission would bring the administration of justice into disrepute.

[118] The reasoning above in regard to the breach of s. 10(b) is equally applicable to the breach of s. 7. Therefore, for the same reasons I exclude the statements made to the police because of the breach of Ms. Arjun's s. 10(b) rights, I also exclude that evidence because of the breach of her s. 7 rights.

R. v. Gaudet, 2010 NBQB 27 (CanLII)

[61] Section 24(2) of the *Charter* enjoins a judge who is determining whether the admission of the evidence would bring the administration of justice into disrepute to inquire into all of the circumstances of the case. The notion of disrepute includes an element of public opinion. Accordingly, the trial judge must ask if the admission of the evidence would bring the administration of justice into disrepute in the eyes of a person who is reasonable, objective and well-informed as to all of the circumstances of the case. Section 24(2) requires the trial judge to take into account all of the circumstances of the case. The trial judge must make a well-reasoned decision having regard to the applicable law and specific facts of the case.

[…]

[65] In the case at bar, there is nothing in the facts to allow for the conclusion that there was a *Charter* violation other than the failure to inform the accused that he had a choice to be served in English or French. Trial fairness and principles of natural justice were never raised. There was no suggestion of unlawful interception or illegal detention. There is no evidence that the action was pursued in an unfair or vexatious manner. There is nothing to indicate that the accused was the victim of discriminatory police practices. The trial judge had no way of knowing whether the peace officer's omission was inadvertent or, on the contrary, abusive, serious and done deliberately to infringe Mr. Gaudet's linguistic rights. Without such evidence, it was impossible for the trial judge to determine its significance to the Attorney General's case or its reliability.

[…]

[67] The facts before the court do not allow for a thorough analysis of all the circumstances as required by s. 24(2) of the *Charter*. However, the factors that we do know tip the balance and mitigate in favour of the admission of the evidence.

[68] Society expects criminal charges to be adjudicated on their merits. Relying on *Collins* and *Grant* and the facts as agreed upon, I cannot find that the admission of the evidence would have brought the administration of justice into disrepute. I cannot agree with the trial judge that the evidence obtained would have been excluded.

R. v. Irving, 2016 QCCQ 2697 (CanLII)

[43] Having mechanically read the accused's rights without a true regard for whether they are understood seems to me to constitute conduct of sufficient seriousness to impose the consequences provided for in the *Charter*.

2. The impact of the infringement of Charter-protected rights

[44] French and English are the two official languages of Canada. This status is constitutional (section 16 of the *Charter*) and is rightly reflected throughout the criminal proceeding. We need only consider section 530.1 of the *Criminal Code*. The Court of Appeal of Québec's well-known decision in *Dow* is a reminder of it as well.

[45] The right of an accused to interact with police officers in his or her language does not have the same status; that is obvious. […]

[46] My previous determination is not, of course, that the infringement is of the purely linguistic right of the accused to use either official language. Rather, it is an observation that the right to be truly informed of the right to consult a lawyer was violated in the circumstances by the failure to use the accused's official language on the part of the police officers, who clearly could have made use of it.

[47] This failure caused, in practice, the inaccessibility of a lawyer to the accused, which appears to me to be a major consequence.

[48] In fact, applying the facts of the case to the principles set out in the above-quoted paragraph leads me to believe, in particular, that the admission of the evidence risks signaling to the public that *Charter* rights, however high sounding, are of little actual avail to the citizen.

[49] This factor contributes to the subsequent rejection of the evidence.

3. Society's interest in an adjudication of the case on its merits

[50] It is conceivable that, in general, society has an interest in the adjudication of all cases alleging criminal misconduct by a member of said society on their merits. It is also conceivable that this interest could nevertheless be variable according to the seriousness of the conduct.

[51] Here, I would like to give a reminder that the offence, in the circumstances, is more technical, since the Crown recognizes that it is unable to prove beyond a reasonable doubt that the accused was driving while impaired by alcohol or a drug.

[52] His crime is solely driving with an alcohol level that was over the legal limit.

[53] I am not saying that one of these crimes is less serious than the other, but if, as in the present circumstances, the Crown recognizes its inability to demonstrate that the accused's ability to control a vehicle was affected by alcohol or a drug, the level of risk to society is certainly lower.

[54] In weighing all of these factors, it seems to me that the evidence should therefore be excluded.

R. v. Lavoie, 2014 NBPC 43 (CanLII)

[39] In *R. v. Losier*, 2011 NBCA 102 (CanLII), the Court of Appeal of New Brunswick ruled on the meaning and scope that should be given to s. 20(2) of the *Charter*. Indeed, the Court of Appeal reiterates that it is incumbent upon courts to eschew a restrictive interpretation of legislative and constitutional provisions dealing with language rights. I draw additional guidance from that landmark decision. On the one hand, a peace officer who stops a member of the public in New Brunswick is under a duty to comply with the obligations imposed on institutions of the Government of New Brunswick by s. 20(2) of the *Charter*, in particular as regards the active offer of service in both official languages. On the other hand, while there is no question that language rights under the *Charter* are "infrangible" and that s. 24 must be interpreted in a way that upholds *Charter* rights by providing effective remedies for their breach, it bears underscoring that for the purposes of the analysis required under s. 24(2), the exclusion of evidence is not necessarily the appropriate remedy for every violation of language rights, regardless of the circumstances. This case is striking proof of that.

The criteria for exclusion under s. 24(2) of the *Charter*

[40] In any event, although the prosecution concedes that the language rights guaranteed by s. 20(2) of the *Charter* were infringed, the analysis does not end there. The next question is whether the evidence should be excluded based on the three criteria set out in *R. v. Grant* 2009 SCC 32 (CanLII), [2009] 2 S.C.R. 353:

> (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message that the justice system condones serious state misconduct),
>
> (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and
>
> (3) society's interest in the adjudication of the case on its merits.

[41] As for the third inquiry, public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such

as one that effectively compels a suspect to talk) undermines the reliability of the evidence, this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither the accused's interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute: *R. v. Grant*, *supra*, para. 81.

[…]

The criteria for exclusion under s. 24(2) of the Charter

A. The seriousness of the Charter-infringing state conduct

[93] The first inquiry being the seriousness of the *Charter*-infringing state conduct, there is no indication of bad faith or obstinacy on the part of the SPCA [Society for Prevention of Cruelty to Animals] officers as to the *Charter*-protected language rights. Although the entry warrant was neither in Form 2 nor filled out in both official languages, the fact remains that Corporal Parish requested Constable Saulnier's assistance to translate and explain its content to the defendant.

B. The impact of the breach on the Charter-protected interests of the accused

[94] As for the impact of the breach on the defendant's language rights, to quote the Supreme Court in *Harrison*, *supra*, I consider the infringement to be "merely transient" given Constable Saulnier's assistance.

[95] The evidence that the defendant is seeking to have excluded consists of so-called "non-bodily physical" evidence that existed notwithstanding and irrespective of the *Charter* violation, namely the officers' observations, the seized dogs, the photos as well as the video depicting the condition of the kennel. In other words, nothing was "discovered" as a result of the language rights violation. This evidence was clearly visible to anyone who cared to look, with or without an entry warrant. Likewise, there is nothing to suggest a context demeaning to the defendant's individual dignity or a serious invasion of privacy. A place of business, such as the defendant's kennel, attracts a lower expectation of privacy than a dwelling house.

C. Society's interest in the adjudication of the case on its merits

[96] I note once again that the charges in this case are not among the most trivial. Depriving a large number of dogs of adequate medical attention and breeding them under conditions that are quite likely to compromise their health cannot be taken lightly. Given its reliability, the search for truth in this case would be better served by including the evidence than by excluding it. The evidence obtained upon executing the entry warrant is also crucial to the prosecution and its exclusion would be virtually fatal to it. In my view, the exclusion of this evidence may bring the administration of justice into disrepute. The interest of society, therefore, requires that the case be adjudicated on its merits.

D. Balancing the various factors

[97] All things considered, wanting in the long term to maintain the integrity of public confidence in the judicial system leads me to conclude that admitting the evidence would not bring the administration of justice into disrepute. Conversely, its exclusion would, in my opinion, tend to bring the administration of justice into disrepute. I therefore find that the evidence obtained on October 27, 2011, and all testimony stemming from it, is admissible.

[…]

[120] I am of the opinion that in this case, the SPCA officers breached the defendant's language rights on October 25 and 27, 2011, infringing the guarantees set out in s. 31(1) of the *Official Languages Act* and s. 20(2) of the *Charter*. In light of the very specific circumstances of this case, and with the exception of the statement by the accused, I am of the view that these breaches do not justify the exclusion of evidence under s. 24(2) of the *Charter*.

R. v. Jacky Savoie, 2012 NBPC 10 (CanLII)

[1] The defendant, Jacky Savoie, is charged with having operated a motor vehicle while his blood alcohol level exceeded the legal limit, an offense under Section 253(1) (b) of the *Criminal Code of Canada*.

[2] On January 18th, 2012, the defence filed a Notice of Application alleging that the language rights of Mr. Savoie as guaranteed under Section 31(1) of the *Official Languages Act* as well as Section 20(2) of the *Canadian Charter of Rights and Freedoms* had been breached. In their Notice, the defence alleges that the arresting officer made no offer of choice of language and as a result of the alleged breach, seeks exclusion of the certificate of the qualified technician.

[…]

[56] In preliminary comments made with respect to the perspectives inherent in Section 24(2) of the *Charter*, the majority [in *Grant*] stated that the purpose of Section 24(2) is to maintain the good repute of the administration of justice. Its purpose is not to punish police misconduct or to compensate the accused for the violation of his rights; its purpose is broader it must reflect the societal interests inherent therein. Section 24(2) does not focus on reaction to the immediate case; it focuses on long term, futuristic and systemic concerns. The critical question to be addressed is whether the overall repute of the administration of justice, viewed in the long term, will suffer from admission of the evidence. The standard is objective, therefore the question the Court must view the matter from a broad perspective and consider whether a reasonable person informed of all relevant circumstances and the values that underlie the *Charter* would conclude that the admission of the evidence would bring the administration of justice into disrepute.

[…]

[67] Considering the first heading, the question of seriousness of the *Charter* infringing conduct, this Court finds that the importance of linguistic rights to be indisputable. In *Losier* the Chief Justice uses the term – infrangible, thus leaving no doubt about their importance in the constitutional constellation. Having said that, I am of the opinion that the *Charter* breach in this case would situate itself at the lower end of the spectrum for the following reasons:

(1) the defendant's mother tongue was French,

(2) his day-to-day language is French,

(3) during Court proceedings, he used the services of an interpreter in order to be able to testify in English given that the language of the trial was English.

[…]

[70] As a result of the above and taking into consideration the analyses that must be carried out under the first and second stage of the protocol, that being the seriousness and resultant impact of the breach, I am of the opinion that exclusion would not be an appropriate remedy given the considerations under these two headings. Without trivializing what has transpired in the present matter, I find that the breach in the present matter would have been minor and the impact on the defendant to have been minimal. In this case, Mr. Savoie in cross-examination quite candidly admitted that he would have answered Cst. Dupuis that he wished to be dealt with in the French language, had the question been posed. This case does not

have evidence of high handed or a cavalier attitude of the police officer present in *Losier*. As a result, I feel that exclusion would not be a viable remedy in these particular aspects of the analysis.

[71] Finally, in my opinion, society's interests in adjudication on the merits would, in this particular matter, strongly militate against exclusion. The reasonable person, having knowledge of the particular facts of this matter, would feel that the administration of justice would be brought into disrepute if the Court were to exclude the results of the analysis under Section 24(2) of the *Charter*. One only has to recall the many comments of the Supreme Court with respect to the dangers of impaired driving.

[72] In *Losier* Chief Justice Drapeau at para.11 observes that despite the importance of linguistic rights "it bears underscoring that exclusion of evidence essential to the prosecution is not necessarily the appropriate remedy for every violation of language rights, regardless of the circumstances. The analysis required under s.24 (2) must be carried out".

[73] As a result, while I have assumed (and this is only an assumption) that there has been a *Charter* breach in this particular instance, the Court is of the opinion that there should not be a ruling under Section 24(2) of the *Charter* excluding the certificate of analysis.

SEE ALSO:

R. v. Ippak, 2015 NUCJ 3 (CanLII)

R. v. Robichaud, 2012 NBQB 359 (CanLII)

R. v. Hnatusko, 2012 ONCJ 35 (CanLII)

R. v. Hernandez, 2012 QCCQ 1435 (CanLII) [judgment available in French only]

R. v. Landry, 2012 NBBR 185 (CanLII) [judgment available in French only]

N.B. – This list is not exhaustive due to the great volume of decisions applying subsection 24(2) of the *Canadian Charter* in the context of language rights and linguistic comprehension.

General (section 27)

27. Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

[LAST UPDATE: JUNE 2017]

ANNOTATIONS

Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14 (CanLII)

[20] Section 23 provides a comprehensive code of minority language education rights which afford special status to minority English- or French-language communities. The Court in *Mahe*, at p. 369, recognized that this special status would create inequalities between linguistic groups. See also *Adler v. Ontario*, 1996 CanLII 148 (SCC), [1996] 3 S.C.R. 609, at para. 32. Specifically, English speakers living in Quebec and French speakers living in the territories and other provinces would enjoy rights denied to other linguistic groups. Section 23 has been described as an exception to ss. 15 and 27 of the *Canadian*

Charter; it is rather an example of the means to achieve substantive equality in the specific context of minority language communities. While this entrenched inequality may be the product of political compromise and negotiation, this does not mean that s. 23 rights are to be construed narrowly. The Court has confirmed on several occasions that language rights must be interpreted in a broad and purposive manner consistent with the preservation and promotion of both official language communities in Canada: *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, at para. 25; *Reference re Public Schools Act (Man.)*, at p. 850; *Reference re Secession of Quebec*, at para. 80; *Arsenault-Cameron*, at para. 27.

R. v. Tran, [1994] 2 S.C.R. 951, 1994 CanLII 56 (SCC)

[37] Sections 15 (equality rights), 25 (aboriginal rights) and 27 (multicultural heritage) of the *Charter* also speak to the importance of the right to interpreter assistance in Canadian society. Section 27, which mandates that the *Charter* be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians, is particularly germane. In so far as a multicultural heritage is necessarily a multilingual one, it follows that a multicultural society can only be preserved and fostered if those who speak languages other than English and French are given real and substantive access to the criminal justice system. Just as s. 27 has already been held to be relevant to the interpretation of freedom of religion under s. 2(a) of the *Charter* (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 752, and *R. v. Gruenke*, [1991] 3 S.C.R. 263), so too should it be a factor when considering how to define and apply s. 14 of the *Charter*.

(iv) Conclusions on the Purposes Served by Section 14

[38] The right of an accused person who does not understand or speak the language of the proceedings to obtain the assistance of an interpreter serves several important purposes. First and foremost, the right ensures that a person charged with a criminal offence hears the case against him or her and is given a full opportunity to answer it. Second, the right is one which is intimately related to our basic notions of justice, including the appearance of fairness. As such, the right to interpreter assistance touches on the very integrity of the administration of criminal justice in this country. Third, the right is one which is intimately related to our society's claim to be multicultural, expressed in part through s. 27 of the *Charter*. The magnitude of these interests which are protected by the right to interpreter assistance favours a purposive and liberal interpretation of the right under s. 14 of the *Charter*, and a principled application of the right.

Mahe v. Alberta, [1990] 1 S.C.R. 342, 1990 CanLII 133 (SCC)

[45] Before directly addressing the question of management and control, I wish to dispose briefly of two arguments raised by the parties. The first, advanced by the appellants, is that s. 23 of the *Charter* should be interpreted in light of the words of ss. 15 and 27 of the *Charter*. These provisions read as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 27. This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

While I agree that it is often useful to consider the relationship between different sections of the *Charter*, in the interpretation of s. 23 I do not think it helpful in the present context to refer to either s. 15 or s. 27. Section 23 provides a comprehensive code for minority language educational rights; it has its own internal qualifications and its own method of internal balancing. A notion of equality between Canada's official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada. As the Attorney General for Ontario observes, it would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to "every individual".

Entreprises W.F.H. Ltée v. Québec (Procureure Générale du), 2001 CanLII 17598 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[100] The appellant relies on s. 27 of the *Canadian Charter*, which reads as follows:

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

[101] The appellant argues that multiculturalism necessarily implies the freedom to choose the language of the commercial message appearing on outdoor signs. It submits that imposing the marked predominance of French violates the principle of multiculturalism.

[102] Section 58 [of the *Charter of the French Language*] does not prohibit the use of any language in particular, and I do not see how it is inconsistent with the objective of preserving and enhancing the multicultural heritage of Canadians. As the Superior Court judge stated, the *Charter of the French Language* is a piece of so-called affirmative action legislation and designed to allow the French language to regain and maintain prominence in an intercultural but majority Francophone community. Section 27 of the *Canadian Charter* cannot be interpreted without regard for s. 16(3) of that same *Charter*, which reads as follows:

> 16.(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

[103] In my opinion, in light of the demonstrably vulnerable state of the French language, the Quebec legislature exercised the power granted by paragraph 16(3) in enacting s. 58.

Lavoie v. Nova Scotia (Attorney-General), 1989 CanLII 5221 (NS CA)

[41] The appellants are entitled to a declaration that pursuant to s. 23(3)(a) they have established that there are sufficient children within the relevant territorial area to warrant provision of minority language instruction, out of public funds.

[42] It follows that the province must provide suitable accomodation for the minority language instruction these children are entitled to receive. It must be made available in a surrounding that is "consistent with the preservation and enhancement" of the French culture (s. 27). It cannot be designed in a way that permits assimilation or smacks of immersion. The instruction must be provided in a suitably structured environment.

[…]

[68] The *Acadian Schools Amendment* is not an example of invidious discrimination. The fact that a distinction exists whereby Acadians are treated differently from the anglophone majority does not mean that the legislation contravenes s. 15 of the *Charter*. The amendment serves to remedy past inequality and affords special treatment to certain of the people of this province. Surely that is a distinction acceptable in Canadian society.

[69] I agree with the appellants that the quality of the primary and secondary school instruction provided their children in the Cape Breton School District must be equal to that provided anglophone pupils. Anything less will not suffice. In fact, it may be somewhat more than equal because it must be provided "in a manner consistent with the preservation and enhancement" of the French heritage: *Charter*, s. 27.

R. v. Punch, 1985 CanLII 120 (NWT CA)

Having come down to us through the centuries as part of our multi-cultural heritage, though modified over the last hundred years in the Territories, the jury of 12 deserves to be considered, in an application such as the present, against s. 27 of the *Charter*:

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

It cannot be said that the modern jury, be it one of six or twelve, is part of the indigenous aboriginal cultures of the Northwest Territories. However, the ancient traditions of mutual consultation, reliance upon the wisdom of elders and community decision-making, are not essentially foreign to the Euro-Canadian institution of the criminal trial jury. These traditions have been recognized by our courts in decided cases*: Re Noah Estate* (1961), 1961 CanLII 442 (NWT TC), 32 D.L.R. (2d) 185, 36 W.W.R. 577 (N.W.T.T.C.), and R. v. Innuksuk, [1979] The Muskox 25 (N.W.T.T.C.). The jury, as an institution, allows for a measure of mutual consultation and community involvement in decision-making within the framework of the trial process of the superior court, and can therefore be recognized as fostering continuation of this important element of our indigenous aboriginal cultures within our criminal justice system.

[…]

Taking both ss. 27 and 28 of the *Charter* into consideration, we should ask whether a six-person jury is more or less likely than one of 12 members to exclude persons of any given ethnic origin or cultural background, or to exclude persons of one or the other sex. Speaking from experience that goes back to 1959, and noting the tables set out in the article "Jury Verdicts in the N.W.T.", 1 *Alta. L. Rev.* 50 (1970), by the late Morrow J. of this Court, it is I think fair to say that women and ethnic minorities can be more easily excluded from a six-person jury than from one of 12 members. Juries of six women, and all-native juries, have been sworn; but the more frequent pattern is one in which one sex or the other is in a minority on the jury, and the same is true of the balance between natives and non-natives. With a larger number, requiring a larger panel from which to choose the jury, one might expect things to even out.

[…]

It seems only reasonable to conclude that the larger the jury the greater is the likelihood of public acceptance of the authority of its verdicts, at least as between one of six and one of 12. And while the larger jury may be more easily approached, in the sense that it will have more members who may be subjected to influence, the effect of any such approach seems much less likely to be decisive than with a jury of only six. The preference, at common law, for 12 jurors ought not to be lightly disregarded as a mere historical accident or whimsical indulgence in numerology. Twelve jurors, good and true, have become accepted as the common law right of Canadians in criminal cases. A jury of six, though long in use in the Territories, does not have the same standing.

Reference re Education Act of Ontario and Minority Language Education Rights, 1984 CanLII 1832 (ON CA)

[126] Section 27 is particularly pertinent to a provision such as s. 23 because, as the Symons Report expressed it at pp. 13-15 (A.C.F.O. Doc. No. 5):

> The French language school provides a setting within which the Francophone student will have a better opportunity to come to know and to understand and to strengthen and develop their own *culture and heritage* ... *[t]he school occupies a central role in the cultural life of the linguistic community* ... [t]he French language schools must truly be community schools and easily accessible to the general population of the linguistic group they exist to serve ... [t]his Commission shares the belief, which is widely held by Franco-Ontarians, that the establishment of French language schools in which the language of both communication and administration is French best meets this ... need to preserve the language, customs and *culture* of the Francophone student.

In the light of s. 27, s. 23(3)(b) should be interpreted to mean that minority language children must receive their instruction in facilities in which the educational environment will be that of the linguistic minority. Only then can the facilities reasonably be said to reflect the minority culture and appertain to the minority.

R. v. Sidhu, 2005 CanLII 42491 (ON SC)

[277] Fundamental fairness and equal access to the courts for linguistic minorities demands purposeful interpretation of the s.14 *Charter* right. "The right to a fair trial is universal and cannot be greater for members of official languages than for persons speaking other languages": *The Queen v. Beaulac* (1999), 1999 CanLII 684 (SCC), 134 C.C.C. (3d) 481 (S.C.C.), at para. 41. While "the right to interpreter assistance is to create a level and fair playing field, not to provide some individuals with more rights than others", a "multicultural society can only be preserved and fostered if those who speak languages other than English and French are given" full access to the justice system: *The Queen v. Tran*, *supra*, at pp. 239-41.

[278] Complementing the s. 14 *Charter* right is the constitutional mandate to provide more than mere lip service to s.27 of the *Charter* "which mandates that the *Charter* be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians": *The Queen v. Tran*, *supra*, at pp. 239-40. […]

Mutual Tech Canada Inc. v. Law, 2000 CanLII 22637 (ON SC)

[1] This case involves a dispute as to a witness' ability to communicate in the language in which a cross-examination was being conducted. Such disputes have arisen before, but what makes this a case of first impression is that the witness insists on testifying in the English language and it is opposing counsel that wishes that an interpreter be used.

[…]

[7] I agree with counsel for the defendant that in a multicultural society the system for the administration of justice must attempt to accommodate the witness' desire to participate in the legal proceedings directly rather than through the intercession of an interpreter. If authority is needed for this proposition I would observe that the *Rules of Civil Procedure* must be interpreted in light of the *Canadian Charter of Rights and Freedoms*. In *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, 108 D.L.R. (4th) 193, L'Heureux-Dubé J. said, "As the court has stressed on previous occasions, *Charter* values nonetheless remain an important consideration in judicial decision making. Courts must try to uphold *Charter* values, and preference should be given to such values in the interpretation of legislation as over those which run contrary to them." Multiculturalism has been elevated to a constitutional principle by s. 27 of the *Charter* which provides:

> 27. This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

[8] The preservation and enhancement of the multicultural heritage of Canadians requires that witnesses who are unable to communicate in the language of the examination are provided with interpreters. It also requires, to the extent reasonably practicable, that individuals who may be less than fluent in the language of the examination are able to participate directly in the legal system without being made to feel alien. In my view, this means the question whether a witness is able to understand the language in which an examination is conducted should be determined in light of the steps taken to accommodate the witness' lack of fluency in the language. The inability of a witness to understand examining counsel will not necessarily lead the court to conclude that the witness is unable to understand the language of the proceeding. When examining a witness who is not fluent in the language of the proceeding, counsel may find it necessary to speak slowly, to use simple and clear language, to constantly face the witness directly in order to allow the witness to have a clear view of counsel's face and lips, to speak in an audible voice (without implying the witness is hard of hearing), to pause after a question to allow the witness to absorb the question and formulate the answer in English, to avoid using any idiomatic expression or other culturally based language, and to repeat or rephrase the question patiently. Where, for example, the

witness is unable to understand idioms used by counsel, the court will not likely order an interpreter be used, but rather can be expected to call upon counsel to make adjustments to the language he or she is using.

[9] In my view, the demands for flexibility and patience do not fall solely on examining counsel, but on all participants, including the witness. The Supreme Court of Canada has made its most focused examination of the notion of accommodation in cases under human rights codes. While that jurisprudence does not govern the situation before me, I find it noteworthy that even where there is a statute-based duty to accommodate, there is an expectation the person whose needs are being met will contribute to the effectiveness of the accommodation. The Court said in *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 S.C.R. 970 at p. 994, 95 D.L.R. (4th) 577:

> The search for accommodation is a multi-party inquiry… To facilitate the search for an accommodation, the complainant must do his or her part as well… Thus, in determining whether the duty of accommodation has been fulfilled, the conduct of the complainant must be considered.

[10] In my view a witness who is not fluent in the language of the examination should be expected to do his or her part to facilitate effective communication.

Alavehzadeh v. Canada (Citizenship and Immigration), 2016 CanLII 73710 (CA IRB)

Effect of Charter s. 27

[95] The appellant submitted that *Charter* s. 27 does not confer any rights but serves to "modify and add meaning to other rights" in the *Charter*, and is particularly significant in this appeal because sponsors of parents are "immigrants and overwhelmingly racialized."

[96] Multicultural heritage is not a *Charter* guarantee but is referenced under s. 27 as an interpretive guide:

> 27. This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

[97] The panel agrees that *Charter* s. 27 is an interpretive guide and notes that, to some degree, it is reflected in the immigration objectives, especially *IRPA* [*Immigration and Refugee Protection Act*] s. 3(b): "to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada." However, the panel disagrees with the appellant's submission that the evidence in this appeal shows that the MNI [Minimum Necessary Income] requirement weakens the multicultural makeup of Canadian society; it could not be extrapolated to support that conclusion. Additionally, the panel notes that the MNI requirement is specifically not required to sponsor many immediate family members.

SEE ALSO:

Incredible electronics Inc. v. Canada (Attorney General of), 2002 CanLII 16056 (ON SC)

Application of Charter (article 33)

33. (1) Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

33. (2) Operation of exception

33. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

33. (3) Five year limitation

33. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

33. (4) Re-enactment

33. (4) (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

33. (5) Five year limitation

33. (5) (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

[LAST UPDATE: JUNE 2017]

ANNOTATIONS – GENERAL

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, 1988 CanLII 19 (SCC)

V. Is Section 58 or s. 69 of the Charter of the French Language Protected from the Application of s. 2(b) of the Canadian Charter of Rights and Freedoms by a Valid and Applicable Override Provision Enacted in Conformity with s. 33 of the Canadian Charter?

[23] As indicated in Part II of these reasons, which quotes the relevant legislative and constitutional provisions, and in the first constitutional question, there are two override provisions in issue: (a) s. 214 of the *Charter of the French Language*, which was enacted by s. 1 of *An Act respecting the Constitution Act, 1982*, S.Q. 1982, c. 21; and (b) s. 52 of *An Act to amend the Charter of the French Language*, S.Q. 1983, c. 56. The two override provisions are in identical terms, reading as follows: "This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the *Constitution Act, 1982* (Schedule B of the Canada Act, chapter 11 in the 1982 volume of Acts of Parliament of the United Kingdom)." The issue of validity that is common to both s. 214 and s. 52 is whether a declaration in this form is one that is made in conformity with the override authority conferred by s. 33 of the *Canadian Charter of Rights and Freedoms*. There are additional issues of validity applicable to s. 214 of the *Charter of the French Language* arising from the manner of its enactment, that is, the "omnibus" character of the Act which enacted it, and from the retrospective effect given to s. 214 by s. 7 of the Act, which has been quoted above.

[24] Section 214 of the *Charter of the French Language* ceased to have effect by operation of s. 33(3) of the *Canadian Charter of Rights and Freedoms* five years after it came into force, and it was not re-enacted pursuant to s. 33(4) of the *Charter*. If the retrospective effect to April 17, 1982 given to s. 214 by s. 7 of *An Act respecting the Constitution Act, 1982*, was valid, s. 214 ceased to have effect on April 17, 1987. If not, it ceased to have effect on June 23, 1987, which was five years after the enacting Act came into force on the day of its sanction. In either case the question of the validity of s. 214 is moot, on the assumption, which was the one on which the appeal was argued, that on an application for a declaratory judgment in a case of this kind the Court should declare the law as it exists at the time of its judgment. We were, nevertheless, invited by the parties in this appeal and the appeals that were heard at the same time to rule on the validity of the standard override provision as enacted by *An Act respecting the*

Constitution Act, 1982, because of the possible significance of that issue in cases pending before other tribunals. Before considering how the Court should respond to that invitation we propose to consider the other override provision in issue which, as we have said, raises a common question of validity.

[25] Section 52 of *An Act to amend the Charter of the French Language*, which was proclaimed in force on February 1, 1984, will not cease to have effect by operation of s. 33(3) of the *Canadian Charter of Rights and Freedoms* until February 1, 1989. It is therefore necessary to consider its validity since the Attorney General of Quebec contends that it protects s. 58 of the *Charter of the French Language* from the application of s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The respondents in this appeal contend that s. 52 is of no force or effect because it is an override declaration that was not made in conformity with s. 33 of the *Canadian Charter*, but the appellant Singer in Devine also raised an issue concerning the application of s. 52, contending that it should not be construed as intending to apply to s. 58, as amended, of the *Charter of the French Language*. That contention will be dealt with before turning to the question of the validity of the standard override provision contained in s. 52.

[26] The appellant Singer in *Devine*, supported by the Attorney General of Canada, submitted that s. 52 applies only to the enacting words of *An Act to amend the Charter of the French Language* and not to the provisions of the *Charter of the French Language*, including s. 58, that were amended by it, and that it could not have been intended that s. 52, which came into force before s. 214 ceased to have effect, should extend the protection of some provisions of the *Charter of the French Language*, but not others, from the application of the *Canadian Charter of Rights and Freedoms* beyond the date on which s. 214 would cease to have effect. These contentions are without merit. Section 52 would have no purpose or effect if it applied only to the enacting words of *An Act to amend the Charter of the French Language*, for example, to the opening words of s. 12 thereof, "Section 58 of the said *Charter* is replaced by the following...." and not to s. 58, as amended by s. 12. The words "This Act shall operate . . ." in s. 52 must mean the whole of what is enacted or has operational effect by the enactment. In so far as the relationship of s. 52 to s. 214 of the *Charter of the French Language* is concerned, s. 52 appears to have been enacted as part of the well-established legislative policy and practice at the time of including the standard override provision in every Quebec statute. It was enacted before the override provision in s. 214 of the *Charter of the French Language* ceased to have effect. It is a separate override provision, unconnected with s. 214. There is no basis for speculation as to whether, at the time of its enactment, the legislature could have intended that s. 52 should continue to have effect with respect to certain provisions of the *Charter of the French Language* after s. 214 ceased to have effect. There was no reason to assume at that time that s. 214 would not be re-enacted pursuant to s. 33(4) of the *Canadian Charter of Rights and Freedoms*. Section 52 of *An Act to amend the Charter of the French Language* therefore purports to apply to s. 58 of the *Charter of the French Language*, as amended, so that if valid, s. 52 must be given its full effect for the five-year period specified in s. 33(3) of the *Canadian Charter*.

[…]

[33] In the course of argument different views were expressed as to the constitutional perspective from which the meaning and application of s. 33 of the *Canadian Charter of Rights and Freedoms* should be approached: the one suggesting that it reflects the continuing importance of legislative supremacy, the other suggesting the seriousness of a legislative decision to override guaranteed rights and freedoms and the importance that such a decision be taken only as a result of a fully informed democratic process. These two perspectives are not, however, particularly relevant or helpful in construing the requirements of s. 33. Section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case. The requirement of an apparent link or relationship between the overriding Act and the guaranteed rights or freedoms to be overridden seems to be a substantive ground of review. It appears to require that the legislature identify the provisions of the Act in question which might otherwise infringe specified guaranteed rights or freedoms. That would seem to require a prima facie justification of the decision to exercise the override authority rather than merely a certain formal expression of it. There is, however, no warrant in the terms of s. 33 for such a requirement. A legislature may not be in a position to judge with any degree of certainty what provisions of the Canadian *Charter of Rights and Freedoms* might be successfully invoked against various aspects of the Act in question. For this reason it must be permitted

in a particular case to override more than one provision of the *Charter* and indeed all of the provisions which it is permitted to override by the terms of s. 33. The standard override provision in issue in this appeal is, therefore, a valid exercise of the authority conferred by s. 33 in so far as it purports to override all of the provisions in s. 2 and ss. 7 to 15 of the *Charter*. The essential requirement of form laid down by s. 33 is that the override declaration must be an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the *Charter*. With great respect for the contrary view, this Court is of the opinion that a s. 33 declaration is sufficiently express if it refers to the number of the section, subsection or paragraph of the *Charter* which contains the provision or provisions to be overridden. Of course, if it is intended to override only a part of the provision or provisions contained in a section, subsection or paragraph then there would have to be a sufficient reference in words to the part to be overridden. In so far as requirements of the democratic process are relevant, this is the form of reference used in legislative drafting with respect to legislative provisions to be amended or repealed. There is no reason why more should be required under s. 33. A reference to the number of the section, subsection or paragraph containing the provisions or provisions to be overridden is a sufficient indication to those concerned of the relative seriousness of what is proposed. It cannot have been intended by the word "expressly" that a legislature should be required to encumber a s. 33 declaration by stating the provision or provisions to be overridden in the words of the *Charter*, which, in the case of the standard override provision in issue in the appeal, would be a very long recital indeed.

[34] Therefore, s. 52 of *An Act to amend the Charter of the French Language* is a valid and subsisting exercise of the override authority conferred by s. 33 of the *Canadian Charter of Rights and Freedoms* that protects s. 58 of the *Charter of the French Language* from the application of s. 2(b) of the *Canadian Charter*. Section 69 of the *Charter of the French Language* is not so protected since it was not affected by *An Act to amend the Charter of the French Language*. In the result, as indicated in the following Part VI of these reasons, s. 58 is subject to s. 3 of the Quebec *Charter of Human Rights and Freedoms* while s. 69 is subject to both s. 2(b) of the *Canadian Charter* and s. 3 of the Quebec *Charter*.

[35] Before leaving Part V of these reasons, it remains to be considered whether the Court should exercise its discretion to rule on the other aspects of the validity of the standard override provision as enacted by *An Act respecting the Constitution Act, 1982*: the "omnibus" character of the enactment; and the retrospective effect given to the override provision. These issues affect both s. 214 of the *Charter of the French Language*, which is in issue in this appeal and in the *Devine* appeal and s. 364 of the *Consumer Protection Act*, R.S.Q., c. P-40.1, in the *Irwin Toy* appeal. The Court has concluded that although both of these provisions have ceased to have effect it is better that all questions concerning their validity should be settled in these appeals because of their possible continuing importance in other cases. Given the conclusion that the enactment of the standard override provision in the form indicated above is a valid exercise of the authority conferred by s. 33 of the *Canadian Charter of Rights and Freedoms*, this Court is of the opinion that the validity of its enactment is not affected by the fact that it was introduced into all Quebec statutes enacted prior to a certain date by a single enactment. That was an effective exercise of legislative authority that did not prevent the override declaration so enacted in each statute from being an express declaration within the meaning of s. 33 of the *Canadian Charter*. Counsel referred to this form of enactment as reflecting an impermissibly "routine" exercise of the override authority or even a "per-version" of it. It was even suggested that it amounted to an attempted amendment of the *Charter*. These are once again essentially submissions concerning permissible legislative policy in the exercise of the override authority rather than what constitutes a sufficiently express declaration of override. As has been stated, there is no warrant in s. 33 for such considerations as a basis of judicial review of a particular exercise of the authority conferred by s. 33. The Court is of a different view, however, concerning the retrospective effect given to the standard override provision by s. 7 of *An Act respecting the Constitution Act, 1982*, which for convenience is quoted again as follows:

> 7. This Act comes into force on the day of its sanction.
>
> However, section 1 and the first paragraph of section 3 have effect from 17 April 1982; section 2 and the second paragraph of section 3 have effect from the date from which each of the Acts replaced under section 2 came into force.

In providing that s. 1, which re-enacted all of the Quebec statutes adopted before April 17, 1982 with the addition in each of the standard override provision, should have effect from that date, s. 7 purported to give retrospective effect to the override provision. In this regard, the wording of s. 33(1) of the *Canadian Charter is not without ambiguity*. For purposes of clarity, we set out the relevant provision in both languages:

> 33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> 33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.

In English, the critical phrase is "shall operate notwithstanding". Generally, the word "shall" may have either a prospective or an imperative meaning or both. Similarly, the French "a effet indépendamment" is susceptible of a valid interpretation in more than one tense.

[36] Pierre-André Côté in his treatise, *The Interpretation of Legislation in Canada* (1984), has a detailed discussion of the rule against retroactive operation. He notes at p. 96:

> The rule against retroactive operation has been affirmed frequently by the courts, though the judicial expressions of the principle often leave something to be desired.
>
> Wright J.'s dictum in *Re Athlumney* frequently cited:
>
> > "Perhaps no rule of construction is more firmly established than this -- that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only." [1898] 2 Q.B. 547, at pp. 551-52]

In *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, 1975 CanLII 4 (SCC), [1977] 1 S.C.R. 271, Dickson J. (as he then was) wrote, for the majority (at p. 279):

> The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act.

Where, as here, an enabling provision is ambiguous as to whether it allows for retroactive legislation, the same rule of construction applies. In this case, s. 33(1) admits of two interpretations; one that allows Parliament or a legislature to enact retroactive override provisions, the other that permits prospective derogation only. We conclude that the latter and narrower interpretation is the proper one, and that s. 7 cannot give retrospective effect to the override provision. Section 7 of *An Act respecting the Constitution Act, 1982*, is to the extent of this inconsistency with s. 33 of the *Canadian Charter*, of no force or effect, with the result that the standard override provisions enacted by s. 1 of that Act came into force on June 23, 1982 in accordance with the first paragraph of s. 7.

Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790, 1988 CanLII 20 (SCC)

III. Are Any or All of ss. 52 (Formerly s. 53), 57, 58, 59, 60, and 61 of the Charter of the French Language Protected From the Application of ss. 2(b) and 15 of the Canadian Charter of Rights and Freedoms by a Valid and Applicable Override Provision Enacted in Conformity with s. 33 of the Canadian Charter?

[21] For the reasons given in *Ford*, ss. 52 (formerly s. 53) and 58 of the *Charter of the French Language* are protected from the application of ss. 2(b) and 15 of the *Canadian Charter of Rights and Freedoms* by

a valid and subsisting override provision, enacted pursuant to s. 33 of the *Canadian Charter*, in the form of s. 52 of *An Act to amend the Charter of the French Language*, S.Q. 1983, c. 56. However, it was held in *Ford* that s. 58 infringes the guarantee of freedom of expression in s. 3 of the Quebec *Charter of Human Rights and Freedoms*, infringes the guarantee against discrimination based on language in s. 10 of the Quebec *Charter*, is not saved from its s. 3 infringement by considerations under s. 9.1, and is thus of no force or effect. In this case, s. 52 of the *Charter of the French Language* is subject to scrutiny only under ss. 3, 9.1 and 10 of the Quebec *Charter*.

[22] Sections 57, 59, 60 and 61 of the *Charter of the French Language* and the *Regulation respecting the language of commerce and business*, which require the use of French but permit the use of another language at the same time, are no longer protected from the application of ss. 2(b) and 15 of the *Canadian Charter of Rights and Freedoms* by a valid and subsisting override provision enacted pursuant to s. 33 of the *Canadian Charter*, since s. 214 of the *Charter of the French Language* ceased to have effect on June 23, 1987. These provisions are, of course, also subject to ss. 3 and 10 of the Quebec *Charter of Human Rights and Freedoms*.

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 1986 CanLII 65 (SCC)

[115] It should be absolutely clear however that this common law right to a fair hearing, including the right of the defendant to understand what is going on in court and to be understood is a fundamental right deeply and firmly embedded in the very fabric of the Canadian legal system. That is why certain aspects of this right are entrenched in general as well as specific provisions of the *Charter* such as s. 7, relating to life, liberty and security of the person and s. 14, relating to the assistance of an interpreter. While Parliament or the legislature of a province may, pursuant to s. 33 of the *Charter*, expressly declare that an Act or a provision thereof shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the *Charter*, it is almost inconceivable that they would do away altogether with the fundamental common law right itself, assuming that they could do so.

Entreprises W.F.H. Ltée c. Québec (Procureure Générale du), 2001 CanLII 17598 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[10] In 1977, the Quebec legislature adopted the *Charter of the French language* that provides, by sections 1 and 58, that public signs and posters and commercial advertising, with some exceptions, shall be solely in French.

[11] On December 15, 1988, in *Ford v. Quebec* (A.G.), 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, the Supreme Court of Canada declared inoperative s. 58 because it constitutes a violation of the freedom of expression guaranteed by s. 3 of the *Charter of Human Rights and Freedoms* and the freedom from discrimination based on language, set out in s. 10 of the Quebec *Charter*, a violation that is not justified by s. 9.1 of this *Charter*.

[12] The same day, in *Devine v. Quebec* (P.G.), 1988 CanLII 20 (SCC), [1988] 2 S.C.R. 790, the Supreme Court declared inoperative certain other provisions of the *Charter of the French language* for violating the right to the freedom of expression and the right to equality. This decision will be the subject of greater comments infra.

[13] On December 22, 1988, *An Act to amend the Charter of the French Language,* (S.Q. 1988, c. 54) came into force. It established the rule of French unilingualism on public signs and posters made outside an establishment, and also allowing that the signs be bilingual inside, under certain conditions.

[14] This Act contains a notwithstanding clause of a duration of five years, allowed by s. 33 of the *Canadian Charter of Rights and Freedoms*, which exempted from scrutiny of the charters, its ss. 58 and 68 (1st paragraph).

[15] In 1993, at the expiry of the notwithstanding clause, *An Act to amend the Charter of the French Language* (S.Q. 1993, c. 40) comes into force. It is the new s. 58 that is the subject of this challenge.

The Supreme Court of Canada's decision in Ford

[16] The scope of this decision is at the heart of this dispute. It seems useful to conduct a short review of the issues it decides.

[17] First, the Court decided that s. 52 of *An Act to amend the Charter of the French Language,* which excludes s. 58 of the *Charter of the French language* to the application of para. 2(b) of the *Canadian Charter* is a valid exercise of the override authority conferred by s. 33 of this *Charter*, but that s. 58 remains subject to s. 3 of the Quebec *Charter*.

[…]

[117] I am of the view that s. 58 of the *Charter of the French language* adopted by the Quebec government following the principles set out by the Supreme Court in *Ford* and *Devine* is a valid provision and that the appellant did not bring any relevant evidence that would have allowed the Superior Court to review the conclusions on the language of public signs and posters and commercial advertising in Quebec.

Constitution Act, 1982 – Other Provisions

Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11

Part II – Rights of the Aboriginal Peoples of Canada (section 35)

35. (1) Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

35. (2) Definition of "aboriginal peoples of Canada"

35. (2) In this Act, "aboriginal peoples of Canada" include the Indian, Inuit and Métis peoples of Canada.

35. (3) Land claims agreements

35. (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

35. (4) Aboriginal and treaty rights are guaranteed equally to both sexes

35. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[LAST UPDATE: JULY 2017]

ANNOTATIONS

N.B. To date, the direct question of a general s.35 right to Aboriginal language has not been considered by the courts. While some courts have opined that it is part of s.35 rights, they have not fully addressed this issue in the context of a civil trial with full and complete evidence or submissions on the issue, nor have the courts defined the contours of the right and what if any obligations this places on the state to preserve, protect or maintain Aboriginal languages.

Adoption — 09201, 2009 QCCA 1583 (CanLII)

[46] Similarly, I am of the view that the Grand Council of the Crees and the Cree Regional Authority have established sufficient standing to intervene and argue the questions of the interpretation and application of the *Agreement* [*James Bay and Northern Quebec Agreement*] (in particular its section 3.1.6) and the statutes giving this *Agreement* force of law. The Grand Council of the Crees (Eeyou Istchee) is the successor of one of the signatories of the *Agreement* (Grand Council of the Crees of Quebec, see section 1 of the *Act approving the Agreement concerning James Bay and Northern Québec*) and, as such, it clearly has standing regarding the interpretation and application of the Agreement. The same may be said for the Cree Regional Authority, whose general mandate is described by Chapter 11A of the *Agreement* and includes an obligation "to assist the James Bay Crees in the exercise of their rights and in the defence of their interests" and to "foster, promote, protect and assist in the preservation of the way of life, the values and the traditions of the James Bay Crees", which surely includes the tradition of customary adoption, if such a tradition exists. The burden of proof in this respect rests on the Cree Regional Authority's shoulders.

[…]

[55] The process undertaken by the DYP A [Respondent Director of Youth Protection for A] regarding the child raises an extremely delicate and painful question, that of the adoption of Aboriginal children when such process is not initiated by Aboriginal groups or entities and involves a non-Aboriginal adoptive family. Each Aboriginal child submitted to such a process, as well-intended as it may be, sees his or her rights affected. We cannot, therefore, under the pretext that the claims of the Appellants extend beyond the interest of the particular child involved here, ignore the fact that it will also directly touch upon the rights of X as a beneficiary of the *Agreement*.

[56] Articles 4, 20, 21 and 30 of the *Convention on the Rights of the Child*, ratified by Canada on December 13, 1991 (albeit with a reservation which I will consider below), provide that:

> **Article 4**
>
> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.
>
> **Article 20**
>
> 1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
>
> 2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
>
> 3. Such care could include, inter alia, foster placement, Kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due

regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

[57] At the time of ratification, Canada issued the following reservation and statement of understanding:

Reservation:

(i) Article 21

With a view to ensuring full respect for the purposes and intent of article 20 (3) and article 30 of the Convention, the Government of Canada reserves the right not to apply the provisions of article 21 to the extent that they may be inconsistent with customary forms of care among Aboriginal peoples in Canada.

Statement of understanding:

Article 30

It is the understanding of the Government of Canada that, in matters relating to Aboriginal peoples of Canada, the fulfillment of its responsibilities under article 4 of the Convention must take into account the provisions of article 30. In particular, in assessing what measures are appropriate to implement the rights recognized in the Convention for Aboriginal children, due regard must be paid to not denying

their right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language.

[58] The right of an Aboriginal child to remain in his or her community of origin is recognized by Canada and, certainly, a motion for eligibility for adoption such as the one presented by the DYP A directly and substantially affects this particular right of the child X

[59] The distinctive status that the Canadian Constitution confers upon Aboriginal rights (especially in the case of treaty rights), which are rights having a collective and individual character, must also be taken into account. In that sense, we cannot deny that the Appellants' interventions, in their constitutional and jurisdictional aspects, seek to protect the interest of the child X in that they defend her right to belong to her community of origin. The interest of the child cannot be limited to the sole question of her attachment and her integration to the foster family that received her and would be ready to adopt her, even if this fact remains important.

[…]

[67] From all of the above, it is to be understood that the Appellants have standing to raise any constitutional and jurisdictional question with respect to the interpretation of the *Agreement* (and in particular section 3.1.6 of said *Agreement*) or the interpretation of the various statutes that were referred to, and to address the questions of the recognition of customary adoption and its effects on the adoption process otherwise governed by the *Youth Protection Act*, the *Civil Code of Quebec* and the *Code of Civil Procedure*. Likewise, the Appellants can address the questions relating to the jurisdiction of the Cree Board and its DYP on X and to adduce evidence (unless it has already been done) on the customary adoption of this child and the circumstances of this adoption. Stated differently, the interventions must bear on the following questions, which flow from the declarations for intervention:

- Is customary adoption a right recognized by the *James Bay and Northern Quebec Agreement*, thereby rendering it a treaty right guaranteed by section 35 of the *Constitution Act, 1982,* or is it a right otherwise recognized by Quebec law, in light of the applicable domestic and international law?

- Would customary adoption, if recognized as such, supersede the provisions of the *Civil Code of Québec* and other general laws in matters of adoption and would it preclude the institution or continuation of proceedings seeking a declaration of eligibility for adoption of a beneficiary child under the *James Bay and Northern Quebec Agreement*, namely the child X, assuming that she has been validly adopted in accordance with custom?

- Taking into account the provisions of Chapter 14 of the *James Bay and Northern Quebec Agreement* and of the *Act respecting health services and social services for Cree Native persons*, R.S.Q., c. S‑5, was the adoption of the child X subject to the jurisdiction of the DYP A or that of the Cree Board of Health and Social Services of James Bay and its Director of Youth Protection, [intervener 1], and must the application for declaration of eligibility for adoption be dismissed if it happens not to have been filed by the proper person or entity?

Québec v. Commission Scolaire Crie, 2001 CanLII 20652 (QC CA) [judgment available in French only]

[21] [Baudouin J. – [OUR TRANSLATION] The two appellants are arguing essentially the same things: that the Superior Court clearly erred on a number of issues, that the agreement is clear, is only aiming to resolve a long-standing dispute between the two governments and does not in any way constitute a threat to the Cree rights to education, their language and their culture as protected under the [*James Bay and Northern Quebec*] *Agreement*.

[22] They raise three criticisms of the trial judge, namely:

(1) having breached his duty to exercise restraint;

(2) having incorrectly analyzed the parties' behaviour and drawn erroneous conclusions;

(3) having incorrectly interpreted the administrative agreement with regard to the provisions of the Agreement.

[23] As noted above, the Superior Court ruled on certain important qualifications which, with all due respect, were not at all relevant to settling this dispute.

[24] First, it qualifies the Agreement as a [TRANSLATION] "treaty entered into in the context of a land claim" within the meaning of subsection 35(3) of the *Constitution Act, 1982* which (it should be repeated) did not exist on November 11, 1975, at the time of the signing of the Agreement. It then qualifies the Cree School Board as [TRANSLATION] "ethnic" based on the (true) fact that only Cree can be elected or appointed as commissioners, but forgetting that it is perhaps not truly [TRANSLATION] "ethnic" as children other than Cree children can register freely.

[25] The constitutionalism of this debate, the affirmation that the Cree School Board (which, we must remember, is simply an administrative body) enjoys true constitutional protection as such, the reference to Indian title and aboriginal rights, the application of the Crown's fiduciary duty at the respondents' suggestion, the inappropriate use of the rules of treaty interpretation all resulted, in my opinion, in the debate, which was genuine, becoming fraught with legalities that were in no way necessary and which unfortunately contributed to obscuring it.

[26] The Supreme Court of Canada has repeatedly stated that trial courts, as well as appeal courts, should refrain from ruling on constitutional issues when it was not necessary to the outcome of the dispute. Should the contrary occur, the legal analysis should then be complete and rely on well-established evidence (*Attorney General of Quebec v. Cumming*, 1978 CanLII 192 (SCC) [1978] 2 S.C.R. 605; *The Queen v. Air Canada*, 1980 CanLII 16 (SCC), [1980] 2 S.C.R. 303; *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357; *Phillips v. Nova Scotia*, 1995 CanLII 86 (SCC), [1995] 2 S.C.R. 97). In this last decision, Sopinka J. wrote:

...

This Court has said on numerous occasions that it should not decide issues of law that are not necessary to a resolution of an appeal. This is particularly true with respect to constitutional issues and the principle applies with even greater emphasis in circumstances in which the foundation upon which the proceedings were launched has ceased to exist.

(p. 111)

and later:

The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen. Early in this century, Viscount Haldane in *John Deere Plow Co. v. Wharton*, 1914 CanLII 603 (UK JCPC), [1915] A.C. 330, at p. 339, stated that the abstract logical definition of the scope of constitutional provisions is not only "impractical, but is certain, if attempted, to cause embarrassment and possible injustice in future cases".

This is a practice that has been generally followed by this Court before and since the *Charter*.

(p. 112)

[27] In this case, this constitutional restraint was even more relevant further to two other actions in Superior Court (*Coon-Come c. Procureur général du Québec, No.: 500-05-027984-960*; *Coon-Come c. Hydro-Québec*, No.: 500-05-004330-906) and a third more recent decision (*Lord c. Procureur général du*

Québec, No.: 500-05-043203-981), which directly question the validity of the Agreement and a series of other important issues regarding how to qualify it and the Indian title.

[28] Moreover, if the hypothesis that the rights in the Agreement can truly be qualified as constitutional rights protected by subsection 35(3) of the *Constitution Act, 1982*, then, as the Supreme Court has clearly indicated, it would be necessary for evidence to be presented to this effect to determine specifically and definitively, according to the criteria it presented, the qualification to give the Agreement. However, no such evidence was submitted.

[29] On this first issue, I agree with the appellants and feel that the first judge erred.

[91] [Rousseau-Houle J.] As Baudouin J., I feel that is it not appropriate considering the case as constituted by the parties and the three actions brought in Superior Court (*Coon-Come c. Procureur général du Québec*, No.: 500-02-017984-960; *Coon-Come c. Hydro-Québec*, No.: 500-05-004330-906 and *Lord c. Procureur général du Québec*, No.: 500-05-043203-981) directly addressing the qualification and validity of the Agreement, to decide whether it can receive constitutional protection under section 35 of the *Constitution Act, 1982*.

[92] We know that the qualification the first judge relied on, namely a treaty entered into in the context of a land claim within the meaning of subsections 35(1) and 35(3) of the *Constitution Act, 1982*, has an impact with regard to the choice of rules of interpretation.

[...]

[96] Without it being necessary to examine whether the rights under the *Agreement* can be given constitutional protection, it is still a solemn agreement entered into with the Cree and the Inuit that was ratified and implemented by legislation. Moreover, Chapter 16 of the Agreement is the key component to the Cree school system and the articles in question target certain guarantees regarding the education services that must be made available to the Cree. In Volume 3 of the *Report of the Royal Commission on Aboriginal Peoples*, chapter 5, dedicated to education, states the following:

> IN ABORIGINAL SOCIETIES, as in many societies, children are regarded as a precious gift. Control over the education of their children has been a pressing priority of Aboriginal peoples for decades. This is not surprising. The destiny of a people is intricately bound to the way its children are educated. Education is the transmission of cultural dna from one generation to the next. It shapes the language and pathways of thinking, the contours of character and values, the social skills and creative potential of the individual. It determines the productive skills of a people.
>
> Aboriginal peoples are diverse in their histories, environments and cultures, but their deep commitment to education cuts across all boundaries. In our public hearings, Aboriginal parents, elders, youth and leaders came forward to tell us of the vital importance of education in achieving their vision of a prosperous future. Education is seen as the vehicle for both enhancing the life of the individual and reaching collective goals.
>
> For more than 25 years, Aboriginal people have been articulating their goals for Aboriginal education. They want education to prepare them to participate fully in the economic life of their communities and in Canadian society.
>
> ...
>
> Equipping successive generations with the skills to participate in a global economy is a major goal of Aboriginal people and their educators, but it is only part of the story. Aboriginal people are determined to sustain their cultures and identities, and they see education as a major means of preparing their children to perceive the world through Aboriginal eyes and live in it as Aboriginal human beings. Aboriginal education therefore must be rooted in Aboriginal cultures and community realities. It must

reinforce Aboriginal identity, instill traditional values, and affirm the validity of Aboriginal knowledge and ways of learning.

[...]

[98] These considerations lead me to conclude that when interpreting articles 16.0.22 and 16.0.23 of the Agreement, we must favour a broad and liberal interpretation of the fiduciary duty of the governments towards the Cree. This fiduciary relationship must, however, reflect a reasonable analysis of the intent and interest of the signing parties and take into consideration the historical and legal context that gave rise to the Agreement. As the Cree were advised by legal counsel and it is an agreement that can be qualified as [TRANSLATION] "modern", any ambiguity will not systematically be interpreted in their favour.

[...]

[106] For article 16.0.23 to have true significance, it seems to me that the role of the tripartite committee must be situated at another level, namely during the development of the actual budgetary rules that allow for an annual budget to be prepared for approval by Quebec and Canada. The Cree obtained the right and privilege to participate in the development of a formula regarding the funds provided by the two governments to maintain their schools, programs and education services that, among others, aim to conserve the Cree language and culture. They qualify this formula as budgetary rules because these are the types of rules that are used with non-Aboriginal school boards to determine the amounts of operating expenses, capital expenditures and debt services (section 472 *Education Act*, R.S.Q., C. I-13.3). The analogy seems fair and excludes, in my opinion, the restrictive interpretation proposed by the two governments.

[138] [Nuss J.] The Cree School Board, in addition to the tasks which are usually incumbent upon School Boards, has a special mission, which is the preservation and transmission to the Cree of their language and culture.

[139] By virtue of article 16.0.22, Canada and Quebec have the following obligations:

1) to maintain the programs of at least the same quality and quantity as those existing in 1975;

2) to provide services of at least the same quality and quantity as those existing in 1975;

3) to fulfil and carry out their obligations to the Crees;

4) to provide the funding for the fulfilment of their above obligations.

[140] In my view, the obligations set out in articles 16.0.22 and 16.0.23 are not those of a merely transitional nature. They confer rights, benefits and privileges to the Cree within the meaning of the Principal Provisions found in articles 2.1 and 2.2 of the [James Bay and Northern Quebec] Agreement cited above at paragraph 2.

[141] In the absence of explicit language stating that these obligations are of a limited duration, it is my view that such important and essential matters, in the field of education which is central to the preservation and transmission of the Cree's language, culture and identity, are not limited to a transitional period, but are rather continuing obligations. This interpretation is in harmony with the permanent nature of the rights, benefits and privileges granted to the Cree in return for their cession, release, surrender and conveyance of their Native claims, rights, titles and interests to land in Quebec.

[…]

[146] It is evident, in my view, that the parties when using the word "formula", are not referring to a mere technical mechanism as to when the funds will be transferred or matters of that nature. In my opinion, the formula for the funding covers matters of a substantial nature having to do with maintaining the quality and quantity of services and programs as well as pursuing the special mission of the Cree School Board to preserve and transmit the Cree language and culture.

[147] The right to participate in the determination of the formula for funding expressed in article 16.0.23 must be viewed in the context of the importance and scope of what the Crees have given in return for the rights, benefits and privileges they are to receive.

[…]

[149] Furthermore, the contention of Appellants that the participation in determining the funding formula refers to a relatively unimportant exercise of a technical nature, such as the timing of payments, is incompatible and in disharmony with the importance and scale of the rights, benefits and privileges which the Cree are to receive in return for and as a measure of what they have given.

[150] It is significant that the party who is to participate in the tripartite determination of the formula is designated to be the Crees as distinguished from the Cree School Board. This indicates that the issue is of a policy nature which affects the entire Cree community. The matter is not left to an administrative body, albeit a very important one, namely the Cree School Board. The concern of the Crees in this matter is of such importance that the issue is entrusted to the representatives of the entire Cree community. The formula, in my view, is to provide parameters within which the funding obligations of Canada and Quebec are to be performed and the special objectives and mission with respect to Cree education are to be pursued.

[…]

[153] The Agreement confers on the Cree the rights, benefits and privileges with respect to their education of a certain minimum quantity and quality of services and programs, a Cree School Board with the power to preserve and transmit the Cree language and culture, as well as a participation in determining the formula for their funding. The latter involves a consideration of what educational services and programs are required to enable the Cree School Board to accomplish its unique objectives and mission.

[…]

[160] I might add that it is rather incongruous that the Crees, who are certainly the most interested party in assuring that the Cree School Board accomplishes its mission, are excluded from the process of elaborating the budgetary rules which the impugned agreement states are designed for the attainment of that mission.

[161] The elaboration of the budgetary rules, as set out in the impugned agreement, in my view, to a large extent, covers what comes under the ambit of the determination of the formula for funding which pursuant to article 16.0.23 is the responsibility of the tripartite group which includes the Cree.

[162] How can the tripartite group establish the funding formula on the basis of the requirements of the Cree School Board in order for the latter to pursue its mission if, *a priori*, Quebec and Canada have decided the amount which is to be available?

[163] One would hope that the three parties to the determination of the funding formula would agree. If they do not, the majority would prevail. However, should that majority establish a formula which does not respect the obligations of Canada and Quebec to fund the programs and services necessary for the accomplishment of the tasks and objectives set out in section 16 of the Agreement, there would be a recourse to the Courts to remedy the situation.

N.B. – See trial decision (Commission scolaire Crie v. Canada (Procureur général), 1998 CanLII 9555 (QC SC) at paras. 102-120.

Kativik (School Board) v. Makivik Corp., 2004 CanLII 12449 (QC SC)

[43] This is a motion for an interlocutory injunction as provided for in articles 750 *et seq C.C.P.* [*Code of civil procedure*]. It is therefore submitted to a three-step test best summarized by Mr. Justice Owen in the *Kanatewat* case:

> "First the applicant has to convince the court that he appears to be entitled to an interlocutory injunction that is the right he is asserting has a reasonable prospect of being recognized by the final judgment. Secondly, the applicant, if successful on the first test, then has to show that it is an exceptional case in which an interlocutory injunction is necessary in order to avoid: (i) serious or irreparable injury to the applicant, or (ii) a factual or legal situation of such nature as to render the final judgment ineffectual.
>
> At the interlocutory injunction stage these rights are apparently either (a) clear, or (b) doubtful or (c) non-existent:
>
> (a) If it appears clear, at the interlocutory stage that the Petitioners have the rights which they invoke then the interlocutory injunction should be granted if considered necessary in accordance with the provisions of the second paragraph of article 752 C.P.
>
> (b) However, if at this stage the existence of the rights invoked by the Petitioners appears (sic) doubtful then the Court should consider the balance of convenience and inconvenience in deciding whether an interlocutory injunction should be granted.
>
> Finally, if it appears, at the interlocutory stage, that the rights claimed are non-existent then the interlocutory injunction should be refused.

[…]

[49] In the previous judgment on the safeguard order, I already qualified the potential disappearance of the Kativik School Board as a legal person before the hearing on the interlocutory injunction as a serious and irreparable harm. Similarly, the disappearance of the Kativik School Board before the trial on the merits of the main action would constitute such a harm, as it would put a premature end to the debate without the benefit of the judicial process. The actual timetable of the amalgamation of the Inuit organizations is not clear. It is very likely to be a lengthy process since the Agreement-in-Principle and the Formal Agreement must be signed and subjected to a referendum before any actual change can take place. But for the purposes of this argument, I will entertain the possibility that in fact the amalgamation could take place before the trial.

[50] I must clarify here, that I consider the irreparable harm to be the loss of the legal *persona* during the judicial proceedings and not, as the Plaintiff had suggested, the disappearance of the Kativik School Board as the holder of the Inuit rights to education. These rights belong to the Inuit people and not to the School Board:

> "Municipal institutions do not have an independent constitutional status. School Boards are somewhat unique, however, as they represent the vehicle through which the constitutionally entrenched denominational rights of individuals are realized. Yet, that is not to say that the institutions themselves are entrenched or must remain mired in their historical form to fulfill these constitutional guarantees".

[51] Section 35 of the *Constitution Act* reads as follows:

> (1) "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada."

[52] This section guarantees the rights of the Inuit, and not the text of treaties such as the JBNQA [James Bay and Northern Quebec Agreement]. The loss of the Kativik School Board does not equate with the loss of the Inuit right to education in either the JBNQA [James Bay and Northern Quebec Agreement] or the Canadian Constitution. Section 17.09 of the JBNQA even provides for the possibility that the Kativik School commissioners may disappear and for their temporary replacement by the Minister of Education of Quebec.

(ii) Education and language

[57] The Kativik School Board claims that if the recommendations included in the LUS report [Nunavik Commission report titled Let Us Share] are followed, Inuit education and the preservation of Innutitut and of the Inuit culture will be severely harmed.

[58] In respect to language, the Kativik School Board's primary argument is based on its interpretation of recommendations 1.29 and 1.31 of the LUS report:

"1.29 The official languages of Nunavik are Inuttitut, French and English.

1.31 Everyone has the right to use any of the official languages in Nunavik."

[59] According to the Kativik School Board, these recommendations do away with the pre-eminence of Innuttitut as a language of instruction and in fact give the people of Nunavik the freedom to choose the language of instruction for their children. Under the present system, the only language of education up to grade 3 is Innutitut.

[60] According to Professor Donald Taylor, a change to freedom of choice of language of education would result in the erosion and eventual loss of the language and culture, and its consequent loss of self-esteem and identity for the Inuit people. In his affidavit, however, Professor Taylor explains that:

"For the purposes of this expert opinion I have been asked to make an assumption that as a result of a hypothetical new form of government in Nunavik, parents of Inuit students will have the opportunity to choose to have their children educated in one of the three official languages of instruction: English, French or Innuttitut".

[61] But the Kativik School Board has presented no evidence that such a freedom of choice is in fact being considered. The text of the recommendations alone does not suffice to come to this conclusion. On the contrary, recommendation 1.29 provides a significant improvement of the position of Innutitut in Nunavik. Presently only French and English are the official languages of Nunavik. Interestingly, even the Political Accord provides for a lesser role to Innutitut than do the recommendations in the LUS report:

"8.1 There shall be an Inuktitut, a French and an English version of this Accord. The French and English versions shall be the authoritative versions."

[62] Mary Aitcheson's and Gilbert Legault's affidavits clearly show a deeply felt concern for what may happen to education in Nunavik during a period of administrative transition if the expertise and experience of the Kativik School Board were lost before they were properly replaced. But they produce no evidence that it is the intention of Makivik or of any of the other Defendants to do away with the significant gains made in the past 25 years. On the contrary, the Framework Agreement provides a safety net clause:

"3.1 (d) Any amendment to the JBNQA and to the NEQA for the purposes of establishing the Unified Entity and the subsequent creation of a new form of government in Nunavik shall be accompanied by a complementary agreement or agreements to the JBNQA and to the NEQA and shall not prejudice

the rights of the Inuit under the JBNQA, and the modified provisions shall be retained as part of the JBNQA."

[63] It is apparent to this Court that the Kativik School Board has achieved tremendous success in creating a new education system adapted to the needs and realities of life in Nunavik. Defendants do not contest this in any way.

[64] On the other hand, it is not the role of the Court to evaluate the desirability of the changes proposed through a political negotiation. The decision to decentralize some of the functions of the School Board to local education committees may or may seem to be a practical suggestion. It is unquestionably, however, an issue of policy outside the jurisdiction of the courts:

"To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so".

[65] Similarly, the courts cannot evaluate the state of readiness of the Parties before a negotiated change takes place. The Kativik School Board claims that there are not sufficiently detailed transitional provisions in place to allow the change over to take place without harming the education system in Nunavik. This too is a question of policy outside the scope of the courts' reviewing powers. The statement in Mary Aitcheson's affidavit that the uncertainty in the future of the School Board is already harming educational planning may well be true:

"Implementing a non-consensus Let Us Share recommendations on education without proper planning and analysis will cause serious prejudice to both present and future students in Nunavik in relation to, amongst others, training for Inuit teachers, administrators and counsellors for students. Such planning and analysis has not been done."

[66] Gilbert Legault expressed the same misgivings in his affidavit:

"Using the LUS Report, especially the part concerning education, without proper planning will cause serious prejudice to both present and future students in Nunavik because it will:

a) destabilize and halt the development of existing services, including, the unique curriculum development services (…); and

b) create uncertainty as to educational services—any uncertainty in education is known to create an unhelpful atmosphere for learning."

[67] All change, however, creates uncertainty and that itself is not a sufficient reason to consider halting all negotiations, which necessarily and by definition involve change.

Ochapowace Indian Band v. Saskatchewan (Minister of Justice), 2004 SKQB 486 (CanLII)

[1] The Applicants have appealed their convictions for failures to file GST returns contrary to s. 326 of the *Excise Tax Act*. They bring two preliminary applications. The first seeks an order directing transcript services of the Province of Saskatchewan “to transcribe the entire proceedings below including oral tradition evidence in the Cree and Saulteaux languages” at the standard fee charged for all other transcripts. The other seeks an order requiring Canada to contribute to the Appellant’s legal cost in any event of the cause. Both motions are framed as constitutional questions with the requisite notices having been given.

[2] The Applicants seek a remedy pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11* (the “*Charter*”) and s. 52 of the *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11* (the “*Constitution*”) directing transcript services of the Province of Saskatchewan to transcribe the

actual Cree and Saulteaux words spoken by certain witnesses at their trial. The constitutional questions posed by the Applicants, as stated by them, are as follows:

> 1. Is the decision of the Saskatchewan Department of Justice dated April 21st, 2004, a breach of the *Charter*, Sections 2(a), 7, and 11(d) by denying the production of oral traditional evidence in the original language it was deposed, by requesting payment of the sum of up to $250.00 per page for transcription.
>
> 2. Is the decision of the Saskatchewan Department of Justice dated April 21st, 2004, a breach of Section 35 of *The Constitution Act, 1982*, and of Constitutional Convention and Treaty by denying the production of oral traditional evidence in the original language it was deposed.
>
> 3. Whether the decision to charge the Appellants a fee in excess of that Provincially mandated as compared to other Appellants is a violation of the *Charter*, Section 15(1) in that the Cree and Saulteaux language of oral traditional evidence is sacred to the Appellants, and further that the use thereof as deposed is necessary to preserve the due process of this Honourable Court and to avoid further offending Section 15(1) of the *Charter* as pertains to these Appellants.

[…]

Section 35 of the Constitution

[11] The Appellants have indicated that they are not disputing the quality of the Interpreter's translation of the evidence given in Cree and Saulteaux at their trial. They are also not seeking a second translation or interpretation of the testimony. They simply argue that transcript services' refusal to provide a transcript of the spoken Cree or Saulteaux words, in addition to the English translation, represents an infringement of their constitutional right to use their original traditional language. Moreover, they contend that it amounts to a refusal to recognize "the indigenous origin of the contributed content" of Treaty 4. They argue under this heading, as they did with respect to s. 7 of the *Charter*, that an understanding of Treaty 4 from the Aboriginal perspective is essential to their defence. They say that it is not possible for a court to justly interpret Treaty 4 and fairly reconcile disparate world views if the process is done exclusively in the language, and therefore the world view, of only one of the treaty participants.

[12] If a party requires the court to recognize and be persuaded to accept, either in whole or in part, a new way of understanding or interpreting an historical document then it is up to that party to educate the court and marshall evidence to support its position. It is not achieved by insisting that Cree or Saulteaux words be typed onto a transcript - - - particularly when such a transcript cannot even be read or understood by the court or by counsel and perhaps even by the individual defendant himself.

[13] This court accepts that there may be occasions when it is extremely difficult for a subtle or complex meaning or cultural perspective that has significance in one language to be adequately described in another language. At times, it may be difficult, if not impossible, to achieve an absolutely authentic understanding through translation. And yet, inadequate translation is not the issue here as the Appellants have not complained about the actual translation. Regardless, even if there were concerns regarding the accuracy or quality of the interpretation and translation, they would not result in the court referring to a transcript of the spoken Cree or Saulteaux.

[14] I find that to the extent the witnesses on behalf of the Appellants have a constitutional right to use their original traditional language, such right has been respected. As previously indicated, any such right does not include the right to demand that others use or even understand that language. A court is entitled to rely on the Interpreter's translation unless either party objects to its correctness. The trial judge raised a concern he had with the translation process. His concern was expressed during the trial but it does not appear to have been shared by the Appellants. They had the opportunity at trial to provide additional evidence to assist the court in understanding the oral tradition testimony of the Elders. There has been no suggestion that the oral tradition evidence given in this case was particularly complicated or prone to

misinterpretation or misunderstanding. The fact that the evidence of the Elders was generally not accepted by the trial judge does not, in itself, suggest that it was not properly understood by him.

[…]

[16] Based on the foregoing, I conclude that the Appellants do not have a constitutional right to require transcript services of the Province of Saskatchewan to produce a transcript of the Cree and Saulteaux words that were spoken at the trial and simultaneously interpreted and translated into English by a duly sworn Interpreter. Constitutional questions 1 and 2 are therefore answered in the negative. For reasons previously discussed, the issue raised by question 3 has been settled on a basis other than s. 15 of the *Charter*.

N.B. – The appeal to the Saskatchewan Court of Appeal was struck (Ochapowace First Nation v. Canada (National Revenue), 2007 SKCA 88 (CanLII)).

First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2 (CanLII)

[106] The legal and substantial practical interests of First Nations children, families, and communities stand to be adversely affected by AANDC's [Aboriginal Affairs and Northern Development Canada] discretion and control over the FNCFS Program [First Nations Child and Family Services Program] and other related provincial/territorial agreements. The Panel agrees with the AFN [Assembly of First Nations], Caring Society [First Nations Child and Family Caring Society of Canada] and the COO [Chiefs of Ontario] that the specific Aboriginal interests that stand to be adversely affected in this case are, namely, indigenous cultures and languages and their transmission from one generation to the other. Those interests are also protected by section 35 of the *Constitution Act, 1982*. The transmission of indigenous languages and cultures is a generic Aboriginal right possessed by all First Nations children and their families. Indeed, the Supreme Court highlighted the importance of cultural transmission in *R. v. Côté, 1996* CanLII 170 (SCC), [1996] 3 SCR 139 at paragraph 56:

> In the aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of aboriginal practices, customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation.

[…]

[109] The Panel agrees with the Caring Society that it is not necessary for the purposes of this case to further define the contours of Aboriginal rights in language and culture or a fiduciary duty related thereto. It is enough to say that, by virtue of being protected by section 35 of the *Constitution Act, 1982* indigenous cultures and languages must be considered as “specific indigenous interests” which may trigger a fiduciary duty. Accordingly, where the government exercises its discretion in a way that disregards indigenous cultures and languages and hampers their transmission, it can breach its fiduciary duty. However, such a finding is not necessary to make a determination regarding whether or not AANDC provides a service; or, more broadly, to determine whether there has been a discriminatory practice under the *CHRA* [*Canadian Human Rights Act*].

[110] Suffice it to say, AANDC’s development of the FNCFS Program and related agreements, along with its public statements thereon, indicate an undertaking on the part of the Crown to act in the best interests of First Nations children and families to ensure the provision of adequate and culturally appropriate child welfare services on reserve and in the Yukon. Whether or not that gives rise to a fiduciary obligation, the existence of the fiduciary relationship between the Crown and Aboriginal peoples is a general guiding principle for the analysis of any government action concerning Aboriginal peoples. In the current “services” analysis under the *CHRA*, it informs and reinforces the public nature of the relationship between AANDC and First Nations on reserves and in the Yukon in the provision of the FNCFS Program and other provincial/territorial agreements.

Adoption — 1212, 2012 QCCQ 2873 (CanLII)

[222] The *James Bay and Northern Québec Agreement* is a modern treaty that was signed after lengthy negotiations and constitutes a treaty within the meaning of section 35(1) of the *Constitution Act, 1982.*

[...]

[604] The mother contends that, by allowing X to be adopted by a non-Aboriginal family, X will be deprived of her right to belong to her community, to participate in its cultural life and to learn its language. In short, X would lose her roots and her values related to Cree culture.

[...]

[616] It should also be stressed that the change in filiation caused by the adoption, within the meaning of provincial legislation, has no legal impact on the status of a child of Aboriginal origin within the meaning of the *Indian Act*. Furthermore, although it is true that X will no longer be entitled to exercise her rights and advantages under the [*James Bay and Northern Québec Agreement*] after ten years outside the *Agreement* territory, she will be able to recover those rights and advantages by establishing her domicile in the territory.

[617] The consensus, in Quebec, Canada, and internationally, is that preference should be given to raising Aboriginal children in their communities within their culture, barring special circumstances. To this end, the Cree of [community A] adopted a resolution, the "Cree Child Repatriation Policy", in February 2008, to ensure the return of children to their community.

[618] Aboriginal claims regarding respect for their values and culture have a collective character and these collective interests must be protected. Through an agreement under section 37.5 of the *Youth Protection Act*, administrative agreements or legislative amendments, a number of solutions are within reach to ensure that situations like X's no longer recur and that Aboriginal children can, in the future, return quickly to their communities.

SEE ALSO:

WSANEC School Board v. B.C. Government and Service Employees' Union, 2016 CIRB 838 (CanLII)

Part V – Procedure for Amending the Constitution of Canada (sections 41 and 43)

41. Amendment by unanimous consent

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province: […]

(c) subject to section 43, the use of the English or the French language;

[LAST UPDATE: JULY 2017]

ANNOTATIONS

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

[69] One should also take into consideration the constitutional amending formula with respect to the use of official languages. Under s. 41(c) of the *Constitution Act, 1982*, the unanimous consent of the Senate and House of Commons and of the legislative assembly of each province is required for that purpose but "subject to section 43". Section 43 provides for the constitutional amendment of provisions relating to some but not all provinces and requires the "resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies". It is public knowledge that some provinces other than New Brunswick – and apart from Quebec and Manitoba – were expected ultimately to opt into the constitutional scheme or part of the constitutional scheme prescribed by ss. 16 to 22 of the *Charter*, and a flexible form of constitutional amendment was provided to achieve such an advancement of language rights. But again, this is a form of advancement brought about through a political process, not a judicial one.

Potter v. Québec (Procureur général du), 2001 CanLII 20663 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[10] Before addressing the analysis itself, it could be useful to restate, as a brief summary, the ways in which the Canadian Constitution can be modified.

[11] In fact, there are many amendment formulas.

[...]

[13] The second is the so-called unanimous procedure (section 41) that only applies to certain matters deemed to be of particular importance (for example, the use of the English or the French language, or the office of the Queen, the Governor General and the Lieutenant Governor of a province).

N.B. – See paragraphs 43 to 45 of the trial judgment (Potter v. Québec (Procureur général), 1998 CanLII 9495 (QC SC) [judgment available in French only].

43. Amendment of provisions relating to some but not all provinces

43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including […] may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

> **(b) any amendment to any provision that relates to the use of the English or the French language within a province,**

[LAST UPDATE: JULY 2017]

ANNOTATIONS

R. v. Mercure, [1988] 1 S.C.R. 234, 1988 CanLII 107 (SCC)

[66] In the *Reference re Manitoba Language Rights*, the Court, by resort to the principle of the rule of law and the de facto doctrine, found means to keep the existing laws temporarily in effect for the minimum period of time necessary for the statutes to be translated, re-enacted, printed and published in French. These matters are fully explained in that case and it is unnecessary for me to go into them except to say that the law enunciated in that case would generally apply to the present situation. Conforming to the procedure required for Manitoba would, of course, remedy the situation in Saskatchewan. There is, however, the important difference that s. 110, unlike s. 23 of the *Manitoba Act, 1870*, is not constitutionally entrenched, so re-enacting, printing and publishing all the provincial statutes or resorting to s. 43 of the *Constitution Act, 1982* are not the only available solutions. The legislature has the power to amend its constitution by an ordinary statute, but in enacting such amending statute it must do so in the manner and form required by the law for the time being in force. This, we saw, requires that such statute be enacted, printed and published in the English and French languages. Accordingly, the legislature may resort to the obvious, if ironic, expedient of enacting a bilingual statute removing the restrictions imposed on it by s. 110 and then declaring all existing provincial statutes valid notwithstanding that they were enacted, printed and published in English only. Whichever option the legislature adopts, it must, consistent with the *Reference re Manitoba Language Rights*, act within a reasonable time. If it opts for translation, it must do so within the minimum period required. If it adopts the route of statutory repeal or modification, it must, having regard to the rule of law, undertake that step as soon as possible. It follows that the decision regarding the option it will take must also be made expeditiously.

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

[69] One should also take into consideration the constitutional amending formula with respect to the use of official languages. Under s. 41(c) of the *Constitution Act, 1982*, the unanimous consent of the Senate and House of Commons and of the legislative assembly of each province is required for that purpose but "subject to section 43". Section 43 provides for the constitutional amendment of provisions relating to some but not all provinces and requires the "resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies". It is public knowledge that some provinces other than New Brunswick – and apart from Quebec and Manitoba – were expected ultimately to opt into the constitutional scheme or part of the constitutional scheme prescribed by ss. 16 to 22 of the *Charter*, and a flexible form of constitutional amendment was provided to achieve such an advancement of language rights. But again, this is a form of advancement brought about through a political process, not a judicial one.

Potter v. Québec (Procureur général du), 2001 CanLII 20663 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[5] The Government of Québec, wishing to substitute the confessional school boards with linguistic school boards, came to an agreement with the Government of Canada to proceed with an amendment to the Canadian Constitution (1867) with the addition of section 93A.

[...]

[7] A resolution proposing the addition of section 93A was therefore adopted by the House of Commons on November 18, 1997, by the Senate on December 15 and sanctioned by the Governor General on December 19, 1997. This constitutional amendment states the following:

> S. 93A: Paragraphs (1) to (4) of section 93 do not apply to Quebec.

[...]

C. Should the addition of section 93A, in any event, have been done by a modified bilateral procedure requiring the approval of five provinces and Quebec or the founding provinces or at least Ontario, considering it did not only apply to the province of Quebec?

[33] The appellants argue that the 1997 amendment did not only apply to Quebec and therefore required the approval of five other provinces, or alternatively, at least four founding provinces or that of Ontario.

[34] Their arguments are supported by the premise that section 43 should be interpreted in light of the main constitutional principles the Supreme Court of Canada noted in *Reference re Secession of Quebec*, in particular federalism, constitutionalism, democracy and the protection of minorities, and that it should therefore be given an interpretation that implements these main principles. On this, I would simply like to make note of the recent warnings this Court has given, in the challenge to *Bill 170* on municipal mergers, to not grant this decision an overly broad and universal scope. These principles were solely destined to fill gaps in the Constitution. These statements also apply in the present case. I would add that at any rate, I cannot agree, at this stage of the analysis, with the proposal that section 43 is inconsistent with these.

[35] The main issue, therefore, is the interpretation to give section 43. The bone of contention comes from the fact that nobody saw a significant divergence between the wording of the English text and that of the French text. These texts were already cited above, but I feel it is necessary to reproduce them here...

[36] As we can see, the French text speaks of "...chaque province concernée… ", and the English, "...each province to which the amendment applies."

[37] It was the doctrine that gave rise to the argument that these two texts do not strictly mean the same thing, and as a result, a broad interpretation was needed that would give them a single and consistent meaning.

[...]

[43] The bilingual legislative interpretation and general rule that texts are to be given an interpretation that allows for a common meaning to apply to both versions only applies, naturally, if the starting point includes the premise that there is truly an ambiguity and that one version may have a different meaning than the other. I am not of this opinion for the following reasons.

[44] Everyone can agree that the English version does not raise any issues with interpretation. The province whose authorization is required is the one in which the constitutional amendment will apply. It would be, according to the above-noted authors, the French version that is problematic and could therefore justify giving a broader meaning to the section. However, these authors' interpretation of the French text seems to me to be out of context and is based more on pure etymological speculation, because ultimately, this interpretation would be inconsistent with the English text.

[45] From a purposive perspective, such an interpretation would totally emasculate section 43 and directly violate the clear will of the constituents.

[46] I agree with the analysis of the issue done by Professor Daniel Proulx in an article published in 1998, in which the English version is used as a basis for determining the scope of the text because it is clear and corresponds very precisely to the intention of the constituent authorities. I agree with the following observations:

> [TRANSLATION]
>
> Certain authors suggested the word "concernée" or the verb "applies" should have a broad interpretation that would be consistent with the two versions of section 43. So, it was noted that, in its English meaning (namely "to be concerned"), the French adjective "concerné" signifies being interested, affected or concerned by something. In this sense, the consent of a province to which an

amendment does not apply could be required to the extent that it is politically concerned by or interested in that amendment. Aside from the fact it is incorrect to give a French term an attribution it does not have in that language, the usual French meaning of concerner is "pertains to" or "applies to" which, actually, corresponds to the English version which uses the verb "applies". So the common meaning of the two verbs is still the one that corresponds to the province to which the amendment actually applies.

As for the interpretation of the term "applies", Professor Woehrling submitted the hypothesis that it could mean "to have some connection". If this meaning that is [TRANSLATION] "much broader that the usual legal language", in the professor's own words, were to be retained, it would support the claim that an amendment to subsections 93(1) to (4) *Constitution Act, 1867* only applicable to Quebec would also "apply" to Ontario in the sense that such an amendment would have "connections" with Ontario. In the same vein, Professor Scott raised in an old text, also in a purely hypothetical context, that the joining of the maritime provinces into a single province could require the authorization of Quebec. This would be true if the amendment were considered to "apply" to Quebec in the following manner: even if the boundary of the Quebec border remained exactly the same, the "nature" of this boundary would be altered in that it would form a new type of border or a border with a new province...

To come to these fictitious interpretations where the verb apply no longer means applies to, affects, targets or produces an effect but has some type of social, political or economic tie and where the word "boundary" at subsection 43(a) no longer means boundary but nature, one must stray far from the general interpretation precept under which a term is usually given its ordinary meaning, to the extent this is consistent with Parliament's intention. However, specifically, if there is an argument against such an interpretation, it is that it would be completely contrary to the purpose of section 43 or, essentially the same thing in this case, the intention of the constituent authorities of 1982…

(p. 70 *et seq.*)

[47] The appellants' last argument is historical compromise. For them, section 93, in 1867, was the fruit of a very significant compromise that aimed to protect the confessional minorities in the country. As a result, they argue that the intrinsic importance of this provision means it can only be amended with the consent of the six provinces to which the provision applies.

[48] Nobody is questioning the historical existence of the political compromise that gave rise to section 93. It is, and everyone recognizes it, a fundamental convention that the fathers of confederation wanted to enshrine and especially protect from the potential aspirations of a province to unilaterally change the rules of the game. However, it is also undeniable that this text only applies to six of ten provinces and that, at the time of the adoption of section 43 in 1982, it is reasonable to assume that the constituent was entirely aware of this fact. However, this text that allows for amendments by bilateral agreement precisely avoids the unilateral aspect of a provincial action and surrounds the process with strong guarantees legally and politically (parliamentary resolution, consent of the two houses of Federal Parliament).

[49] More credit must be given to the drafters of the *Constitution Act, 1982*. As noted above, they managed to appropriately balance the five procedures that allow for constitutional amendments, in order to give the entire process some flexibility while maintaining democratic control of significant legal and political guarantees. They were aiming to address in this way the needs and evolution of Canadian federalism.

[50] As for the claim that at least the approval of Ontario is required, it is also without merit because the confessional obligations in education matters were never reciprocal or even identical in the two provinces.

[51] Lastly, the various decisions the appellant insisted on raising in support of their allegations (*Reference re Secession of Quebec; Attorney General of Quebec v. Blaikie*; *OPSEU v. Ontario*) do not support their claims in any way and seem to me, with due respect, to be cited completely out of context. They all indicate that a province cannot unilaterally amend a constitutional provision under a compromise

and Confederation. They do not lend any support to the argument that such a modification cannot be made bilaterally according to section 43.

[52] For these reasons, I feel that the appeal must be dismissed with costs.

N.B. – See paragraphs 23, 24 and 43 to 45 of the trial judgment (Potter v. Québec (Procureur général), 1998 CanLII 9495 (QC SC) [judgment available in French only]

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[9] In short, the province pioneered by enacting in 1969 the *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1, which recognizes that the English and French languages possess and enjoy equality of status and equal rights and privileges in all matters within the jurisdiction of the province and provides for the exercise of specific language rights. In 1981, the provincial government enacted *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, S.N.B. 1981, c. O-1.1. This Act officially recognizes the existence and equality of the two official linguistic communities. The following year, 1982, when the federal government was proceeding to patriate the Canadian Constitution and enact the *Canadian Charter of Rights and Freedoms*, the New Brunswick government had certain language rights entrenched in the *Charter*; these rights apply specifically to the institutions of the legislature and government of New Brunswick. These language rights are contained in subsections 16(2) to 20(2) of the *Charter*. Finally, in 1993, by way of constitutional amendment under section 43 of the *Constitution Act, 1982*, the provincial government constitutionalized the principles of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick* that the Legislative Assembly passed in 1981. This became section 16.1 of the *Charter*; it contains a declaration that the English linguistic community and the French linguistic community are equal, defines the role of preserving and promoting the equality of status of the official linguistic communities and specifically confers this role on the legislature and government of New Brunswick.

Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212, 2017 SKQB 109 (CanLII)

[79] In Quebec the Quiet Revolution of the 1960s replaced the primacy of religion in schools with the primacy of language. In 1997 Quebec, using s. 43 of the *Constitution Act, 1982*, rescinded denominational school rights and replaced them with a language-based education system. Accordingly, s. 93 no longer applies in Quebec.

[…]

[295] I question whether the principle of a “solemn pact” should weigh as predominantly in interpreting s. 17(1) of the *Saskatchewan Act* as it has in interpreting s. 93(1) of the *Constitution Act, 1867* in cases dealing with separate school legislation in Ontario and Quebec. The solemn pact was a constitutional arrangement between the four original confederating colonies, but essentially applicable only in Quebec and Ontario since New Brunswick and Nova Scotia did not have separate schools. One might suggest that the notion of a “solemn pact” is losing significance. In 1997 Quebec sought a constitutional amendment under s. 43 of the *Constitution Act, 1982* and rescinded denominational school rights and replaced them with a language-based education system. The *Constitution Act, 1867* now includes s. 93A: “Paragraphs (1) to (4) of section 93 do not apply to Quebec.” The “solemn pact” between Ontario and Quebec has effectively become a partner-less pact since 1997.

R. v. Pare, 1986 CanLII 1189 (BC SC)

[21] The language rights in the *Charter* are in addition to similar constitutional language rights which exist in Quebec and Manitoba under s. 133 of the *Constitution Act, 1867*, and s. 23 of the *Manitoba Act*. It is important to observe that constitutional language rights vary in different regions of Canada. Certain of these rights exist with respect to institutions and matters within federal jurisdiction and within the provinces of Manitoba and New Brunswick that do not exist elsewhere. Even with respect to the right under s. 20 of the *Charter* it is restricted in some situations by a “where the numbers warrant” test. I note

too the condition placed on minority languages education rights by s. 23 of the *Charter*. These are illustrations by historical factors relating to language rights and a recognition of the distribution of the minority language population throughout the nation.

[22] It is also important to note the special amending formula set forth in s. 43 of the *Constitution Act, 1982*, whereby a scheme is set up designed to have the provinces “opt in” to the language rights scheme set out in ss. 16 to 22.

Part VII – General Provisions (sections 55, 56, 57 and 59)

55. French version of Constitution of Canada

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

[LAST UPDATE: JULY 2017]

ANNOTATIONS

Bertrand v. Quebec (Attorney General), 1996 CanLII 12476 (QC SC)

5. The failure to adopt the French version of certain documents in the schedules to the *Constitution Act, 1982*.

[145] The defendant submits that the plaintiff's action should not be allowed to proceed because the *Constitution Act, 1982* on which he is relying is of no force or effect. Section 55 of that Act states that the Minister of Justice of Canada shall, as expeditiously as possible, prepare a French version of the portions of the Constitution of Canada referred to in the schedule and, when any portion thereof sufficient to warrant action being taken has been so prepared, table it for enactment by proclamation issued by the Governor General under the Great Seal of Canada. But 14 years have elapsed and these portions have not yet been enacted. The defendant argues that the failure to comply with this provision inevitably means, in legal terms, that the package of Constitutional provisions is of no force or effect.

[146] Three constitutional obligations are entrenched within section 55, he says. In the first place, the Minister is instructed to prepare, as expeditiously as possible, a French version of the portions of the Constitution referred to in the schedule. Secondly, when any portion thereof sufficient to warrant action being taken has been so prepared, the Minister shall put it forward for adoption. This obligation comprises two indissociable steps. The Minister must decide, first, whether a portion is sufficient to warrant action being taken, and then whether it is ready for enactment. Thirdly, the French version of these portions is enacted, in accordance with the procedure applicable to the amendment of the constitutional provisions contained therein.

[147] Yet the Minister has failed to comply with his obligations. In regard to the first, he has failed to act with the necessary diligence; as for the second, he has failed to table for adoption the portions sufficient to warrant action being taken, once they have been prepared; and the third obligation has simply not been fulfilled.

[148] Moreover, since the obligation imposed on the Minister in section 55 is a mandatory constitutional obligation, failure to comply with this translation order from the Imperial Parliament can only mean that the

Constitution is of no force or effect. The very way in which the section is worded gives it this character, and the use of the word "shall" in the English version removes any ambiguity. Moreover, by inserting this provision in the *Constitution Act, 1982*, the Parliament and Government of the United Kingdom were ordering Canada to enact the French version of these documents.

[149] The plaintiff replies that while the text of the schedules to the *Constitution Act, 1982* has not yet been adopted, which is unthinkable, the Quebec government must share some blame. It is unacceptable that this government, with its mission to protect the French fact in America, has to this point neither sought nor insisted on the adoption of the French version of the schedules to the Constitution of Canada, which it has had in its possession since 1990.

[150] He notes, moreover, that the defendant, in arguing that the Constitution is of no force or effect, has alluded to one of the provisions in the *Constitution Act, 1982*. In doing so, the plaintiff says, the defendant implicitly recognizes the Constitution.

[151] But, he continues, how can the defendant demand that the *Constitution Act, 1982* be enforced while simultaneously acting in violation of its provisions?

[152] As for the Attorney General of Canada, one of the impleaded parties and, by the nature of the case, a defendant, he argues that there has been no failure to comply with the provisions of section 55 and that if such were the case the sanction would be not the invalidity of the Constitution itself or any part of it, but rather a declaration of non-compliance.

[153] In any event, he explains, the federal Minister of Justice clearly carries the primary responsibility under this provision, and he has fulfilled his obligation. As early as 1984 he appointed a French-language constitutional drafting committee. This committee published an initial report including a French version of the *Constitution Act, 1867*. This initial document was sent to all the provinces. The committee subsequently continued its work, which ended in 1990 with the production of a final report. In December of that year, the report was tabled in Parliament by the then Minister of Justice, the Honourable Kim Campbell, who sent a copy of the report to all of her provincial counterparts.

[154] Following that, consultations were to be held with the provinces, but they have not taken place. However, the fact remains that since 1990 a complete French version of the texts has been available and was supplied to all interested parties.

[155] As to the second aspect of the provision, the enactment of the French version of the translated texts, this presupposes the participation of all the actors, provincial as well as federal. Under the procedure set out in Part V of the Constitution, these governments must present resolutions and ensure their adoption prior to any proclamation by the government under the Great Seal of Canada.

[156] However, not one province has enacted a resolution along these lines. On the other hand, section 55 does not state the legal consequences of a failure to comply, nor does it condition the validity of any portion of the Constitution on the performance of this provision.

[157] Finally, the Attorney General of Canada argues, if the Court were to adopt the defendant's position but to conclude at the same time that the failure of the Minister of Justice of Canada to fulfil his obligations under section 55 should not result in the invalidation of the Constitution of Canada, it would then fall to the judge hearing the main action to consider the appropriate remedy.

[158] One may, to be sure, wonder at the fact that 17 of the 24 Acts still in force in the schedules to the *Constitution Act, 1982* have not yet been enacted, and speculate on the reasons why. Nevertheless, some important questions of fact should be assessed by a judge who is hearing the substantive case. For example: what is the explanation for the fact that more than eight years elapsed before the final version of the Acts had been prepared? Did the legal editors, constitutional lawyers and translators responsible for preparing the French version of these Acts encounter more than the ordinary problems? Why did the provinces, upon receiving the final version of the Acts, not take the necessary steps to ensure their

adoption? Was it necessary to consult the provinces concerning their adoption, as the intervener contends? If so, why did these consultations not take place?

[159] I am unable to declare, on a motion to dismiss, that the Minister of Justice of Canada has breached his constitutional obligations without giving him an opportunity to make full answer and defence concerning the circumstances surrounding these events. What is certain is that I cannot dispose of this important issue on the basis of the facts set out by the Attorney General of Canada in his factum, without prejudice to the case proceeding on the main action.

[160] Moreover, if I adopted the defendant's argument concerning the failure of the Minister of Justice of Canada to fulfil his obligations under section 55 of the *Constitution Act, 1982*, but concluded that this should not result in the invalidity of the Acts in question, some remedies would then have to be contemplated (*Mahe v. Government of Alberta*, *supra*, *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, 1993 CanLII 119 (SCC), [1993] 1 S.C.R. 839, 100 D.L.R. (4th) 723 (S.C.C.)). What would they be? Again, this is a substantive issue. A motion to dismiss is not an appropriate framework within which to determine such measures.

P.G. (Québec) v. Langlois (December 5, 1997), Québec 200-73-000514-979, decision on application (QC CQ) [hyperlink not available] [judgment available in French only]

N.B. – Judgment aff. by P.G. (Québec) v. Langlois (April 21, 1998), Québec 36-511-972 (QC SC). Appeal from this decision was dismissed by the Quebec Court of Appeal on July 6, 1998, 200-10-000685-987.

[OUR TRANSLATION]

As for the respondent's second reason, the Court assumes that the arguments refer to the obligation imposed under section 55 of the *Constitution Act, 1982*. This section sets out certain obligations on the Department of Justice Canada, first to draft the French version of the parts of the Constitution referred to in the Schedule as expeditiously as possible and to put forward for enactment any portion thereof sufficient to warrant being drafted in French pursuant to the applicable procedure, namely under Part V of the Act.

Based on the evidence heard, it would seem that various means were implemented for the parts of the Constitution of Canada referred to in the Schedule to be drafted in French; the Final Report of the French Constitutional Drafting Committee was submitted to the Department of Justice in Ottawa in 1989 and sent to the provinces and territories eight days after the final report was submitted; and more than 16 years after the obligation created by section 55 of the *Constitution Act, 1982*, the procedure under this section has still never been initiated by any of the provinces or territories. There have only been the letters dated April 11, 1997, with a reminder of this procedure, sent to the Deputy Attorney Generals of the 10 provinces and the Deputy Ministers of Justice of the 2 territories; these letters were signed by Mary Dawson, Associate Deputy Minister with the Federal Department of Justice.

Clearly, after more than 16 years the expected result has not been achieved. Even though it is surprising that there was such a long delay for a preliminary objection to be presented before the Court, the evidence did not allow for an assessment of the means implemented for section 55 of the *Constitution Act, 1982* to be respected in its entirety as expeditiously as possible.

The type of proceeding the respondent used does not permit the Court to rule on the relative severity required by the use of the expression "as expeditiously as possible" or the means in place and used by the federal Department of Justice.

The procedure required by section 55 of the *Constitution Act, 1982* imposes on the principal contractor, the federal Department of Justice, a mandatory collaboration, which means the final result depends on a will that it cannot control throughout the process.

The respondent did not present any arguments to challenge the efficiency of the existing means.

Lastly, as correctly noted by the prosecution, the Act does not set out any consequences for the non-respect of the section 55 obligation.

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56. English and French versions of certain constitutional texts

56. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

[LAST UPDATE: JULY 2017]

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57. English and French versions of this Act

57. The English and French versions of this Act are equally authoritative.

[LAST UPDATE: JULY 2017]

ANNOTATIONS

Saskatchewan Human Rights Commission v. Kodellas, 1989 CanLII 284 (SK CA)

[pp. 17-18] [Vancise J.A.] Section 57 of the *Charter* makes the English and French versions equally authoritative. In determining what purpose and interests are meant to be protected and what remedies are available, it is necessary to examine the character and objects of the *Charter* as well as both versions of the language chosen to articulate the specific right or freedom and remedies. It is necessary to refer to both versions to determine if there are inconsistencies or discrepancies, to resolve those discrepancies, and determine the true meaning from both versions. In so doing, the interpretation of the bilingual text should be approached no differently than a unilingual text. The objective is the same, to determine the meaning that best accords with the object of the legislation. In "The Charter as a Bilingual Instrument" (1986), 64 *Can. Bar Rev.* 155 at 156-57, J.P. McEvoy states the proper approach to be used as follows:

> That Canadian lawyers and jurists must appreciate the bilingual nature of our Constitution and the importance of that factor in construing constitutional provisions is self-evident. For failure to do so is to deny the basic fact that the expression of Canadian constitutional principles is a bilingual expression. To refer to only one language version may result in failure to properly ascertain the true meaning of the Constitution where possible discrepancies of language exist between the two versions. The proper approach, it is suggested, is to refer to both language versions of the provisions in issue, resolve any discrepancies of meaning and then apply the true meaning so ascertained from both versions. Absent a finding of equivalency between versions, it would seem improper to apply one language version of a provision in disregard of the other and would open up the possibility of variant results where a discrepancy between versions exists.

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59. (1) Commencement of paragraph 23(1)(a) in respect of Quebec

59. (1) Paragraph 23(1)(a) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

59. (2) Authorization of Quebec

59. (2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec.

[LAST UPDATE: JULY 2017]

ANNOTATIONS

Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14 (CanLII)

[8] When the Canadian Constitution was patriated, the adoption of s. 23 of the *Canadian Charter* confirmed the framers' intention to guarantee rights to instruction that were, in principle, identical for all of Canada's minority language groups (*Arsenault-Cameron*, at para. 26). However, that principle was watered down considerably in the case of Quebec: s. 59 of the *Constitution Act, 1982* provides that s. 23(1)(a) does not apply in Quebec. It may come into force only with the authorization of the National Assembly or the Quebec Government. To date, such authorization has not been given. To this extent, s. 59 limits the classes of rights holders in Quebec to those described in ss. 23(1)(b) and 23(2) (*Quebec Association of Protestant School Boards*, at p. 82). By so defining the classes of rights holders, which are in theory uniform throughout Canada but are limited in Quebec by the effect of s. 59, the framers also rejected the freedom to choose the language of instruction in Quebec [...].

A.G. (Que.) v. Quebec Protestant School Boards, [1984] 2 S.C.R. 66, 1984 CanLII 32 (SCC)

[p. 70] However, s. 23(1)(a) of the *Charter*, cited above, is not in force in Quebec, pursuant to s. 59(1) and (2) of the *Constitution Act, 1982* [...].

[p. 82] It is therefore not surprising that *Bill 101* [*Charter of the French language*] was very much in the minds of the framers of the Constitution when they enacted s. 23 of the *Charter*, which guarantees "minority language educational rights". This is confirmed when the wording of this section is compared with that of ss. 72 and 73 of *Bill 101*, and with other provincial statutes on the language of instruction.

[p. 82] To begin with, the fact that Quebec is the only province in Canada in which, by virtue of s. 59(1) and (2) of the *Constitution Act, 1982*, s. 23(1)(a) of the *Charter* is not yet in force and cannot be brought into force without the consent of Quebec, indicates clearly that the framers of the Constitution had Quebec specially in mind when they enacted s. 23 of the *Charter*. It may be possible to suggest a reason for this exception: so far as Quebec is concerned, s. 23(1)(a) applies to Canadian citizens whose first language is English but who did not receive their primary school instruction in that language in Canada, that is, in practice, largely immigrants whose first language is English and who have become Canadian citizens. It is therefore plausible to think that this particular provision of the *Charter* was suspended for Quebec in part so as to calm the concerns regarding immigration, that, long before *Bill 101* was adopted, were expressed in Quebec because of the minority status of French in North America.

Constitution Act, 1867

Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.)

Preamble

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom: […]

N.B. – Underlying constitutional principles relating to language rights are dealt with under the Preamble of the *Constitution Act, 1867* rubric.

[LAST UPDATE: AUGUST 2017]

ANNOTATIONS

Caron v. Alberta, [2015] 3 S.C.R. 511, 2015 SCC 56 (CanLII)

[5] There is, of course, no question that linguistic duality and linguistic rights with respect to French and English are deeply rooted in our history and reflect our fundamental principles of constitutionalism and the protection of minorities. They are basic to the very idea of Canada. The Court must, as it has often affirmed, "take special care to be faithful to the spirit and purpose of the guarantee of language rights": *Mercure*, at pp. 269-70, quoting *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, 1986 CanLII 66 (SCC), [1986] 1 S.C.R. 549, at p. 564. The Court must also be mindful, however, that federalism — another fundamental constitutional principle — recognizes a large measure of "autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction": *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 58. We must be equally faithful to the spirit and purpose of all of these fundamental constitutional principles.

[…]

[35] Constitutional documents should be interpreted in a large and liberal manner: see *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII), [2004] 3 S.C.R. 698, at para. 23. Moreover, important guiding principles apply in relation to language rights and the protection of minorities. Language rights must be interpreted purposively and remedially, "in a manner consistent with the preservation and development of official language communities in Canada": *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, at para. 25, citing *Reference re Public Schools Act (Man)*, s. 79(3), (4) and (7), 1993 CanLII 119 (SCC), [1993] 1 S.C.R. 839, at p. 850; *Reference re Secession of Quebec*. When looking at historical rights involving minorities, we must be mindful that, even at the time of Confederation, the protection of minority rights was "an essential consideration in the design of our constitutional structure": *Reference re Secession of Quebec*, at para. 81, citing *Reference re Authority of Parliament in relation to the Upper House*, 1979 CanLII 169 (SCC), [1980] 1 S.C.R. 54, at p. 71.

[36] These important principles, however, do not undermine the primacy of the written text of the Constitution: *Reference re Secession of Quebec*, at para. 53. The Constitution, the Court has emphasized, "should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time": *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at p. 394; see also *British Columbia (Attorney General) v. Canada (Attorney General)*, 1994 CanLII 81 (SCC), [1994] 2 S.C.R. 41 ("*Vancouver Island Railway (Re)*"); P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 15-50.

[37] As Iacobucci J. observed in *Vancouver Island Railway (Re)*: "Although constitutional terms must be capable of growth, constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question"(p. 88). More recently, this Court in *R. v. Blais*, 2003 SCC 44 (CanLII), [2003] 2 S.C.R. 236, cautioned that courts are "not free to invent new obligations foreign to the original purpose of the provision"; rather, "[t]he analysis must be anchored in the historical context of the provision" (para. 40).

[38] Thus, we must assess the appellants' arguments by looking at the ordinary meaning of the language used in each document, the historical context, and the philosophy or objectives lying behind the words and guarantees. We cannot simply resort to the historical evidence of the desires and demands of those negotiating the entry of the territories, and presume that those demands were fully granted. It is obvious that they were not. The Court must generously interpret constitutional linguistic rights, not create them.

Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 1998 CanLII 793 (SCC)

[32] […] In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. […]

[38] Several matters remained to be resolved, and so the Charlottetown delegates agreed to meet again at Quebec in October, and to invite Newfoundland to send a delegation to join them. The Quebec Conference began on October 10, 1864. Thirty-three delegates (two from Newfoundland, seven from New Brunswick, five from Nova Scotia, seven from Prince Edward Island, and twelve from the Province of Canada) met over a two and a half week period. Precise consideration of each aspect of the federal structure preoccupied the political agenda. The delegates approved 72 resolutions, addressing almost all of what subsequently made its way into the final text of the *Constitution Act, 1867*. These included guarantees to protect French language and culture, both directly (by making French an official language in Quebec and Canada as a whole) and indirectly (by allocating jurisdiction over education and "Property and Civil Rights in the Province" to the provinces). The protection of minorities was thus reaffirmed.

[...]

[43] […] The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments. The *Constitution Act, 1867* was an act of nation-building. It was the first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest. Federalism was the political mechanism by which diversity could be reconciled with unity.

[...]

[46] […] The proclamation of the *Constitution Act, 1982* removed the last vestige of British authority over the Canadian Constitution and re-affirmed Canada's commitment to the protection of its minority, aboriginal, equality, legal and language rights, and fundamental freedoms as set out in the *Canadian Charter of Rights and Freedoms*.

[...]

[51] Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.

[52] The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree", to invoke the famous description in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.

[53] Given the existence of these underlying constitutional principles, what use may the Court make of them? In the *Provincial Judges Reference*, *supra*, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as "organizing principles" and described one of them, judicial independence, as an "unwritten norm") could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that

there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. […]

[54] Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the *Manitoba Language Rights Reference*, supra, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada". […]

[59] The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the *Union Act, 1840* (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself.

[...]

(e) Protection of Minorities

[79] The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. Some of those provisions are, as we have recognized on a number of occasions, the product of historical compromises. As this Court observed in *Reference re Bill 30*, *An Act to amend the Education Act (Ont.)*, 1987 CanLII 65 (SCC), [1987] 1 S.C.R. 1148, at p. 1173, and in *Reference re Education Act (Que.)*, 1993 CanLII 100 (SCC), [1993] 2 S.C.R. 511, at pp. 529-30, the protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. See also *Greater Montreal Protestant School Board v. Quebec (Attorney General),* 1989 CanLII 125 (SCC), [1989] 1 S.C.R. 377, at pp. 401-2, and *Adler v. Ontario*, 1996 CanLII 148 (SCC), [1996] 3 S.C.R. 609. Similar concerns animated the provisions protecting minority language rights, as noted in *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, 1986 CanLII 66 (SCC), [1986] 1 S.C.R. 549, at p. 564.

[80] However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the *Charter*'s provisions for the protection of minority rights. See, e.g., *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), 1993 CanLII 119 (SCC), [1993] 1 S.C.R. 839, and *Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342.

[81] The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter,* and the process of constitutional judicial review that it entails, is

the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: *Senate Reference*, *supra*, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

Re Manitoba Language Rights, [1985] 1 S.C.R. 721, 1985 CanLII 33 (SCC)

[59] In the present case, declaring the Acts of the Legislature of Manitoba invalid and of no force or effect would, without more, undermine the principle of the rule of law. The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Indeed, it is because of the supremacy of law over the government, as established in s. 23 of the *Manitoba Act, 1870* and s. 52 of the *Constitution Act, 1982*, that this Court must find the unconstitutional laws of Manitoba to be invalid and of no force and effect.

[…]

[64] Additional to the inclusion of the rule of law in the preambles of the *Constitution Acts* of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.

[…]

2) Application of the Principle of the Rule of Law

[67] It is clear from the above that: (i) the law as stated in s. 23 of the *Manitoba Act, 1870* and s. 52 of the *Constitution Act, 1982* requires that the unilingual Acts of the Manitoba Legislature be declared to be invalid and of no force or effect, and (ii) without more, such a result would violate the rule of law. The task the Court faces is to recognize the unconstitutionality of Manitoba's unilingual laws and the Legislature's duty to comply with the "supreme law" of this country, while avoiding a legal vacuum in Manitoba and ensuring the continuity of the rule of law.

[…]

[83] The only appropriate solution for preserving the rights, obligations and other effects which have arisen under invalid Acts of the Legislature of Manitoba and which are not saved by the *de facto* or other doctrines is to declare that, in order to uphold the rule of law, these rights, obligations and other effects have, and will continue to have, the same force and effect they would have had if they had arisen under valid enactments, for that period of time during which it would be impossible for Manitoba to comply with its constitutional duty under s. 23 of the *Manitoba Act, 1870*. The Province of Manitoba would be faced with chaos and anarchy if the legal rights, obligations and other effects which have been relied upon by the people of Manitoba since 1890 were suddenly open to challenge. The constitutional guarantee of rule of law will not tolerate such chaos and anarchy.

R. v. MacKenzie, 2004 NSCA 10 (CanLII)

[67] These authorities support the conclusions that there is an unwritten principle of the Constitution governing the protection of minority language rights, and this principle has normative force. I need not consider the ambit or degree of the normative force. From the passages I have quoted (*Secession*

Reference, para. 53, *Charlebois*, para. 58, *LaLonde*, para. 121) it is clear that the principle does not amend the text of the *Charter of Rights*.

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[56] I think that it is important to spell out how this Court is going to use the organizing principles set out in *Reference re Secession of Quebec* in this case, including the principle of the respect for minority rights. Some of the interveners supporting the position of the appellant that unilingual by-laws of the City of Moncton are invalid relied on the passage from the above-mentioned case (paragraph 54) which states: "Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force" ...), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments." The same interveners also cited *Lalonde v. Ontario (Commission de restructuration des services de santé)* (1999), 1999 CanLII 19910 (ON SC), 181 D.L.R. (4th) 263 (Ont.S.C.); [2001] O.J. No. 4768 (C.A.), online: QL (OJ), to support the argument that the courts must intervene, where necessary, to grant protection against government action which fails to recognize this underlying principle of minority rights protection. […]

[58] [...] [I] think that the argument that this unwritten and underlying principle can also be used independently of any constitutional text, as a basis of an application for judicial review to strike down government action is not very convincing. I believe that the "powerful normative force" referred to by the Supreme Court concerns the interpretation of constitutional texts and not the creation of rights outside of the constitutional texts. […]

Lalonde v. Ontario (Commission de restructuration des services de santé), 2001 CanLII 21164 (ON CA)

[81] The protections accorded linguistic and religious minorities are an essential feature of the original 1867 Constitution without which Confederation would not have occurred. […]

[82] The Supreme Court of Canada explained in the *Secession Reference*, *supra*, at p. 261 S.C.R. that the protection of religious minorities and the fear of assimilation was a central concern in the Confederation bargain. […]

Issue 4: What is the relevance to Montfort of the unwritten constitutional principle of respect for and protection of minorities?

[103] The most definitive and complete consideration of the unwritten or structural principles, and the authority most pertinent to the respondents' submissions before this court, is the Supreme Court of Canada's 1998 decision in the *Secession Reference*, *supra*. There, at p. 240 S.C.R., the Supreme Court affirmed the existence of unwritten constitutional rules "not expressly dealt with by the text of the Constitution" but which nonetheless have normative force as operative instruments of our constitutional order. The court identified at p. 240 S.C.R. "four fundamental and organizing principles of the Constitution" that bear upon the question of the possibility of provincial secession, namely, federalism, democracy, constitutionalism and the rule of law, and respect for minorities.

[...]

[106] The federalism principle has an important bearing on the situation of cultural and linguistic minorities. The reality of the distinctive language and culture of the French speaking majority of Quebec was unquestionably a principal and defining feature of the Canadian union of 1867 as it required the adoption of a federal structure in the first place. As the court explained in the Secession Reference at p. 252 S.C.R.:

> "The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture."

[…]

[110] The related principle of constitutionalism rests on the proposition that the Constitution is the supreme source of law and that all government action must comply with its requirements. Constitutionalism qualifies majority rule and, like federalism, has an important bearing on minorities. As the court explained in the *Secession Reference* at p. 259 S.C.R., the constitutional entrenchment of rights protects these rights against the will of the majority and ensures that they are given due regard and protection. A constitution may, the court explained at p. 259 S.C.R., "seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority".

Respect for and protection of minorities

[111] Finally, in the *Secession Reference*, the court spoke of the principle of "respect for minorities" or "protection of minorities". […]

[112] The protection of linguistic minorities is essential to our country. Dickson J. captured the spirit of the place of language rights in the Constitution in *Société des Acadiens*, *supra*, at p. 564 S.C.R.: "Linguistic duality has been a longstanding concern in our nation. Canada is a country with both French and English solidly embedded in its history." As stated by La Forest J. in *R. v. Mercure*, 1988 CanLII 107 (SCC), [1988] 1 S.C.R. 234 at p. 269, 48 D.L.R. (4th) 1, "rights regarding the English and French languages . . . are basic to the continued viability of the nation."

[...]

[114] The principle of respect for and protection of minorities is a fundamental structural feature of the Canadian Constitution that both explains and transcends the minority rights that are specifically guaranteed in the constitutional text. This is an area where, as the Supreme Court of Canada explained in the *Secession Reference* at p. 292 S.C.R., "[a] superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading." This structural feature of the Constitution is reflected not only in the specific guarantees in favour of minorities. It infuses the entire text and, as we have explained, plays a vital role in shaping the content and contours of the Constitution's other structural features: federalism, constitutionalism and the rule of law, and democracy.

[...]

[143] The legislative history and the comments of the members of the legislature when the *F.L.S.A.* [*French Language Services Act*] was enacted permit this court to draw a number of inferences and conclusions about the underlying purposes and objectives of the *F.L.S.A.* and the intention of the legislature enacting it. One of the underlying purposes and objectives of the Act was the protection of the minority francophone population in Ontario; another was the advancement of the French language and promotion of its equality with English. These purposes coincide with the underlying unwritten principles of the Constitution of Canada. […]

[173] The present case does not involve a written constitutional guarantee, but it does involve a situation with profound implications for Ontario's minority francophone community that engages the constitutional principle of respect for and protection of minorities.

[...]

[176] Unwritten constitutional norms may, in certain circumstances, provide a basis for judicial review of discretionary decisions. […]

[180] The Commission was required by statute to exercise its powers with respect to Montfort in *accordance with the public interest*. In determining the public interest, the Commission was required to have regard to the fundamental constitutional principle of respect for and protection of minorities. The Commission was also required to have regard to the recommendations of regional health councils. As noted earlier, the regional health councils recognized the unique role of Montfort and its importance to the continued survival of the language and culture of the francophone community. The Commission, however, viewed consideration of Montfort's larger institutional role as beyond its mandate. This is demonstrated by the letter written by Dr. Sinclair dated February 22, 1999 to which reference has already been made at paras. 49 and 72.

[…]

[187] We conclude, accordingly, that the Commission's directions must also be quashed on the ground that, contrary to the constitutional principle of respect for and protection of minorities, in the exercise of its discretion, the Commission failed to give serious weight and consideration to the linguistic and cultural significance of Montfort to the survival of the Franco-Ontarian minority.

Westmount (Ville de) v. Québec (Procureur Général du), 2001 CanLII 13655 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[91] The appellants' reliance on the *Reference* [*re Secession of Quebec*] and the judgements of the Supreme Court is therefore, in our view, inconsistent with what the Court has stated, as the appellants have failed to take into account, first, the context in which the judgment was rendered and, second, the important caveat that the Court has expressed on more than one occasion. The appellants appear to have totally ignored the significance of this caveat.

[92] In reality, they are relying on these principles not to fill in gaps, but to oust the jurisdiction of the provinces and entrench in the Constitution new language obligations for municipalities. They ignore the importance of the Supreme Court's caveat to the effect that the recognition of unwritten principles cannot be taken as an invitation to dispense with the written text of the Constitution.

[…]

[94] Moreover, the principle of protection of minorities does not confer a right to institutions to protect minorities when no such right is guaranteed in the Constitution, nor can it be interpreted as granting a linguistic minority the right to municipal structures that are frozen in time, which for all intents and purposes would amount to a right to veto any municipal reforms.

[…]

a) The Constitution guarantees minority rights

[96] First of all, the appellants rely on para. 96 of the *Reference*, in which the Supreme Court states that linguistic and cultural minorities, including Aboriginal peoples, look to the Constitution for the protection of their rights.

[97] This statement must be placed back in its context, that is, the negotiations between Quebec and Canada should Quebec secede and as an example of issues that could be raised by such negotiations. It therefore cannot be viewed in isolation and given the general application that the appellants ascribe to it.

[…]

d) Protection of minorities

[102] The appellants argue at length the principle of protection of minorities as set out by the Supreme Court in the *Reference* and rely on it to justify their request to preserve the municipal institutions which they claim are essential to the survival of the Anglophone minority.

[103] First, it is important to bear in mind the context in which the Supreme Court stated this principle. It did so to define Quebec's obligations to its minorities in the case of a possible secession: the province could not disregard the rights of individuals and minorities in seceding.

[104] However, nowhere in the *Reference* is it stated that the protection of minorities must be ensured through their municipal institutions. When the Supreme Court talks about preserving institutions, it does so in connection with the principle of constitutionalism and the reasons why a constitution is entrenched beyond the reach of simple majority rule. It is therefore the written Constitution that is truly at issue.

e) The elimination of municipal institutions: a situation not contemplated by the Constitution

[105] Some of the appellants also argue that the organizing principles apply in full to this case, since the Constitution is silent on the elimination of municipal institutions. They rely on the pre-Confederation debates in which it was stated that the protection of minorities is a fundamental condition of the Union. Anglophone municipalities, they argue, while not vulnerable at that time, are so now.

[106] The response to this argument is simple. The mere silence of the written Constitution does not necessarily constitute a gap. The Constitution could not and should not foresee every eventuality, and the current situation cannot be equated with a gap within the meaning which the Supreme Court gives this term. At the time of Confederation, the issue was specific protections for religious minorities, not municipalities. If the Fathers of Confederation had intended to protect municipal institutions as well, they would have done so explicitly, as they did, for example, for so-called "protected" electoral divisions under s. 80 of the *Constitution Act, 1867*.

[107] Unless we rewrite history, it is impossible to ascribe to them such an intention with regard to Anglophone municipalities.

f) Federalism

[108] According to the appellants, the judge erred in not considering the principle of federalism, whose purpose is to facilitate the pursuit of collective goals by cultural and linguistic minorities.

[109] This principle governs the spheres of jurisdiction between the provinces and the federal government and thus allows the provinces to make laws in accordance with their own objectives and the wishes of the people within their territories. It does not apply to relations within a single province.

[110] At the hearing, when the Court asked the appellants whether they would go so far as to argue that the government could neither add nor withdraw one of the powers attributed to the municipalities without violating this principle, the appellants said yes, they would. According to them, the government must take the people's opinion into consideration before legislating and cannot take rights away from minorities.

[111] The consequences of this argument amount to completely denying the jurisdiction conferred by s. 92(8). Federalism clearly does not have this scope and cannot be used to hollow out the written provisions of the Constitution of their content.

Gigliotti v. Conseil d'administration du Collège des Grands Lacs, 2005 CanLII 23326 (ON SCDC)

[40] The applicants rely on the unwritten constitutional principle of protection of minorities, which was articulated by the Supreme Court of Canada in *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, [1998] S.C.J. No. 61 and then further interpreted by the Ontario Court of

Appeal in *Lalonde*, *supra*. They argue that the Minister failed to consider the important role played by the Collège [des Grands Lacs] in the Franco-Ontarian community of CSW [Central South-West] Ontario and, therefore, the decision to close the Collège should be set aside.

[…]

[46] In our view, the decision to close the Collège was fully consistent with the unwritten constitutional principle of respect for and protection of minorities. In this case, the Board of Governors of the Collège, which included 12 representatives of the Franco-Ontarian community among its 17 members, initiated the decision to close the Collège because of concerns about the quality of education offered. In contrast, in *Lalonde*, the decision about the future role of Hôpital Montfort was made by a government agency, despite widespread protests from the Francophone community. The Commission also ignored the recommendations of the Regional District Health Council that the Commission should recognize Montfort's primary and distinctive functions as a Francophone hospital.

[47] While the applicants argue that the unwritten constitutional principle requires consultation with the Franco-Ontarian community, the *Lalonde* decision speaks of consideration of the interests of the community (at para. 187). In this case, the evidence shows that the Minister and Ministry have taken into consideration the broader interests of the Franco-Ontarian community and considered the effect of the closure on it. […]

[51] In our view, the Minister did consider the unwritten constitutional principle of respect for and protection of the linguistic minority in Ontario, and her decision was consistent with that principle. The decline in enrollment at the Collège from 155 full-time students in 1997-1998 to approximately 60 at the commencement of the 2001-2002 academic year, the deterioration in the quality of education offered, and the escalation of the costs of providing education demonstrate that the Collège was not a significant institution "vital to the minority francophone population of Ontario", to use the words of the Court of Appeal in *Lalonde*, *supra*, to describe Hôpital Montfort. Therefore, this ground of review fails.

SEE ALSO:

Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14 (CanLII)

R. v. Car-Fre Transport Ltd., 2015 ABPC 280 (CanLII) [judgment available in French only]

VI. Distribution of Legislative Powers

Powers of the Parliament (section 91)

91. Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, --

1. Repealed.

1A. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance.

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

23. Copyrights.

24. Indians, and Lands reserved for the Indians.

25. Naturalization and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

[LAST UPDATE: AUGUST 2017]

ANNOTATIONS

R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

[14] The power to make laws with regard to the use of official languages has not been formally inscribed in ss. 91 and 92 of the *Constitution Act, 1867*. It is an ancillary power to the exercise of legislative authority over a class of subjects assigned to Parliament or to provincial legislatures. But the backdrop against which language provisions have been examined remains the language rights that are established by the Constitution.

Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790, 1988 CanLII 20 (SCC)

[14] It appears to have been accepted by all the members of the Court of Appeal [of Quebec], whether expressly or impliedly, that provincial legislative jurisdiction with respect to language is not an independent one but is rather "ancillary" to the exercise of jurisdiction with respect to some class of subject matter assigned to the province by s. 92 of the *Constitution Act, 1867*. That conclusion was based primarily on what was said by this Court in *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182, and on the opinion of Professor Hogg in *Constitutional Law of Canada* (2nd ed. 1985), at pp. 804-806, which in turn is based on what was said in *Jones*. Since this Court agrees with that conclusion, substantially for the reasons given in the Court of Appeal in the judgments of Monet, Chouinard and Paré JJ.A., it would not serve a useful purpose to reproduce here the references to the authorities in support of that conclusion which are fully set out in their opinions, including a long extract from the opinion of Professor Hogg. We adopt the following passages of the opinion of Professor Hogg as a statement of the law on this question, *i.e.*, that:

> ... language is not an independent matter of legislation (or constitutional value); that there is therefore no single plenary power to enact laws in relation to language; and that the power to enact a law affecting language is divided between the two levels of government by reference to criteria other than the impact of law upon language. On this basis, a law prescribing that a particular language or languages must or may be used in certain situations will be classified for constitutional purposes not as a law in relation to language, but as a law in relation to the institutions or activities that the provision covers.
>
> . . .
>
> ... for constitutional purposes language is ancillary to the purpose for which it is used, and a language law is for constitutional purposes a law in relation to the institutions or activities to which the law applies.

In order to be valid, provincial legislation with respect to language must be truly in relation to an institution or activity that is otherwise within provincial legislative jurisdiction.

Jones v. A.G. of New Brunswick, [1975] 2 S.C.R. 182, 1974 CanLII 164 (SCC)

[p. 189] Apart from the effect of s. 133 and s. 91(1), to be considered later in these reasons, I am in no doubt that it was open to the Parliament of Canada to enact the *Official Languages Act* (limited as it is to the purposes of the Parliament and Government of Canada and to the institutions of that Parliament and Government) as being a law "for the peace, order and good government of Canada in relation to [a matter] not coming within the classes of subjects … assigned exclusively to the Legislatures of the Provinces". The quoted words are in the opening paragraph of s. 91 of the *British North America Act*; and, in relying on them as constitutional support for the *Official Languages Act*, I do so on the basis of the purely residuary character of the legislative power thereby conferred. No authority need be cited for the exclusive power of the Parliament of Canada to legislate in relation to the operation and administration of the institutions and agencies of the Parliament and Government of Canada. Those institutions and agencies are clearly beyond provincial reach.

[p. 191] […] I point out, in addition, that it is within federal legislative competence to impose duties upon provincially-appointed judicial officers in respect of matters falling within federal legislative authority, as for example, the criminal law and its administration: see *In re Vancini*. *A fortiori*, it is within federal competence to repose a discretion in such officers in relation to the administration of the federal criminal law, albeit in courts established under provincial legislation.

[pp. 191-192] It was the submission of counsel for the Attorney General of Canada, which I accept, that the language in which criminal proceedings are conducted, whether documents are involved or oral conduct only or both, may be brought within the legislative authority conferred by s. 91(27) of the *British North America Act*; and so far as s. 91(27) is alone the source of authority for the specification of language in which the criminal law is to be written or in which criminal proceedings thereunder are to be conducted, Parliament's authority is paramount.

R. v. T.D.M., 2008 YKCA 16 (CanLII)

[28] There is no specific constitutional head of power dealing with language rights. Rather, the power to enact language laws is ancillary to the legislative authority otherwise assigned to Parliament and the provincial legislatures by the *Constitution Act, 1867*: *Beaulac* at para. 14. In *Devine v. Quebec (Attorney General)*, 1988 CanLII 20 (SCC), [1988] 2 S.C.R. 790 at 808, the Court stated that "in order to be valid, provincial legislation with respect to language must be truly in relation to an institution or activity that is otherwise within provincial legislative jurisdiction".

R. v. MacKenzie, 2004 NSCA 10 (CanLII)

[51] Section 16(3) [of the *Charter of Rights and Freedoms*] codifies the principle of "advancement" from *Jones v. Attorney General of New Brunswick*, 1974 CanLII 164 (SCC), [1975] 2 S.C.R. 182. In *Jones*, Chief Justice Laskin for the Court at pp. 189 - 90 stated that the residual power "for the peace, order and good government of Canada" under the opening words of s. 91 of the *Constitution Act, 1867* entitled Parliament to enact official languages legislation to advance usage of English and French in Federal institutions.

Regina v. Murphy, Ex Parte Belisle and Moreau, 1968 CanLII 732 (NB CA)

[8] As "procedure in criminal matters" is one of the classes of subjects assigned to the Parliament of Canada by s. 91(27) of the *British North America Act, 1867* (U.K.), c. 3, the Legislature of a province is without jurisdiction to enact legislation respecting the use of language in criminal proceedings. [...]

Lavigne v. Canada (Human Resources Development), [2002] 2 F.C.R. 164, 2001 FCT 1365 (CanLII)

[91] The use of the spending power by the federal government, through conditional grants or otherwise, does not transform provincial legislation into a federal one or make a provincial government recipient of federal funds, a federal institution for the purpose of the *OLA* [federal *Official Languages Act*]. To accept such propositions would subvert Canadian federalism as we know it. It would annihilate provincial jurisdiction.

R. v. Paquette, 1986 CanLII 1634 (AB QB)

(iv) Conclusions of the court as to Issue 1

[…]

2. For the reasons given at p. 29 [p. 54, Alta. L.R.] of my earlier judgment, I am of the opinion that language is an aspect of criminal procedure and thus within the exclusive legislative authority conferred on the Parliament of Canada by s. 91(27) of the *Constitution Act, 1867*. This finding goes to the root of the matter.

3. I agree with Halvorson J. of the Court of Queen's Bench of Saskatchewan in *Tremblay* when he said at p. 464: "…I perceive in s. 6(7) a resolve by the federal government to implement bilingualism in all criminal courts notwithstanding resistance". In my opinion, the Government of Canada has the constitutional authority to provide that a person charged with an indictable offence in Alberta has the right to be tried before a court that speaks his or her official language. While the consent and cooperation of the province is highly desirable, it is not, in my opinion, essential under the division of responsibility that has existed in our Constitution since 1867.

R. v. Pare, 1986 CanLII 1189 (BC SC)

[13] The obvious purpose of Part XIV.1 [of the *Criminal Code*] was to expand existing language rights in criminal proceedings in two ways. First, the right to use English and French would be increased by providing the accused with the right to be tried by a judge and jury who speak the official language of the accused. Secondly, these rights would be expanded geographically by extending the right to use English and French in criminal proceedings where such a right did not previously exist. However, Parliament clearly recognized that it would not be possible to implement Part XIV.1 in all parts of Canada at the same time. Two factors prevented this. First, while Parliament has constitutional authority pursuant to s. 91(27) of the *Constitution Act, 1867* to determine the language of trial (*Jones v. A.-G. Can. et al.* (1974), 1974 CanLII 164 (SCC), 16 C.C.C. (2d) 297, 45 D.L.R. (3d) 583, [1975] 2 S.C.R. 182 sub nom. *Jones v. A.-G. N.B. et al.*) the provinces have constitutional responsibility for the "administration of justice in the province" pursuant to s. 92(14). Accordingly, this is an area in which constitutional responsibility is shared and implementation of the rights set out in Part XIV.1 could not take place without the co-operation of the provinces. Secondly, historical, political and demographic matters meant that it would be much more difficult to implement the requirements of Part XIV.1 in some provinces than in others. Reference here may be usefully made to the *House of Commons Debates*, 3rd Session, 30th Parliament, vol. 5, 1978, pp. 5087-9, and to the *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 3rd Session, 30th Parliament, Issue No. 31, pp. 6-10 and 24-5.

SEE ALSO:

Quebec (Attorney General) v. 156158 Canada Inc. (Boulangerie Maxie's), 2015 QCCQ 354 (CanLII)

N.B. – This judgment was appealed (156158 Canada inc. v. Québec (Attorney General), 2016 QCCS 1676 (CanLII)), but s. 91 of the *Constitution Act, 1867* is not discussed by the Superior Court of Québec. The judgment of the Superior Court of Québec is currently under appeal before the Court of Appeal of Québec.

Exclusive Powers of Provincial Legislatures (section 92)

92. Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, --

1. Repealed.

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:

> **a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;**
>
> **b. Lines of Steam Ships between the Province and any British or Foreign Country;**
>
> **c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.**

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

ANNOTATIONS – GENERAL

R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

[14] The power to make laws with regard to the use of official languages has not been formally inscribed in ss. 91 and 92 of the *Constitution Act, 1867*. It is an ancillary power to the exercise of legislative authority over a class of subjects assigned to Parliament or to provincial legislatures. But the backdrop against which language provisions have been examined remains the language rights that are established by the Constitution.

Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 1998 CanLII 793 (SCC)

[59] The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the *Union Act*, 1840 (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself.

Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790, 1988 CanLII 20 (SCC)

[14] It appears to have been accepted by all the members of the Court of Appeal [of Quebec], whether expressly or impliedly, that provincial legislative jurisdiction with respect to language is not an independent one but is rather "ancillary" to the exercise of jurisdiction with respect to some class of subject matter assigned to the province by s. 92 of the *Constitution Act, 1867*. That conclusion was based primarily on what was said by this Court in *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182, and on the opinion of Professor Hogg in *Constitutional Law of Canada* (2nd ed. 1985), at pp. 804-806, which in turn is based on what was said in *Jones*. Since this Court agrees with that conclusion, substantially for the reasons given in the Court of Appeal in the judgments of Monet, Chouinard and Paré JJ.A., it would not serve a useful purpose to reproduce here the references to the authorities in support of that conclusion which are fully set out in their opinions, including a long extract from the opinion of Professor Hogg. We adopt the following passages of the opinion of Professor Hogg as a statement of the law on this question, *i.e.*, that:

> ... language is not an independent matter of legislation (or constitutional value); that there is therefore no single plenary power to enact laws in relation to language; and that the power to enact a law affecting language is divided between the two levels of government by reference to criteria other than the impact of law upon language. On this basis, a law prescribing that a particular language or languages must or may be used in certain situations will be classified for constitutional purposes not as a law in relation to language, but as a law in relation to the institutions or activities that the provision covers.
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> . . .
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> ... for constitutional purposes language is ancillary to the purpose for which it is used, and a language law is for constitutional purposes a law in relation to the institutions or activities to which the law applies.

In order to be valid, provincial legislation with respect to language must be truly in relation to an institution or activity that is otherwise within provincial legislative jurisdiction.

R. v. T.D.M., 2008 YKCA 16 (CanLII)

[28] There is no specific constitutional head of power dealing with language rights. Rather, the power to enact language laws is ancillary to the legislative authority otherwise assigned to Parliament and the provincial legislatures by the *Constitution Act, 1867*: *Beaulac* at para. 14. In *Devine v. Quebec (Attorney General)*, 1988 CanLII 20 (SCC), [1988] 2 S.C.R. 790 at 808, the Court stated that "in order to be valid, provincial legislation with respect to language must be truly in relation to an institution or activity that is otherwise within provincial legislative jurisdiction".

SEE ALSO:

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ANNOTATIONS – SUBSECTION 92(8)

Attorney General of Quebec v. Blaikie et al., [1981] 1 S.C.R. 312, 1981 CanLII 14 (SCC)

[p. 324] Last but not least, municipal institutions constitute a distinct albeit subordinate order of government at the local level, the administration of which is usually in the hands of locally elected mayors and members of council. Their growth and the multiplication of their regulations were inherent in their nature and accordingly foreseeable. Since the provinces were explicitly given the power to make laws relating to those institutions in s. 92(8) of the *B.N.A. Act* [*British North America Act*], the absence of any reference to them in s. 133 cannot possibly be viewed as an oversight. It is a purposeful silence to which effect must be given if the intent of the Fathers of Confederation is to be respected.

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[100] It is clear, from this wording [of paragraph 32(1)(b) of the *Canadian Charter of Rights and Freedoms*], that the legislature and government of New Brunswick are subject to the *Charter*. It is equally clear that this provision expressly contemplates the possibility that entities or institutions, other than the legislature or the government, that are themselves within "matters within the authority of the legislature of each province", are subject to the *Charter*. In this case, the other government entities referred to are the municipalities of the province. Municipalities are created by a provincial statute and exercise the powers granted to them under such statute. They fall within the legislative authority which is itself conferred on the provinces by subsection 92(8) of the *Constitution Act, 1867*.

Westmount (Ville de) v. Québec (Procureur Général du), 2001 CanLII 13655 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[123] In the present case, the cities have raised the right to the protection of their language, the vehicle of their culture and their "Englishness", to borrow the term used by one of the lawyers, and powerful symbol of their community's existence and development. They are not claiming new or additional language rights, they argue, just the maintenance of existing municipal institutions that preserve their community and ensure its continued existence. This argument thus implies recognition of the permanence of certain municipalities and, consequently, a significant limitation on legislative power through the application of s. 92(8), a theory that is clearly inconsistent with the principle that "in the Canadian legal order, . . . municipalities remain creatures of provincial legislatures". Indeed, if we accepted the appellants' argument, a certain number of municipalities would be exempted from the application of s. 92(8) that play an important role in protecting a minority of some sort. The practical consequences of such a statement would be considerable in terms of the organization of local governments. First, which minorities would be

protected? The organizing principle of minority protection under the Canadian Constitution is not limited to the country's English and French language minorities. Second, how would this guarantee be measured, since the demographics of cities are by their nature always changing, as the studies in the record show? Third, which rights would be protected? And fourth, could the territory, structure or powers of these so-called protected municipalities be revised or changed? Would these changes first have to pass the minority protection test as set out by the appellants? The appellants' argument amounts to granting so-called protected cities and villages a veto.

[124] In sum, as ably presented as it is, the cities' argument, when considered in light of its consequences and scope, leads to the irremediably flawed conclusion that certain municipalities are constitutionally protected, which a consistent body of case law of the Supreme Court of Canada has long rejected. What is more, where the Framers intended to restrict the power of lawmakers in order to protect the collective rights of a group of citizens because of the language factor, they did so explicitly. Such is the case with s. 80 of the *Constitution Act, 1867* with regard to protected Anglophone electoral divisions. Similarly, the appellants' argument necessarily implies that, by operation of an organizing principle of the Constitution, the powers of Parliament or the legislatures set out in the written constitutional instrument could be restricted, which would mean that a part of the Constitution is modified by another argument that has been firmly rejected, here again, by the Supreme Court.

[125] The cities also argued that municipal institutions were covered by the province's own constitution and could not be changed by the legislature because this would violate the organizing principle of minority protection. This claim is incorrect because, for the reasons already stated, the organizing principles do not have the scope that the appellants give them, which demolishes the very premise of their line of reasoning. Moreover, if the abolition of municipalities were not a matter of s. 92(8) of the *Constitution Act, 1867*, but of the province's own constitution, the province could nevertheless amend it legislatively.

[126] *Bill 170* [*Act to reform the municipal territorial organization of the metropolitan regions of Montréal, Québec and the Outaouais*] is a comprehensive reform of the municipal regime of the island of Montréal. It is the result of political choices that drastically transform—with good reason, some would say—a social structure that has been so well entrenched for so long that it is seen by some as permanent and immutable. However, this law is an exercise of an exclusive power of the National Assembly. Therefore, unless it infringes constitutionally guaranteed fundamental or language rights, it must be considered valid.

ANNOTATIONS – SUBSECTION 92(14)

Jones v. A.G. of New Brunswick, [1975] 2 S.C.R. 182, 1974 CanLII 164 (SCC)

[p. 197] [...] In my view, in the absence of federal legislation competently dealing with the language of proceedings or matters before provincial Courts which fall within exclusive federal legislative authority, it was open to the Legislature of New Brunswick to legislate respecting the languages in which proceedings in Courts established by that Legislature might be conducted. This includes the languages in which evidence in those Courts may be given. Section 92(14) of the *British North America Act, 1867* is ample authority for such legislation. For the same reason, I would answer question 3, respecting the validity of s. 14 of the *Official Languages of New Brunswick Act*, in the affirmative.

R. v. T.D.M., 2008 YKCA 16 (CanLII)

[35] In my view, *Jones* stands for the proposition that, subject to the paramountcy doctrine, the authority to enact legislation with respect to the "administration of justice" vested by s. 92(14) of the *Constitution Act, 1867*, confers on the provinces the power to enact legislation giving a witness the right to use either French or English in a criminal proceeding. This proposition also holds true for language rights legislation enacted by Yukon in the exercise of the authority delegated to it by Parliament through s. 18(1)(k) of the *Yukon Act*.

[...]

[41] Further, Parliament has acknowledged that the provinces and territories have authority to legislate with respect to language rights in criminal proceedings, provided those laws are not inconsistent with federal legislation. This can be seen in s. 532 of the [*Criminal*] *Code*, which reads:

> Nothing in this Part or the *Official Languages Act* derogates from or otherwise adversely affects any right afforded by a law of a province in force on the coming into force of this Part in that province or thereafter coming into force relating to the language of proceedings or testimony in criminal matters that is not inconsistent with this Part or that Act.

"Province" includes Yukon: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 35.

R. v. Thim, 2015 BCSC 1677 (CanLII)

[20] In the words of Lord Reading C.J. in Lee Kun, quoted by the Supreme Court of Canada in *Tran* at p. 965, "[i]t is for the Court to see that the necessary means are adopted to convey the evidence to [the accused's] intelligence." In British Columbia, the judiciary relies upon the Attorney General of British Columbia to provide court interpreter services and to provide these services to the high standard mandated by s. 14 of the *Charter* and articulated in *Tran*.

[21] Section 92(14) of the *Constitution Act, 1867*, U.K., 30 and 31 Victoria, c. 3, provides:

> In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> . . . The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

[22] There are two aspects to administration of the courts in the Province of British Columbia. Section 2(3) of the *Supreme Court Act*, R.S.B.C. 1996, c. 443, provides that the Chief Justice has responsibility for the administration of the judges of the Supreme Court of British Columbia. Section 10(1) of the same Act provides that the Attorney General is responsible for the provision, operation and maintenance of court facilities, registries and administrative services. Section 41 of the *Provincial Court Act*, R.S.B.C. 1996, c. 379, sets up a similar division of administrative responsibilities for the Provincial Court. Thus, the management and direction of matters related to judicial functions — including matters connected to the preparation, management, and adjudication of proceedings in the courts and all other matters assigned to the judiciary by law — are matters of judicial administration, while the management and direction of matters necessary for the operation of the courts other than judicial administration is the responsibility of the Attorney General.

[23] It is the responsibility of the Attorney General of British Columbia to provide sufficient resources to allow this province's courts to carry out their constitutional functions in a constitutional manner. The core adjudicative function of the courts is dependent on the other branches of government to provide necessary resources. It is in this context that the Attorney General, through the Court Services Branch of the Ministry of Justice, provides the courts with interpreter services. In the case at bar, the failure to provide this necessary resource has resulted in an embarrassing collapse of the ability of the courts to adjudicate.

[…]

[65] It is readily apparent to any observer that the administration of this case has been anything but orderly. But there is another message that most observers must be receiving loudly and clearly: the courts have not taken seriously the constitutional requirement to provide the accused with the assistance of an interpreter. It is surely important for this Court at this time to dissociate itself in an effective way from this pernicious perception. (In so stating my opinion, I acknowledge that the relatively rare person that is conversant with the division of powers in the *Constitution Act, 1867*, might receive the more nuanced

message that representatives of the Attorney General of British Columbia — as contrasted with the presiding judges — have not taken this constitutional requirement seriously.)

Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001 FCT 239 (CanLII)

[133] I do not dispute the right of the federal and provincial governments to assign the administration of certain functions, and even those relating to prosecutions, to certain municipal authorities, or the legitimacy of their doing so. However, while the general jurisdiction in relation to the administration of justice set out in section 92(14) of the *Constitution Act, 1867* could, if stretched, give concurrent powers to the attorneys general of the provinces, the respondents have not persuaded me that municipal governments have the authority to exercise those powers in relation to contraventions, as might be the case for the attorneys general of the provinces if we agreed that the province has concurrent jurisdiction in respect of prosecutions relating to offences under federal statutes enacted pursuant to section 91(27) of the *Constitution Act, 1867*.

[134] However, it must be acknowledged that the Attorney General of Canada and the Attorney General of the province of Ontario are entirely within their rights to assign the implementation of the *CA* [*Contraventions Act*, S.C. 1992, c. 47] within the territory of their provinces to certain municipal governments, and, to that end, to make precise agreements from time to time to govern that delegation of powers.

[135] In the circumstances, it seems clear that the federal government has full power to delegate to the provincial government or to municipalities, the administration of prosecutions for violations of federal statutes and regulations. The Government of Ontario then chose to delegate this power to administer, by way of legislative regulation and specific agreements relating to the administration of certain contraventions by municipal authorities.

[136] Under this analysis, the authority that has received the delegated power still has a duty to comply with the language laws that were binding on the delegating authority, whether the Government of Canada or the Government of Ontario, as the case may be.

[137] It would therefore seem important to ensure that the legal obligations of the delegating authority, the federal government, or of the delegates, the Government of Ontario and municipal governments, particularly with regard to language rights, which were characterized earlier as constitutional rights, are delineated and specified sufficiently to ensure that the rights of every accused person will be respected, whether the legislation relating to contraventions is administered by the federal government, the Ontario Government or the municipal authorities.

[138] I therefore conclude that the province of Ontario and the municipalities that have been given the province's delegated powers are acting on behalf of the Government of Canada in implementing the *CA* and that the municipal governments that have signed an agreement with Justice Canada are also acting on behalf of the Government of Canada.

[139] In addition, even if it were agreed that in administering the *CA* the Government of Ontario was acting pursuant to the powers granted to it by section 92(14) of the *Constitution Act, 1867*, that government would still be obliged to respect the quasi-constitutional language rights set out in the *OLA* [*Official Languages Act*] and in sections 530 and 530.1 of the *Criminal Code*.

[140] It must be recalled that in administering the *CA*, the Government of Ontario is applying a federal statute within the territory of the province. Accused persons are entitled to expect the same language rights guarantees as if it were the Attorney General of Canada administering the *CA*.

[141] A federal law of general application such as the *OLA* cannot be applied throughout Canada in a discriminatory manner, depending on who is responsible for applying the *CA*. The language guarantees set out in the *OLA* and in the *Criminal Code* must therefore apply regardless of whether the Attorney

General of Canada, the Attorney General of Ontario or the municipalities are given the authority to administer the *CA*.

R. v. Pare, 1986 CanLII 1189 (BC SC)

[13] The obvious purpose of Part XIV.1 [of the *Criminal Code*] was to expand existing language rights in criminal proceedings in two ways. First, the right to use English and French would be increased by providing the accused with the right to be tried by a judge and jury who speak the official language of the accused. Secondly, these rights would be expanded geographically by extending the right to use English and French in criminal proceedings where such a right did not previously exist. However, Parliament clearly recognized that it would not be possible to implement Part XIV.1 in all parts of Canada at the same time. Two factors prevented this. First, while Parliament has constitutional authority pursuant to s. 91(27) of the *Constitution Act, 1867* to determine the language of trial (*Jones v. A.-G. Can. et al.* (1974), 1974 CanLII 164 (SCC), 16 C.C.C. (2d) 297, 45 D.L.R. (3d) 583, [1975] 2 S.C.R. 182 sub nom. *Jones v. A.-G. N.B. et al.*) the provinces have constitutional responsibility for the "administration of justice in the province" pursuant to s. 92(14). Accordingly, this is an area in which constitutional responsibility is shared and implementation of the rights set out in Part XIV.1 could not take place without the co-operation of the provinces. Secondly, historical, political and demographic matters meant that it would be much more difficult to implement the requirements of Part XIV.1 in some provinces than in others. Reference here may be usefully made to the *House of Commons Debates*, 3rd Session, 30th Parliament, vol. 5, 1978, pp. 5087-9, and to the *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 3rd Session, 30th Parliament, Issue No. 31, pp. 6-10 and 24-5.

ANNOTATIONS – SUBSECTION 92(16)

Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790, 1988 CanLII 20 (SCC)

[13] The first question in the appeal is whether the challenged provisions of the *Charter of the French Language* are *ultra vires* the provincial legislature as being beyond provincial legislative authority under the Constitution Act, 1867. It will be noted that the first two constitutional questions distinguish in this respect between provisions requiring the "exclusive use of French" and provisions requiring the "joint use of French", as did the minority in the Court of Appeal.

[14] It appears to have been accepted by all the members of the Court of Appeal [of Quebec], whether expressly or impliedly, that provincial legislative jurisdiction with respect to language is not an independent one but is rather "ancillary" to the exercise of jurisdiction with respect to some class of subject matter assigned to the province by s. 92 of the *Constitution Act, 1867*. That conclusion was based primarily on what was said by this Court in *Jones v. Attorney General of New Brunswick*, 1974 CanLII 164 (SCC), [1975] 2 S.C.R. 182, and on the opinion of Professor Hogg in Constitutional Law of Canada (2nd ed. 1985), at pp. 804-806, which in turn is based on what was said in Jones. Since this Court agrees with that conclusion, substantially for the reasons given in the Court of Appeal in the judgments of Monet, Chouinard and Paré JJ.A., it would not serve a useful purpose to reproduce here the references to the authorities in support of that conclusion which are fully set out in their opinions, including a long extract from the opinion of Professor Hogg. We adopt the following passages of the opinion of Professor Hogg as a statement of the law on this question, *i.e.*, that:

> ...language is not an independent matter of legislation (or constitutional value); that there is therefore no single plenary power to enact laws in relation to language; and that the power to enact a law affecting language is divided between the two levels of government by reference to criteria other than the impact of law upon language. On this basis, a law prescribing that a particular language or languages must or may be used in certain situations will be classified for constitutional purposes not as a law in relation to language, but as a law in relation to the institutions or activities that the provision covers.
>
> ...

> ...for constitutional purposes language is ancillary to the purpose for which it is used, and a language law is for constitutional purposes a law in relation to the institutions or activities to which the law applies.
>
> In order to be valid, provincial legislation with respect to language must be truly in relation to an institution or activity that is otherwise within provincial legislative jurisdiction.

[15] While agreeing with this premise as to the nature of provincial jurisdiction with respect to language, the members of the Court of Appeal differed, as indicated above, as to whether s. 58 of the *Charter of the French Language*, which requires that public signs and posters and commercial advertising shall be solely in French, is truly in relation to commerce within the province. It should be noted that in the Court of Appeal the appellant apparently did not, as he did in this Court, challenge provincial legislative jurisdiction to require the use of French without prohibiting the use of any other language (the "joint use" of French referred to in the second constitutional question). The majority in the Court of Appeal held that the challenged provisions were in relation to commerce within the province. The minority opinion, as expressed by Paré J.A., with whom Montgomery J.A. concurred in separate dissenting reasons, was that while the provisions requiring the "joint use" of French, to use the terms of the constitutional questions, could be said to be in relation to commerce within the province, those requiring the "exclusive use" of French could not. Paré J. based this distinction on the premise that in order to be in relation to commerce within the province a language provision must be calculated to favour such commerce or at least be of some remedial nature in relation to it. He reasoned that while the requirement of the "joint use" of French obviously conferred certain benefits on the francophone population in commercial dealings which would enure to the overall benefit of commerce within the province, the requirement of the exclusive use of French while perhaps conferring some advantage on francophones could not conceivably have any overall beneficial effect on commerce within the province. He concluded that the purpose of the requirement of the "exclusive use" of French was the purely ideological one, unrelated to commerce within the province, of enhancing the status of French.

[16] On this issue we are in agreement with the majority in the Court of Appeal. It is true, as the preamble of the *Charter of the French Language* indicates, that one of its objects is "to make of French the language of commerce and business" but that object necessarily involves the regulation of an aspect of commerce and business within the province, whatever the nature of the effect of such regulation may be. The purpose and effect of the challenged provisions of Chapter VII of the *Charter of the French Language* entitled "The Language of Commerce and Business" is to regulate an aspect of the manner in which commerce and business in the province may be carried on and as such they are in relation to such commerce and business. That the overall object of the *Charter of the French Language* is the enhancement of the status of the French language in Quebec does not make the challenged provisions any less an intended regulation of an aspect of commerce within the province. As such, they fall within provincial legislative jurisdiction under the *Constitution Act, 1867*.

SEE ALSO:

Att. Gen. of Quebec v. Blaikie et al., [1979] 2 S.C.R. 1016, 1979 CanLII 21 (SCC)

Education (sections 93 and 93A)

93. Legislation respecting Education

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions: --

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

[LAST UPDATE: AUGUST 2017]

ANNOTATIONS – GENERAL

Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General), [2015] 2 S.C.R. 282, 2015 SCC 25 (CanLII)

[68] That said, this Court recently reaffirmed that while "the *Charter* reflects the importance of language rights, it also reflects the importance of respect for the constitutional powers of the provinces": *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42 (CanLII), [2013] 2 S.C.R. 774, at para. 56. Pursuant to s. 93 of the *Constitution Act, 1867*, provincial legislatures have authority to make laws in relation to education. Federalism remains a notable feature in matters of minority language rights. As this Court stated in *Solski*, a case upholding Quebec legislation requiring a student to have received the "major part" of his or her education in English in order to qualify for access to publicly funded English-language schools:

> As education falls within the purview of provincial power, each province has a legitimate interest in the provision and regulation of minority language education . . . .
>
> . . .
>
> . . . The latitude given to the provincial government in drafting legislation regarding education must be broad enough to ensure the protection of the French language while satisfying the purposes of s. 23. As noted by Lamer C.J. in *Reference re Public Schools Act (Man.)*, at p. 851, "different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province". [Citation omitted; paras. 10 and 34.]

[…]

[FOOTNOTE 2] Section 93 applies directly to Ontario, Nova Scotia, New Brunswick, British Columbia and Prince Edward Island. Section 93 also applies to Quebec, but not ss. 93(1) to 93(4): *Constitution Amendment, 1997 (Quebec)*, SI/97-141, s. 1; s. 93A of the *Constitution Act, 1867*. Modified versions of s. 93 apply in the other provinces and the territories: *Manitoba Act, 1870*, S.C. 1870, c. 3, s. 22; *Saskatchewan Act, S.C. 1905*, c. 42, s. 17; *Alberta Act*, S.C. 1905, c. 3, s. 17; *Constitution Amendment, 1998 (Newfoundland Act)*, SI/98-25, s. 1(2); *Northwest Territories Act*, S.C. 2014, c. 2 [as en. by the

Northwest Territories Devolution Act], s. 18(1)(o); *Yukon Act*, S.C. 2002, c. 7, s. 18(1)(o); *Nunavut Act*, S.C. 1993, c. 28, s. 23(1)(m).

Gosselin (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 238, 2005 SCC 15 (CanLII)

[27] [...] Equality rights, while of immense importance, constitute just part of our constitutional fabric. In *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, the protection of minorities was also identified as a key principle, manifested in part in minority language education rights (s. 23 of the *Canadian Charter*), denominational school rights (s. 93 of the *Constitution Act, 1867*) and aboriginal and treaty rights (ss. 25 of the *Canadian Charter* and 35 of the *Constitution Act, 1982*). The Court stated:

> . . . even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. [para. 80]

See also *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 2001 CanLII 21164 (ON CA), 56 O.R. (3d) 505 (C.A.), at para. 101.

Reference re: Education Act (Que.), [1993] 2 S.C.R. 511, 1993 CanLII 100 (SCC)

1. Does the *Education Act* (1988, c. 84) ["*Bill 107*"], in particular ss. 111, 354, 519, 521, 522 and 527, prejudicially affect the rights and privileges protected by s. 93 (1) and (2) of the *Constitution Act, 1867* by providing for the establishment of French language and English language school boards which will succeed to the rights and obligations of school boards for Catholics and Protestants?

[…]

[82] This question goes to the fundamental purpose of *Bill 107*, namely the Quebec Government's power to create linguistic school boards which shall be denominationally neutral, to define their territories and to reassign the property of the old boards to the new ones, leaving aside the terms and conditions discussed in the other questions of the reference.

[…]

[84] The Court of Appeal unanimously answered this question in the negative. Beauregard J.A. considered that there was no objection in principle to the provincial legislature legislating in this way, as long as the right to dissent is maintained. There is nothing to prevent the provincial legislature providing that boards will be French-language and English-language, since s. 93 (1) and (2) make absolutely no mention of the language used by the boards and in the schools. Beauregard J.A. was of the view that the legislature could also provide for the dissolution of the existing boards for Catholics and for Protestants. He also held that in terminating the existence of the Protestant school board and Catholic school board corporations, the legislature could make provision for distributing their property after their dissolution.

[...]

[90] Like the Court of Appeal, I conclude that the provisions in question are constitutional. By legislating on education in this way, the Quebec Government is pursuing a legitimate purpose which is in keeping with s. 23 of the *Canadian Charter of Rights and Freedoms*. Although the measures contemplated by the legislature will occasion a fundamental upheaval in the institutions to which the province has been accustomed for over a hundred years — even though they have been altered on several occasions, as I noted, they have always focused on religion — the legislature's power to create some other kind of school system, neutral or for denominations other than Catholics and Protestants, has been recognized since the Privy Council decision in *Hirsch*, *supra*.

[91] The province can go ahead with such a reorganization provided that in doing so it does not prejudicially affect the rights and guarantees set out in s. 93 of the Constitution. As I have already explained — and I shall have occasion to return to this later — this means chiefly that the right to dissent must be maintained outside Quebec and Montreal and that in those two cities, Catholics and Protestants must continue to have access to denominational schools.

[92] It is natural and normal for the linguistic boards to be the successors of the boards for Catholics and the boards for Protestants. Like the latter, they are boards which are not the result of the exercise of a right of dissent and are therefore not protected by s. 93.

[93] The abolition of the existing boards is also not *in itself* an infringement of the rights guaranteed by the Constitution. Furthermore, if the province has the power to create linguistic school boards, it is proper that it should also have the power to determine their territories.

[…]

[108] The right to dissent is still linked to the notion of a denominational minority. Since the constitutionally guaranteed right may be exercised by a minority in respect of the inhabitants of a given school municipality, Anglophone Protestants and Roman Catholic Francophones will not often be able to use this mechanism with regard to linguistic school boards. In view of the purpose and reasons for the right to dissent, they will not have need of it since they will constitute the religious majority, and consequently the school board will probably meet their needs and aspirations. Of course one can conceive of cases where this theoretical situation will not reflect the real needs of certain parents, but s. 93 of the Constitution and the *1861 Act* ["*Act respecting Provincial Aid for Superior Education, — and Normal and Common Schools*", C.S.L.C. 1861, c. 15] it crystallizes are also not a perfect solution. It should also be recalled that outside the two major cities, s. 93 provides the religious majority with no form of protection.

Ottawa Separate School Trustees v. Mackell (1916), 32 D.L.R. 1 (UK JCPC)

[p. 1] This appeal raises an important question as to the validity of a Circular of Instructions issued by the Department of Education for the Province of Ontario on August 17, 1913. […] The circular in some of its clauses deals with all schools, but its heading refers only to English-French schools, which are defined as being those schools, whether separate or public, where French is a language of instruction or communication, which have been marked out by the Minister for inspection as provided in the circular.

[…]

[pp. 1-2] The object of the circular is to restrict the use of French in these schools, and to this restriction the appellants, who are the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa, assert that they are not obliged to submit.

[…]

[p. 2] The appellants' defence of their action rests in substance upon the contention that the instructions were, and are, wholly unauthorized and unwarranted and beyond the powers of the Minister of Education, because they were contrary to, and in violation of, the *B.N.A.* [*British North America*] *Act of 1867*.

[…]

[p. 3] Accordingly it would require an Act of the Imperial Legislature prejudicially to affect any right or privilege reserved under provision (1) [of s. 93], and if the regulations which are impeached do prejudicially affect any such right or privilege, to that extent they are not binding on the appellants.

[…]

[p. 4] Further, the class of persons to whom the right or privilege is reserved must, in their Lordships' opinion, be a class of persons determined according to religious belief, and not according to race or language. In relation to denominational teaching, Roman Catholics together form within the meaning of the section a class of persons, and that class cannot be subdivided into other classes by considerations of the language of the people by whom that faith is held. The appellants and the respondents, therefore, are members of the same class, but this fact does not affect the appellants' position on their appeal, for their case is that even to the class so determined there was preserved by the statute and vested in them as trustees rights or privileges which include the right of decided as to the language to be used as a means of instruction; and the question, therefore, that arises, is, What were the rights and privileges that were protected by the Act, and were they invaded by the circular according to its true meaning?

[…]

[p. 8] Mr. Bellcourt urged that so to regulate the use of the French language in the separate Roman Catholic schools in Ottawa constituted an interference, and is in some way inconsistent with a natural right vested in the French-speaking population; but unless this right was one of these reserved by the act of 1867, such interference could not be resisted, and their Lordships have already expressed the view that peopled joined together by union of language and not by the ties of faith do not form a class of persons within the meaning of the Act. If the other opinion was adopted, there appears to be no reason why a similar claim should not be made on behalf of the English-speaking parents whose children are being educated in the Roman Catholic separate schools in Ottawa.

[…]

[p. 9] The right to manage does not involve the right of determining the language to be used in the schools. Indeed, the right to manage must be subject to the regulations under which all the schools must be carried on; and there is nothing in the Act to negative the view that those regulations might include the provisions to which the appellants object.

Lalonde v. Ontario (Commission de restructuration des services de santé), 2001 CanLII 21164 (ON CA)

[80] The *Constitution Act, 1867* also contains, in s. 93, important education guarantees for the Catholic minority in Ontario and the Protestant minority in Québec, guarantees that were replicated for religious minorities in several provinces that joined Confederation after 1867.

[81] The protections accorded linguistic and religious minorities are an essential feature of the original 1867 Constitution without which Confederation would not have occurred. In *Re Regulation and Control of Aeronautics in Canada*, 1931 CanLII 466 (UK JCPC), [1932] A.C. 54 at p. 70, 101 L.J.P.C. 1 (a passage quoted by the Supreme Court of Canada in *Reference re Authority of Parliament in Relation to the Upper House (S. 55)*, [1980] 1 S.C.R. 54 at p. 71, 1979 CanLII 169 (SCC), 102 D.L.R. (3d) 1), Lord Sankey L.C. observed:

> [I]t is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected.

[82] The Supreme Court of Canada explained in the *Secession Reference*, *supra*, at p. 261 S.C.R. that the protection of religious minorities and the fear of assimilation was a central concern in the Confederation bargain:

> [L]a protection des droits des minorités religieuses en matière d'éducation avait été une considération majeure dans les négociations qui ont mené à la Confédération. On craignait qu'en l'absence de protection, les minorités de l'Est et de l'Ouest du Canada d'alors soient submergées et assimilées.

[83] Similarly, in *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, 1987 CanLII 65 (SCC), [1987] 1 S.C.R. 1148 at pp. 1173-74, 40 D.L.R. (4th) 18, Wilson J. observed that the protection of religious minorities was a "major preoccupation" at the time of Confederation and the rights accorded to protect these minorities from hostile majorities, in the words of Duff J. in *Reference re Adoption Act (Ontario)*, 1938 CanLII 2 (SCC), [1938] S.C.R. 398 at p. 402, 1938 CanLII 2 (SCC), [1938] 3 D.L.R. 497, comprised "the basic compact of Confederation".

[84] While the text of the *Constitution Act, 1867* focused on religious minorities, the minority Catholic community in Ontario at that time was, to a significant extent, also the minority francophone community and linguistic and denominational characteristics were typically twinned. As Gonthier J. observed in *Reference re Education Act (Que.)*,1993 CanLII 100 (SCC), [1993] 2 S.C.R. 511 at pp. 529-30, 154 N.R. 1:

> Section 93 is unanimously recognized as the expression of a desire for political compromise. It served to moderate religious conflicts which threatened the birth of the Union. At the time, disagreements between communities hinged on religion rather than language.

[85] Fifty years after Confederation, in a highly controversial decision, the Privy Council held that s. 93 was limited to denominational protection and included no minority language protection: *Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell*, [1917] A.C. 62, 86 L.J.P.C. 65 (P.C.). The historic grievance of the linguistic minority in relation to the language of education was finally addressed in 1982 by s. 23 of the *Charter*, discussed below.

[86] It should be mentioned as well that certain features of the *Constitution Act, 1867* for the protection of minorities may have fallen into disuse, but they still may be taken as expressions of the fundamental constitutional importance attached to the protection of the French and Catholic minority outside Quebec. Linguistic and religious minorities were exposed to the risk that their interests might be ignored at the provincial level, but there is little doubt that it was implicit in the Confederation bargain that they could look to the federal government for constitutional protection. In the case of diminution of religious education rights by a provincial government, s. 93(3) gave the adherents of the religious minority a right of appeal to the federal cabinet, and by s. 93(4), Parliament had the right to enact remedial legislation. The federal power of disallowance (ss. 55-57, 90) was available where the legitimate interests of those minorities were imperiled by provincial action.

[…]

[101] It has been held in other contexts that where the Constitution accords special rights to special groups, those specific guarantees must be respected and other *Charter* rights cannot be used to expand or diminish the rights so granted. In *Reference Re Bill 30*, *supra*, Wilson J. stated at pp. 1196-97 S.C.R. that although the special minority religion education rights conferred by s. 93 of the *Constitution Act, 1867* "[sit] uncomfortably with the concept of equality embodied in the Charter", s. 15 can be used neither to nullify the specific rights of the protected group nor to extend those rights to other religious groups. This position was affirmed in *Adler v. Ontario*, 1996 CanLII 148 (SCC), [1996] 3 S.C.R. 609, 140 D.L.R. (4th) 385. There, the court dismissed a claim for funding health services for religious schools falling outside the ambit of s. 93 based on the guarantee of freedom of religion in s. 2(a) and on the right to equality in s. 15.

Westmount (Ville de) v. Québec (Procureur Général du), 2001 CanLII 13655 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[120] In our opinion, this plenary provincial power [over municipalities] therefore permits the legislature to change the structures as it sees fit. On this point, it is interesting to draw a parallel between this plenary power over municipal institutions and the power over education, which in contrast is limited by a constitutional provision expressly protecting the Catholic and Protestant religions, which was called “the right to dissent” (s. 93, *Constitution Act, 1867*).

Lavoie v. Nova Scotia (Attorney-General), 1989 CanLII 5221 (NS CA)

[54] The *Acadian Schools Amendment* extends minority language rights to a class of persons not granted such rights under s. 23 of the *Charter*, namely, children whose first language learned and still understood is French. The impact of s. 23 of the *Charter* is to establish minority linguistic rights for Canadian citizens who, upon meeting the eligibility tests in s-ss. (1) and (2), may have their children provided minority language instruction. The result is that there are two sources of French language instruction in Nova Scotia in addition to that provided in the general curriculum. The first is pursuant to s. 23 of the *Charter* and the second results from the Acadian Schools Amendment in the *Education Act*. The provisions in the *Education Act* do not detract from nor impair the rights of Canadian citizens protected by s. 23 of the *Charter*. They are a valid exercise of the province's jurisdiction over education as authorized by s. 93 of the *Constitution Act, 1867*.

Reference re Education Act of Ontario and Minority Language Education Rights, 1984 CanLII 1832 (ON CA)

III Historical summary of minority language rights in Ontario

[…]

1844-1880

[…]

Denominational or separate schools gained further official recognition. In 1863, "An Act to Restore to Roman Catholics in Upper Canada Certain Rights in Respect to Separate Schools", 1863 (Ont.), c. 5 (the *Scott Act*), was passed. This Act formed the basis for the constitutional recognition of denominational education rights in s. 93 of the *Constitution Act, 1867*: app. "C", A.-G. Ont., No. 3.

[…]

Since Confederation, Quebec has, in practice, guaranteed the right of English-speaking and French-speaking students to be educated in their maternal language. This came about as a result of s. 93 of the *Constitution Act, 1867*, which protected denominational rights. Only in Quebec did language and religion coincide so that the predominantly anglophone Protestants obtained legal rights equal to those of the predominantly francophone Roman Catholics. In the other provinces, the Roman Catholic populations included many anglophones: see app. "C", A.-G. Ont., No. 6, vol. I, pp. 67-8.

It should be noted, however, that in 1977, Quebec introduced the *Charter of the French Language, 1977* (Que.), c. 5, an Act which restricted the rights of anglophones to have their children educated in English. As well, Quebec has not yet proclaimed s. 23(1)(a) of the *Canadian Charter of Rights and Freedoms*, pursuant to s. 59 of the *Constitution Act, 1982*.

[…]

We note that, subject to the *Charter* and s. 93 of the C*onstitution Act, 1867*, education in the province is a provincial matter. The Legislature has exclusive power to make laws in relation to education and to establish a system for the management thereof that it deems suitable to conditions in the province. Section 23 limits this power in respect to minority language education. The rights conferred by this section with respect to minority language facilities impose a duty on the Legislature to provide for educational facilities which, viewed objectively, can be said to be of or appertain to the linguistic minority in that they can be regarded as part and parcel of the minority's social and cultural fabric. The quality of education to be provided to the minority is to be on a basis of equality with the majority.

[…]

The issue raised by Q. 3 is essentially whether the minority language educational rights guaranteed by s. 23 of the *Charter* are modified to any degree in their application to denominational schools by reason of s. 93 of the *Constitution Act, 1867*.

Section 93 is the cardinal legislation provision in relation to education. This provision grants to the Legislature of Ontario the exclusive power to legislate in relation to education, but limits that power by prohibiting anything which shall "prejudicially affect" certain rights and privileges of denominational schools. The place of s. 93 in the constitutional framework was made plain by the Judicial Committee of the Privy Council in *Ottawa Separate School Trustees v. Mackell* (1916), 32 D.L.R. 1 at pp. 2-3, [1917] A.C. 62 at p. 68, in the following passage:

> The material sections in the *B.N.A.* [*British North America*] *Act* upon which the appellants rely are secs. 91, 92 and 93. Sec. 91 authorizes the Parliament of Canada to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the legislatures of the provinces. Sec. 92 enumerates the classes of subjects in relation to which the Legislatures of the Provinces may exclusively make laws, and includes therein generally all matters of a merely local or private nature in the province. Sec. 93 deals specifically with education, and enacts that in and for each province the legislature may exclusively make laws in relation to education, subject and according to the provisions therein contained. It appears, therefore, that the subject of education is excluded from the powers conferred on the Parliament of Canada, and is placed wholly within the competence of the Provincial Legislatures, who again are subject to limitations expressed in four provisions.

The *Scott Act*, to which reference has already been made, constituted an important step in the development of separate schools in the province. This Act, which was passed in 1863 and was in effect at Confederation, conferred certain rights and privileges on Roman Catholics with respect to separate schools and formed the basis for the constitutional recognition of denominational educational rights in s. 93 of the *British North America Act, 1867*. The question of what rights or privileges are entitled to the protection of s. 93 has been the subject of a number of judicial decisions. A brief examination of the construction placed by the courts on s. 93 is instructive in determining whether that section is an impediment to the implementation in denominational schools of the minority language education rights guaranteed by s. 23 of the *Charter*.

The constitutionally protected rights or privileges are, by the terms of s. 93(1), those which "any class of persons" had "by law" at Confederation. The phrase "by law" has been construed to mean that only statutory rights or privileges in existence in 1867 are afforded protection; long-standing practices, customs or privileges of a voluntary character do not qualify under s. 93(1): *Maher v. Town of Portland (1874)*, *Wheeler's Confederation Law of Canada* 338 at p. 367; *Hirsch v. Protestant Board School Com'rs of Montreal et al.*, *supra*, at p. 1048 D.L.R., p. 210 A.C.

Before 1867, indeed before 1968, there was no statutory authorization for the use of any language other than English in Ontario schools. On this basis, the Privy Council in the *Mackell* case, *supra*, was able to uphold the validity of the controversial Reg. 17 which required French-speaking separate schools to adopt English language instruction. The law in force in the province at the time of Confederation did not confer any legal power on separate school trustees to choose the language of instruction, although they had enjoyed that power in practice and, as we noted earlier, by regulation passed in 1851 allowing for the use of French in the schools of Upper Canada. Accordingly, the rights and privileges guaranteed by s. 93(1) were held not to include the power to choose the language of instruction.

In reaching this conclusion, the Judicial Committee drew a distinction between religion and education. The phrase "any class of persons" in s. 93(1) was interpreted to mean a class of persons "determined according to religious belief, and not according to race or language". The protected rights or privileges are therefore those possessed by the entire Roman Catholic community without regard to differences in race or language. And, while the constitutional protection afforded by s. 93(1) extends to the denomination of schools, it does not extend to the language of instruction in the schools. Language falls under the general power in relation to education vested in the province by the introductory words of s. 93. The following

observations in the judgment of Lord Buckmaster L.C., speaking on behalf of the Privy Council in *Mackell*, are pertinent to our present considerations, at pp. 3-4 D.L.R., p. 69 A.C.:

> There is no question that the English-French Roman Catholic Separate Schools in Ottawa are denominational schools to which the provision applies, and it has been decided by this Board that the right or privilege reserved in the provision is a legal right or privilege, and does not include any practice, instruction, or privilege of a voluntary character which at the date of the passing of the Act might be in operation (*City of Winnipeg v. Barrett*, [1892] A.C. 445).
>
> Further, the class of persons to whom the right or privilege is reserved must, in their Lordships' opinion, be a class of persons determined according to religious belief, and not according to race or language. In relation to denominational teaching, Roman Catholics together form within the meaning of the section a class of persons, and that class cannot be subdivided into other classes by considerations of the language of the people by whom that faith is held.

[...]

Section 93 clearly precludes only laws which "prejudicially affect" protected rights and privileges. Legislation may affect those rights and privileges but unless the effect is prejudicial to denominational schools, the legislation does not violate s. 93. [...]

In sum, it is evident from the authorities that the restraints imposed by s. 93 on the power of the province over education leave wide scope for the province's regulation of education in denominational schools. Apart from the protection granted to denomination, the province remains free to adapt its system of education to the changing needs of society. [...]

Before the advent of the *Charter*, the province's power over education in the public schools was plenary; with respect to the separate schools, its power was limited only to the extent provided in s. 93. Manifestly, s. 23 of the *Charter* imposes a further limitation, applicable to both public and denominational education, on the province's power to legislate in relation to education. Now, the constitutional right to minority language education created by s. 23 must be given effect -- save only in so far as the exercise of that right conflicts with the denominational rights protected by s. 93 of the *Constitution Act, 1867* and reinforced by s. 29 of the *Charter*.

On the wording of s. 23, the right of citizens to have their children receive minority language instruction "applies wherever in the province the number of children ... is sufficient". No distinction is drawn between denominational and non- denominational education, and the section, on its face, applies to both. It is to be noted also that the right applies whenever the number of children is sufficient to warrant the provision of minority language instruction or educational facilities "out of public funds". Since both elementary schools, including separate schools to grade 10, and secondary schools are and have been publicly funded in Ontario, the use of the phrase "out of public funds" is further indication of a legislative intent that s. 23 apply equally to both the separate and public school systems of education.

Is there anything in s. 93 to prevent s. 23 from being applied with equal force to denominational education? In our opinion, there is not. Language of instruction, as the cases establish, is a matter of linguistic and not denominational concern; its choice has not been judged a right or privilege within the purview of s. 93. Quite apart from the *Charter*, the province would be entitled, on the basis of *Mackell*, *supra*, to enact laws according a right to minority language instruction in denominational schools without violation of s. 93. By the same token, the conferral of such a right by force of the *Charter* does not constitute an abrogation or derogation of any of the constitutionally protected rights or privileges.

Denominational education under Parts IV and V of the *Education Act* is limited to the elementary school level and, for present purposes, is assumed to be in compliance with the requirements of s. 93. The application of minority language educational rights to the existing institutional framework prescribed for denominational education by the *Education Act* would not infringe upon or prejudicially affect any established denominational rights. The fundamental right of denominational school supporters to elect

their own trustees and the right of the elected trustees to manage the denominational schools remains intact. "The right to manage", as was pointed out in *Mackell*, "does not involve the right of determining the language to be used in the schools." The separate school system, in our opinion, will not be unconstitutionally interfered with by the full implementation of the new minority language rights. Whether, on the other hand, the existing framework satisfies the requirements of s. 23 is a matter beyond the scope of this question.

As we view the *Charter*, it grants supporters of denominational schools a right in addition to those granted them in 1867 by s. 93. They are now entitled, by virtue of s. 23, to have their children receive denominational education in either the minority or majority language. If, because of s. 93, s. 23 were treated as inapplicable to denominational schools, an anomolous and, indeed, patently unacceptable result would follow. French-speaking members of the Roman Catholic community would then be required to forgo their denominational education rights protected by s. 93 in order to avail themselves of the new minority language educational rights conferred on them by s. 23 of the *Charter*. We see no conflict between the two provisions compelling that result. In our opinion, s. 23 and s. 93 are compatible and capable of living and operating in harmony with one another.

Accordingly, in answer to Q. 3, we are of the opinion that the minority language educational rights of the *Canadian Charter of Rights and Freedoms* apply with equal force and effect to minority language instruction and educational facilities provided for denominational education under Parts IV and V of the *Education Act* and to minority language instruction and educational facilities provided for public education under the *Education Act*.

[…]

VII

Question 4: Is it within the legislative authority of the Legislative Assembly of Ontario to amend the *Education Act* as contemplated in the White Paper of March 23, 1983, in relation to boards of education, to provide for the election of minority language trustees to Roman Catholic separate school boards to exercise certain exclusive responsibilities as minority language sections of such school boards?

[...]

The separate school trustees recognized that French-speaking Roman Catholics are as determined to preserve the religious and other values of education in the separate school system as English-speaking Roman Catholics. Their opposition to the White Paper was based on the fear that it would weaken separate schools by dividing them along language lines. This, it was said, would prejudicially affect them by compelling a division of restricted financial resources to provide parallel facilities. Objection was also taken to the proposals of budgeting which would require a double majority of both majority and minority language trustees to adopt estimates. The majority of separate school supporters would thus be effectively deprived of its right to choose sites, select teachers, build schools and administer finances.

We cannot agree that the changes proposed by the White Paper in the structure, management and financing of separate schools would have the effect of prejudicially affecting the rights and privileges of separate school supporters protected by s. 93(1). The White Paper proposals for giving responsibility for direction of minority language instruction to a minority-speaking section of the board of trustees appear to us to be no different in kind from the other major structural changes made in such boards from time to time since 1867. The proposals are within the Legislature's undoubted regulatory power to establish an effective method of achieving proper minority language instruction in this province.

We are also unable to agree that division of the board's powers with respect to finances prejudicially affects the denominational character of the separate school system. It seems to us that these specific provisions giving minority language sections of boards power over the allocation of funds are appropriate because they are consistent with the rights guaranteed by s. 23(3)(b) of the *Charter*.

The decision that Roman Catholics, as a whole, were the class of persons whose rights were protected by s. 93(1) was fundamental to the result in *Mackell*, *supra*. The Privy Council held that s. 93(1) protected only the religious rights and not the linguistic rights of French-speaking separate school supporters. The fact that French-speaking Roman Catholics were unable to rely on s. 93(1) to protect their linguistic rights does not preclude them from relying on s. 23 of the *Charter* to assert those rights. We cannot, therefore, accept the argument that s. 93(1) erects a constitutional barrier against according special linguistic rights to French-speaking separate school supporters.

N.B. – The above language issues are not discussed in the appeal of this reference before the Supreme Court of Canada (Reference re Bill 30, An Act to Amend the Education Act (Ont.), [1987] 1 S.C.R. 1148, 1987 CanLII 65 (SC)).

Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212, 2017 SKQB 109 (CanLII)

B. The Confederation Compromise

[73] Section 93's accommodation of separate school rights is rooted in Canada's history of state formation. Confederation required statesmanship and compromise to bring together two founding nations, one with strong ties to Britain and the other with strong ties to France; one English-speaking, the other French-speaking; one essentially Protestant, the other Roman Catholic; one a victor in war, the other vanquished in war. In *Reference re: Bill 30*, 1987 CanLII 65 (SCC), [1987] 1 SCR 1148 [*Reference re Bill 30*], the Supreme Court recognized the s. 93 compromise as the "solemn pact," "which made confederation possible." Justice Wilson cited Sir Charles Tupper in the House of Commons debates offered 30 years after confederation at 1173-1174):

> . . . I say it within the knowledge of all these gentlemen...that but for the consent to the proposal of the Hon. Sir Alexander Galt, who represented especially the Protestants of the great province of Quebec on that occasion, but for the assent of that conference to the proposal of Sir Alexander Galt, that in the *Confederation Act* should be embodied a clause which would protect the rights of minorities, whether Catholic or Protestant, in this country, there would have been no Confederation . . . . I say, therefore, it is important, it is significant that without this clause, without this guarantee for the rights of minorities being embodied in that new constitution, we should have been unable to obtain any confederation whatever. That is my reason for drawing attention to it at present.

[74] One must also understand the significance of religion and language in pre-confederation Ontario and Quebec. At confederation and for several decades after, the only religious groups were Roman Catholic and largely French-speaking, and Protestants and invariably English-speaking. Religion permeated all aspects of life, particularly education. Deep seated prejudices and conflicts existed between Catholics and Protestants. Confederation united these religious and language factions into a workable nation, particularly when minority groups of each religion were found in the most populous uniting provinces of Ontario and Quebec.

[75] Education had historically been the domain of the churches. The Catholic Church showed little interest in abdicating its influence over education in face of a movement toward publicly-funded common schools developing in Ontario from 1840 to confederation. Dr. Dixon testified extensively respecting the influence that Dr. Egerton Ryerson, a Methodist minister, exerted on education in Ontario during his tenure as Superintendent of Education from 1844-1867. His vision of education was to develop common or mixed schools, open to all, with an emphasis on civic duties and development of the child with a religious component of sufficient breadth to accommodate the faith of all Christians. Roman Catholics opposed these developments, not just on the parochial scene, but directly from the Vatican. Bishop Charbonelle, the Bishop of Toronto whom Dr. Dixon described as a "warrior" against liberalism and common schools, issued a statement that Roman Catholic parents who failed to send their children to Catholic schools were committing a mortal sin and liable to eternal damnation.

[76] In 1867, when legislative powers were divvied up between the new federal and provincial governments, jurisdiction over education was exclusively allocated to the provinces. Although s. 92 of the *Constitution Act, 1867* was the repository of other provincial heads of power, education was uniquely set out in s. 93. And while s. 93 used identical introductory wording to grant power over education as was used for other enumerated powers, s. 93 restricted provincial power over education with the phrase, "subject and according to the following Provisions." Thereafter followed ss. 93(1) to (4). They reserved certain powers to the federal government, thereby curtailing provincial authority over education. Otherwise, education would have been another enumerated power among the 16 heads of power described in s. 92, without federal control or restriction. Sections 93(3) and (4) allowed the federal government to provide redress if a province either abrogated the rights of denominational schools as they existed at union, or if augmenting such rights, the province then abrogated them.

[77] In this action, Government counsel repeatedly encouraged me to accept the 1867 constitutional compromise accommodating minority Catholic and Protestant schools as qualitatively "good." I, though, hesitate to base my analysis on this presumption. Instead, I accept that the historic compromise embodied in s. 93 gave privileged status to Catholic and Protestant minorities, described by the Court of Appeal of the Northwest Territories in *Yellowknife Public Denominational District Education Authority v Euchner, 2008 NWTCA 13* (CanLII), [2009] 3 WWR 10 [*Yellowknife*], (leave to appeal to the Supreme Court of Canada denied at 2009 CANLII 28593 (SCC)), as "the only religious groups then of concern to the Fathers of Confederation." My disinclination to anchor my decision on the premise that the constitutional compromise is normatively "good," finds favour with statements of commentators such as Irwin Cotler who wrote that s. 93 has caused more bitterness than any other section of the Constitution or M. H. Ogilvie who wrote that s. 93 "shackled the new nation of Canada with the chains of nineteenth-century sectarian strife."

C. The Experience of the Provinces

[78] A proper understanding of this lawsuit requires an appreciation for separate school rights across Canada. Although *Charter* rights are consistent across Canada, separate school rights are glaringly inconsistent. Of the four provinces entering confederation in 1867, only Ontario and Quebec had denominational schools. Nova Scotia and New Brunswick (although the latter only after much acrimony and the Privy Council's decision in *Maher v Town Council of Portland*, [1874] UKPC 83 (BAILLI) [*Maher*]) had no denominational schools at confederation so s. 93(1) did not apply to them. Nor did British Columbia or Prince Edward Island when it joined the union, respectively, in 1871 and 1873. In 1949, Newfoundland's schools were denominational and similarly protected by Term 17 of the *Terms of Union of Newfoundland with Canada* (December 11, 1948). Newfoundland constitutionally amended its denominational school system and discontinued confessionally based schools in favour of a single public school system after a referendum in 1997. Denominational school rights were never constitutionally entrenched in the Northwest Territories (Yellowknife).

[79] In Quebec the Quiet Revolution of the 1960s replaced the primacy of religion in schools with the primacy of language. In 1997 Quebec, using s. 43 of the *Constitution Act, 1982*, rescinded denominational school rights and replaced them with a language-based education system. Accordingly, s. 93 no longer applies in Quebec.

[80] When Manitoba gained provincial status in 1870, s. 93 of the *Constitution Act, 1867* was replaced by s. 22 of the *Manitoba Act, 1870*, (with s. 22(3) identical to s. 93(4) of the *Constitution Act, 1867*), but with slightly nuanced differences. It protected separate schools existing "by Law or practice" and noticeably did not refer to separate schools being "thereafter established." In 1870, Manitoba's population was approximately equally split between Roman Catholics and Protestants (*Brophy v Attorney-General of Manitoba*, [1895] AC 202 (PC) [*Brophy*]). One year later, Manitoba enacted a true dual denominational school system. But with an influx of English-speaking Protestants, the Province enacted the Public Schools Act in 1890, reversing the policy of the preceding years by creating a single, English, non-denominational, tax-funded, school system. Catholics, obligated to pay taxes to support the new common school, could send their children to Catholic schools but at their expense. The City of Winnipeg sued a non-complying Catholic taxpayer in *Barrett v City of Winnipeg (1891)*, 1891 CanLII 61 (SCC), 19 SCR

374 [*Barrett*]. The Manitoba courts found the new Act inoffensive to s. 22(1) and valid. The Supreme Court of Canada unanimously allowed Barrett's appeal, a decision reversed by the Judicial Council which gave little credence to concerns advanced by Roman Catholics and the Church of England.

[81] Catholic school supporters pressured the federal cabinet to act remedially under s. 22(2) of the *Manitoba Act, 1870*. A reference in *Brophy* to the Supreme Court asked whether the government could intervene to remedy the rights of the Catholic minority. The Privy Council (again reversing the Supreme Court) found that Parliament could intervene. It did. When Manitoba rejected the federal commission's proposals, the Conservative federal government attempted to enact a remedial bill. The Liberal opposition blocked its passage. The school question became a federal election issue in 1896 with Wilfred Laurier claiming that by "sunny ways" a compromise with the Manitoba government would satisfy the Catholic claims. The federal election was fought on the School Question. A year later, Prime Minister Laurier negotiated a compromise with Manitoba, with Pope Leo XIII's approval. The Manitoba School Question engendered a national firestorm that brought down the federal Conservative government and spilled over into an acrimonious and animated discussion of denominational schools just as Saskatchewan and Alberta were in the throes of gaining provincial status.

[82] In 1905, Saskatchewan and Alberta were carved out of the Northwest Territories as new provinces. Each party in this action led significant testimony and provided reference to several historical sources (Sessional Papers, Hansard, School Board Reports and newspaper reports) to illustrate the complexity, intensity and acrimony of the debates that accompanied the passage of the *Saskatchewan Act* and the *Alberta Act,* commonly called the *Autonomy Bills*. Religious education in the new provinces was foremost among these debates and resulted in s. 17 of the *Autonomy Bills* modifying s. 93(1) of the *Constitution Act, 1867*, as previously cited.

[...]

[292] The evolution of the School Ordinances, indisputably showing a progression away from protecting predominantly Catholic interests in separate schools, is only exemplary of a broader trend emerging in Saskatchewan's population on the eve of union as it moved toward a secular and largely British view of society. One must remember, too, that the Catholic faith and the French language were inextricably linked during the years leading to union. [...]

Second Principle – The "Solemn Pact"

[294] A recurring theme respecting s. 93 is the principle that constitutional accommodation to educate the Catholic and Protestant minorities was critical in achieving confederation. Section 93 has been called the "solemn pact," (*Québec (Procureur général) c Conseil scolaire de l'île de Montréal*, 1990 CanLII 2677 (QC CA)); the "confederation compromise," (*Reference re Bill 30*); "one of the cardinal terms of the Confederation arrangement," (*Reference Re Adoption Act*, 1938, 1938 CanLII 2 (SCC), [1938] SCR 398 at 402); and a "central consideration…leading to confederation." (*Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217). Few cases concerning s. 93 are without reference to this principle. The defendants understandably rely upon the principle, stating, "The importance of s. 93 to the Confederation compact cannot be over-stated."

[295] I question whether the principle of a "solemn pact" should weigh as predominantly in interpreting s. 17(1) of the *Saskatchewan Act* as it has in interpreting s. 93(1) of the *Constitution Act, 1867* in cases dealing with separate school legislation in Ontario and Quebec. The solemn pact was a constitutional arrangement between the four original confederating colonies, but essentially applicable only in Quebec and Ontario since New Brunswick and Nova Scotia did not have separate schools. One might suggest that the notion of a "solemn pact" is losing significance. In 1997 Quebec sought a constitutional amendment under s. 43 of the *Constitution Act, 1982* and rescinded denominational school rights and replaced them with a language-based education system. The *Constitution Act, 1867* now includes s. 93A: "Paragraphs (1) to (4) of section 93 do not apply to Quebec." The "solemn pact" between Ontario and Quebec has effectively become a partner-less pact since 1997.

[376] Section 93 of the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*], confers on British Columbia the exclusive power to make "laws in relation to education". In *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15 (CanLII) [*Ontario Catholic Teachers*], the Court held (at para. 61) that s. 93 "gives the provincial government the plenary power over education in the province, and it is free to exercise this power however it sees fit in relation to the public school system."

[377] The Province's jurisdiction pursuant to s. 93 is limited by both the right to minority language education in s. 23 of the *Charter* and the rights to denominational schools in s. 93(1) of the *Constitution Act, 1867*. There are interesting parallels between the rights given to the linguistic minority in s. 23 and the rights given to denominational schools in s. 93(1). In *Adler v. Ontario*, 1996 CanLII 148 (SCC), [1996] 3 S.C.R. 609, a majority of the Court drew an analogy between the rights conferred on denominational schools by s. 93 and those guaranteed in s. 23. The majority commented that both were founded in political compromise, and granted special status to particular classes of people for the purpose of education (at para. 31).

[378] Further, the rights to denominational schools limit the Province's jurisdiction over education in a similar manner to s. 23. Denominational schools have a right to control the denominational aspects of their education programmes and the right to a measure of equality in the education services they are entitled to: *Ontario Catholic Teachers* at para. 60 citing *Adler* at para. 45. Section 23 affords the linguistic minority similar rights: a right to management and control over matters pertaining to the language and culture of the linguistic minority, and a positive right to facilities on the basis of equality to the majority.

[379] As a result, when interpreting the continuing jurisdiction of the Province over minority language education, I will take into account some of the jurisprudence concerning the interpretation of s. 93(1) of the *Constitution Act, 1867*, and the manner in which the rights of denominational schools limit provincial jurisdiction over education.

[380] Section 23 limits the Province's plenary power in two ways: by the linguistic minority's right to management and control over some aspects of the education system, and by the positive obligation on government to provide minority language education services. I define each of those limits below, including the extent to which the Province retains its plenary jurisdiction over education pursuant to s. 93.

[...]

[396] Matters that are outside the scope of language and culture (for example, the right to tax) will fall outside the minority's right to management and control. They remain within the Province's plenary jurisdiction over education pursuant to s. 93.

[...]

[399] Since some matters clearly fall within and some outside the right to management and control over matters pertaining to language and culture, the Province clearly retains some of its jurisdiction over the education provided to the linguistic minority pursuant to s. 93.

[...]

[406] On the other hand, the Province is entitled to develop institutional structures and regulations governing the minority's right to management and control. The linguistic minority is not entitled to any particular design of the education system. The Province continues to enjoy the jurisdiction to alter the education system pursuant to its plenary power over education. So long as those structures do not interfere with the minority's linguistic and cultural concerns, the minority is required to comply with those regulations, and must exercise their right of management and control consistently with them.

SEE ALSO:

Potter v. Québec (Procureur général du), 2001 CanLII 20663 (QC CA) [judgment available in French only]

Commission des Ecoles Fransaskoises Inc. et al. v. Saskatchewan, 1988 CanLII 5128 (SK QB), aff. by Commission des Ecoles Fransaskoises Inc. v. Saskatchewan, 1991 CanLII 7999 (SK CA)

Hirsch v. Montreal Protestant School Board of School Commissioners, [1928] J.C.J. No. 2 [hyperlink not available]

ANNOTATIONS – SUBSECTION 93(1)

Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General), [2001] 1 S.C.R. 470, 2001 SCC 15 (CanLII)

[55] Section 234(3) of the new *Education Act* [1997 *Education Quality Improvement Act*] also guarantees that minority education rights protected by s. 23 of the *Charter* will be respected by education funding in Ontario. In *Mahe*, *supra*, Dickson C.J. explored the content of the protections offered by s. 23. Writing for the Court, at pp. 375-76, he employed an aspects approach similar to that employed in relation to the guarantees of s. 93(1): [...]

Section 93(1) of the *Constitution Act, 1867* offers guarantees of the same nature as the guarantees provided by s. 23 of the *Charter*, but for denominational aspects of education instead of linguistic and cultural aspects. So long as separate schools are funded in a manner that is fair and equitable as compared to their public school counterparts, the underlying legislation will not violate s. 93(1).

[56] There is no evidence before this Court that the *EQIA* does not fund separate schools in a fair and equitable manner. It specifically mandates fair and equitable treatment with regard to the distribution of provincial education grants, which are used to equalize funding after funds raised through property taxation are taken into account. The evidence is that separate schools have actually seen their funding increase under the new funding model. As the intervener OCSTA [Ontario Catholic School Trustees' Association] states in their factum, the new funding model produces "the cherished result of equitable per pupil funding". The *EQIA* therefore does not prejudicially affect the right of separate schools to fair and equitable funding as guaranteed by s. 93(1) of the *Constitution Act, 1867* through the operation of ss. 7 and 20 of the *Scott Act*.

Adler v. Ontario, [1996] 3 S.C.R. 609, 1996 CanLII 148 (SCC)

[31] A useful analogy can be drawn between s. 93 and the minority language guarantees contained in s. 23 of the *Charter*. Like s. 93, s. 23 has its origins in political compromise. See *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, 1986 CanLII 66 (SCC), [1986] 1 S.C.R. 549, at p. 578; *Reference re Public Schools Act (Man.)*, 1993 CanLII 119 (SCC), [1993] 1 S.C.R. 839, at p. 851.

[32] Furthermore, both sections grant special status to particular classes of people. Dickson C.J. discussed the entrenched inequality created by s. 23 in *Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342. In this case, a group of parents claimed that their children were being denied the French language educational facilities to which they were entitled under s. 23 of the *Charter*. The parents argued that s. 23 should be interpreted in light of the words of s. 15(1) of the *Charter*. Speaking for a unanimous court, Dickson C.J. rejected this argument. In his words, s. 23 provides a "comprehensive code", a unique source for minority language educational rights. See *Mahe*, *supra*, at p. 369. The Court recognized that this would create inequalities: English speakers living in francophone provinces and French speakers living in anglophone provinces would enjoy rights which are denied to other linguistic groups. However, it is the words of the Constitution itself which create this "special status". As Dickson C.J. said at p. 369:

> [Section 23] is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada.

[33] Section 93(1) confers a similarly privileged status on those religious minorities which, at the time of Confederation, enjoyed legal rights with respect to denominational schools. In *Reference Re Bill 30*, Wilson J. acknowledged at p. 1197 that this special status may "sit uncomfortably with the concept of equality embodied in the *Charter*", but it must nonetheless be respected. In his concurring judgment, Estey J. drew a similar conclusion, saying that the purpose of s. 93 was "to provide the province with the jurisdiction to legislate in a prima facie selective and distinguishing manner". See *Reference Re Bill 30*, *supra*, at p. 1206.

[34] As Dickson C.J. concluded in *Mahe*, at p. 369, to use s. 15(1)'s equality rights as an interpretive aid to s. 23 would unacceptably distort the meaning and scope of the educational guarantees:

> ... it would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to "every individual".

[35] In my opinion, the reasoning used in *Mahe* is equally applicable to the appellants' attempt to use s. 2(a) in combination with s. 15(1) to expand on s. 93's religious educational guarantees. Thus, just as s. 23 is a comprehensive code with respect to minority language education rights, s. 93 is a comprehensive code with respect to denominational school rights. As a result, s. 2(a) of the *Charter* cannot be used to enlarge this comprehensive code. Given that the appellants cannot bring themselves within the terms of s. 93's guarantees, they have no claim to public funding for their schools. To emphasize, in Ontario, s. 93(1) entrenches certain rights with respect to public funding of religious education. However, these rights are limited to those which were enjoyed at the time of Confederation. To decide otherwise by accepting the appellants' claim that s. 2(a) requires public funding of their religious schools would be to hold one section of the Constitution violative of another -- a result which *Reference Re Bill 30* tells us to avoid, as will be further discussed below.

Mahe v. Alberta, [1990] 1 S.C.R. 342, 1990 CanLII 133 (SCC)

[71] Under the terms of s. 29 of the *Charter* any interpretation of s. 23 must be consistent with the rights and privileges of denominational schools. Section 29 reads:

> 29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

The rights of denominational, separate or dissentient schools referred to in s. 29 are generally provided for in s. 93(1) of the *Constitution Act, 1867*:

> 93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions: --
>
> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

The province of Alberta is governed by a slightly different provision. When Alberta became a province in 1905, it adopted s. 93 of the *British North America Act, 1867* (later renamed the *Constitution Act, 1867*), but with an amendment to s. 93(1). The amendment is set out in s. 17 of the *Alberta Act*:

> Section 93 of the *Constitution Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:

"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-west Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances."

. . .

(3) Where the expression "by law" is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the Union" is employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force.

[72] The phrase "right or privilege with respect to separate schools" is used in both the *Constitution Act, 1867* and the *Alberta Act*. (The terms "separate schools" and "denominational schools" are interchangeable.) In view of the similar contexts in which s. 93(1) and s. 17 were introduced, it can be presumed that the shared phrase carries the same meaning in each provision. Thus, the jurisprudence on s. 93(1) of the *Constitution Act, 1867* is relevant in interpreting s. 17 of the *Alberta Act*. With this approach in mind, I pose the pertinent question: does conferring upon minority language parents the rights to management and control infringe a "right or privilege with respect to separate schools" as guaranteed under s. 17 of the *Alberta Act*?

[73] The answer to this question is provided by the recent case of *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377. In that case, Beetz J., writing for the majority, held that the phrase "Right or Privilege with respect to Denominational Schools" in s. 93(1) of the *Constitution Act, 1867*, means that the section protects powers over denominational aspects of education and those non-denominational aspects which are related to denominational concerns which were enjoyed at the time of Confederation. The phrase does not support the protection of powers enjoyed in respect of non-denominational aspects of education except in so far as is necessary to give effect to denominational concerns. Beetz J.'s finding is equally applicable to the parallel provision in s. 17 of the *Alberta Act*.

[74] On this view of s. 93(1) of the *Constitution Act, 1867* and s. 17 of the *Alberta Act*, the powers of management and control which s. 23 would accord to minority language groups under the interpretation proposed would not affect any rights in respect of the denominational aspects of education or related non-denominational aspects. The minority language trustees on a denominational school board who are to be given powers over management and control will be, at the same time, denominational trustees: in such instances, the denominational board is not required to cede powers to a non-denominational group of persons, it is only required to give certain of its members authority over minority language education. The proposed regulation would not remove a denominational board's power to manage and control, or alter its denominational character.

[75] The transfer of the powers in respect of management and control thus amounts to the regulation of a non-denominational aspect of education, namely, the language of instruction, a form of regulation which the courts have long held to be valid: see *Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202 (P.C.); *Ottawa Roman Catholic Separate Schools Trustees v. Mackell*, [1917] A.C. 62 (P.C.); and *Ottawa Roman Catholic Separate Schools Trustees v. Quebec Bank*, [1920] A.C. 230 (P.C.). I note that this conclusion was also reached by the Ontario Court of Appeal in *Reference Re Education Act of Ontario*, *supra*. That court stated that the provinces enjoy a "full power of regulation", adding on p. 538, that "[s]o long as the legislation regulates education and does not threaten the existence of the separate schools or interfere with their denominational character it is valid".

Berthelot v. Ontario (Education Improvement Commission, 1998 CanLII 19424 (ON SCDC)

[41] Paragraph 93(1) of the *Constitution Act, 1867* and Section 23 of the *Canadian Charter of Rights and Freedoms* do not guarantee effective representation. In the case *Reference re Education Act (Que.)*, 1993 CanLII 100 (SCC), [1993] 2 S.C.R. 511 at pp. 541-42, 105 D.L.R. (4th) 266, the Honourable Mr. Justice Gonthier stated as follows:

> What s. 93 of the Constitution guarantees "rural" inhabitants is the right to dissent itself, not the form of the institutions which have made it possible to exercise that right since 1867. This means, for example, that while the right of dissent obviously includes the means and framework in which it is exercised, the latter are not in themselves constitutionally guaranteed. The framers of the Constitution were wise enough not to determine finally the form of institutions, as it is those very institutions which must be capable of change in order to adapt to the varying social and economic conditions of society. Moreover, as we shall see, the institutions have been altered by the legislature many times since 1867.

At page 564, Gonthier J. added:

> It must be noted that the Constitution provides no guarantee that existing institutions or vested rights will be maintained. Consequently, reform of the educational system is possible, with the transitional inconvenience involved in any major institutional reorganization.

[42] And furthermore, at page 567:

> As I have already said, the Constitution guarantees the right to dissent per se, not to certain legal institutions through which it may be exercised. The legislature can therefore alter them without infringing the constitutional protections.

[43] Section 23 of the *Canadian Charter* clearly only includes the right to management and control, which can be translated as the right to work in one's own language, to share a common culture and interests and points of view. In the case *Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342 at p. 380, 68 D.L.R. (4th) 69, Chief Justice Lamer stated as follows:

> Finally, it should be noted that the management and control accorded to s. 23 parents does not preclude provincial regulation. The province has an interest both in the content and the qualitative standards of educational programmes. Such programmes can be imposed without infringing s. 23, in so far as they do not interfere with the linguistic and cultural concerns of the minority.

[44] In order to come to a conclusion with respect to *Bill 104* [*Fewer School Boards Act*, 1997, S.O. 1997, c. 3] and its attendant regulations, it is appropriate to ask whether the present context gives French-language-speaking Catholics on District Board No. 61 the means and the framework necessary to allow them to exercise their right of management and control over their schools.

[45] In a modern world such as exists in Ontario, means of communication have greatly improved over the years and allow those who manage enterprises to expand their field of action without however, the necessity of constantly having to travel. That is why one can understand that an individual can well serve the needs of a larger population over a larger territory. However, it still must be recognized that the management of schools in the north of the Province of Ontario is more difficult than the management of schools in the south, due to the distances that the trustees have to travel. It should be noted, moreover, that the Ontario government has recently adopted new regulations in further application of *Bill 104* which recognize, among other things, the holding of board meetings by electronic means and which require that each district board elaborate and implement a policy for the use of electronic means for the holding of its meetings and other meetings at various locations within their territory.

[46] The solicitor representing the Ministry emphasized that the province is in the process of carrying out vast reforms in the field of education and that new regulations demonstrate that the process is constantly evolving. He noted that some of these regulations concern the matter before this court and that they in fact are designed to use modern technology to minimize both expenses and travel and to improve the situation in a practical manner for administrators and voters in the territories located in the north of the province.

[47] In the present context, *Bill 104* provides for the management and control of French language Catholic schools by French-speaking Catholic school board trustees. The structure providing for the organization

of the board of District No. 61 does not infringe the constitutional rights guaranteed to French-speaking Catholics in this region. Both the Act and its implementing regulations have the necessary flexibility to allow the exercise of this management and control in a practical manner. The Court cannot conclude that this structure is illusory and that it unduly restrains those charged with managing French-speaking Catholic education in this district.

[48] Consequently, the Court dismisses the application filed by the applicants asking for a declaration that *Bill 104* and its implementing regulations infringe their rights and privileges protected by the *Constitution Act, 1867* and the *1982 Canadian Charter*.

93A. Quebec

93A. Paragraphs (1) to (4) of section 93 do not apply to Quebec.

[LAST UPDATE: AUGUST 2017]

ANNOTATIONS

Québec (Procureure générale) v. Association des communautés scolaires franco-protestantes du Québec, 2001 CanLII 40079 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[12] The respondents, with the obvious exception of the Association des communautés scolaires franco-protestantes du Québec, are Francophone parents of children attending 11 Protestant schools.

[13] On April 15, 1997, with the objective of setting up French- and English-language school boards throughout Quebec, the Quebec National Assembly passed a resolution allowing the amendment of s. 93 of the *Constitution Act, 1867*. This resolution was followed by another one by the House of Commons and the Senate authorizing the amendment.

[14] On December 19, 1997, the Governor General proclaimed, under the Great Seal of Canada, *the Constitution Amendment, 1997* (Quebec), adding s. 93A after s. 93 of the *Constitution Act, 1867*, thereby making ss. 93(1) to (4) of no force or effect in Quebec.

[15] Before the Constitution Amendment, 1997 (Quebec), s. 93 of the *Constitution Act, 1867* guaranteed Catholics and Protestants, be they in the majority or the minority, the right to denominational schools in the cities of Montréal and Québec, while elsewhere in the province, only minority Catholics and Protestants enjoyed this right, by virtue of the right to dissent.

Potter v. Québec (Procureur général du), 2001 CanLII 20663 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[5] The Quebec government, wishing to replace denominational school boards with language-based ones, came to an agreement with the Government of Canada to amend the *Constitution Act, 1867* by adding s. 93A to it.

[6] A resolution in this regard was initially passed by the National Assembly on April 15, 1997. Subsequently, the Canadian Minister of Intergovernmental Affairs proposed the creation of a joint committee of the House of Commons and the Senate to study the issue. That committee, which sat in October and November 1997, had the chance to hear a large number of experts in constitutional law (law professors, lawyers, Quebec government ministers, members of the opposition, etc.) regarding the

validity of the constitutional amendment process. The committee tabled its report on November 7, 1994, finding unequivocally that the proposed amendment could be made through the bilateral process provided under s. 43 of the *Constitution Act, 1982*.

[7] A resolution proposing the addition of s. 93A was consequently passed by the House of Commons on November 18, 1997, then by the Senate on December 15, and finally assented to by the Governor General on December 19, 1997. That constitutional amendment reads as follows:

> Section 93A: Paragraphs (1) to (4) of section 93 do not apply to Quebec.

[…]

A. Section 93A and amendment to the division of powers with regard to education

[20] The appellants' first argument is that the 1997 amendment (enactment of section 93A) changed the division of powers between the federal and provincial levels of government, so the regular procedure for amending the Constitution should have been used. To support this argument, they therefore start from the premise that s. 93, read as a whole, divides jurisdiction over education between the two levels of government. […]

[21] For the reasons that follow, this argument must fail.

[22] First of all, the federal government's power under subsection 4 of the provision (*i.e.* the power to make "remedial" laws) by no means grants a general or special jurisdiction over education, which is an exclusive power of the provinces, according to the section's preamble. The right to make remedial laws is merely an accessory, or rather ancillary, one that applies strictly to the constitutional protection of the rights described in subsections (1) and (2). The federal government has this right only to the extent that it is consistent with subsections (1) and (2) of s. 93 and does not enjoy an independent power that would amount to a true sharing of jurisdiction with the provincial level of government. Moreover, this right is limited by decisions of the Governor General in Council pursuant to appeals under s. 93(3).

[23] Second, the 1997 amendment does not reduce this ancillary power to nothing, since the federal government can continue to exercise it with regard to provinces other than Quebec. In short, this amendment merely limits the scope of the ancillary power.

[24] Finally, this is not a division of powers, insofar as s. 93 applies only to certain Canadian provinces (Quebec, Ontario, Nova Scotia, New Brunswick, British Columbia and Prince Edward Island) and not the other four. The constituent statutes of the provinces of Manitoba, Alberta, Saskatchewan and Newfoundland, meanwhile, provide for their own systems, which are similar but with some differences.

[…]

B. Did the addition of s. 93A indeed amend s. 29 of the *Canadian Charter of Rights and Freedoms*, thus making it necessary to use the normal constitutional amendment procedure under s. 38?

[…]

[32] As *Alder v. Ontario* and *Reference re Bill 30* clearly confirm, s. 29 was simply enacted for greater certainty and did not in any way change the Constitution. Its purpose was to confirm the denominational rights guaranteed under the Constitution, nothing more. The Charter per se does not provide any guarantees regarding denominational rights, which are therefore in a certain way exceptions to the *Charter*.

[…]

C. Should the addition of s. 93A have in any event been done by a modified bilateral process requiring the approval of five provinces and Quebec, or of the founding provinces or at least the province of Ontario, given that the amendment did not concern just the province of Quebec?

[33] The appellants argue that the 1997 amendment did not concern just Quebec and therefore required the agreement of five other provinces, or in the alternative of at least the four founding provinces or the agreement of Ontario.

[50] As for the argument that at least Ontario's agreement was required, it is also without merit, since the denominational obligations regarding education have never been reciprocal or even identical between the two provinces.

[51] Finally, the various judgments on which the appellants relied heavily to support their claims (*Reference re the secession of Quebec*; *Attorney General of Quebec v. Blaikie*; *O.P.S.E.U. v. Ontario*) do not support their arguments at all and, with respect, seem to me to have been cited completely out of context. They are all to the effect that a province cannot unilaterally amend a constitutional provision that is the product of compromise and the negotiation of the Confederation agreement. They by no means support the proposition that such an amendment could not be made bilaterally in accordance with the requirements of s. 43.

IX. Miscellaneous Provisions

General (section 133)

133. Use of English and French Languages

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

[LAST UPDATE: AUGUST 2017]

ANNOTATIONS

R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

[15] In 1975, when this Court confirmed that language guarantees in s. 133 of the *Constitution Act, 1867* were minimal provisions and did not preclude the extension of language rights by either the federal or the provincial legislatures (*Jones v. Attorney General of New Brunswick*, 1974 CanLII 164 (SCC), [1975] 2 S.C.R. 182, at pp. 192-93), a purposive and liberal approach to the interpretation of language rights was adopted. This approach was re-affirmed and expanded in *Attorney General of Quebec v. Blaikie*, 1979 CanLII 21 (SCC), [1979] 2 S.C.R. 1016 (*Blaikie No. 1*), and *Attorney General of Quebec v. Blaikie*, 1981 CanLII 14 (SCC), [1981] 1 S.C.R. 312 (*Blaikie No. 2*). In *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, the Court wrote, at p. 739:

> If more evidence of Parliament's intent is needed, it is necessary only to have regard to the purpose of both s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, which was to ensure full

and equal access to the legislatures, the laws and the courts for francophones and anglophones alike. [Emphasis added.]

[16] In 1986, three decisions dealing with language rights in the courts appeared to have reversed the tendency to adopt a liberal approach to the interpretation of constitutional language guarantees: *MacDonald v. City of Montreal*, 1986 CanLII 65 (SCC), [1986] 1 S.C.R. 460, *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, 1986 CanLII 66 (SCC), [1986] 1 S.C.R. 549, and *Bilodeau v. Attorney General of Manitoba*, 1986 CanLII 64 (SCC), [1986] 1 S.C.R. 449. In those cases, the majority of the Court held that s. 133 of the *Constitution Act, 1867* guarantees a limited and precise group of rights resulting from a political compromise, and that, contrary to legal rights incorporated in ss. 7 to 14 of the *Charter*, they should be interpreted with "restraint" (*Société des Acadiens du Nouveau-Brunswick*, at p. 580). The majority judgments went on to say that progression towards equality of official languages is a goal to be pursued through the legislative process. The Court held that the right to use one's language in s. 133 does not impose a corresponding obligation on the State or any other individual to use the language so chosen, other than the obligation not to prevent those who wish to do so from exercising those rights; see *Société des Acadiens du Nouveau-Brunswick*, at pp. 574-75. In dissent on the constitutional question, Dickson C.J. wrote, at p. 560: "In interpreting *Charter* provisions, this Court has firmly endorsed a purposive approach." Noting the willingness of the Court to expand the definition of the words "Acts" and "Courts" in *Blaikie No. 1* and *Blaikie No. 2*, Dickson C.J. re-affirmed, at p. 563, that the purpose of s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867* was based on equality. He then quoted from the *Reference re Manitoba Language Rights*, *supra*, at p. 744: […]

[17] Immediately after the trilogy, the Court seemed to depart from its restrictive position. While this more liberal approach to language rights was not always directed at s. 133 of the *Constitution Act, 1867* or the similar provisions of s. 23 of the *Manitoba Act, 1870*, the new language cases are significant because they re-affirm the importance of language rights as supporting official language communities and their culture. [...]

Doré v. Verdun (City), [1997] 2 S.C.R. 862, 1997 CanLII 315 (SCC)

[24] This argument was rejected by Baudouin J.A. in the judgment under appeal, partly on the basis that the English version of the *Civil Code* is [Translation] "merely a translation of the original French version" (p. 1327). With respect, although what he stated is unfortunately true, it cannot be used to reject the argument made by the appellant. Section 7 of the *Charter of the French language*, R.S.Q., c. C-11, provides that the French and English versions of Quebec statutes "are equally authoritative". This is in accordance with s. 133 of the *Constitution Act, 1867* which requires that the statutes of the legislature of Quebec be enacted in both official languages and that both versions be equally authoritative and have the same status (see: *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721).

Sinclair v. Quebec (Attorney General), [1992] 1 S.C.R. 579, 1992 CanLII 126 (SCC)

[14] In *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212, this Court reaffirmed the position adopted in Reference re Manitoba Language Rights, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721 at p. 739, that the purpose of s. 133 of the *Constitution Act, 1867* is "to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike." Section 133, therefore, must be read to apply not only to statutes in the strict sense, but equally to all other instruments of a legislative nature. In the 1992 *Manitoba Language Reference*, we decided that the class of instruments having a legislative character might include certain orders in council and documents incorporated into statutes by reference. More generally, we decided that it is not the form of the instrument, but, rather, the degree of "connection between the legislature and the instrument [which] is indicative of a legislative nature" (p. 233).

[15] With respect to the content and effect of an instrument, we decided that the following characteristics are further badges of its legislative character (at p. 233):

1. The instrument embodies a rule of conduct;

2. The instrument has the force of law; and

3. The instrument applies to an undetermined number of persons.

[...]

[17] The question, therefore, is whether the instruments in question in this appeal possess these characteristics. At the outset, however, and prior to embarking upon an examination of the five instruments here in question, we should point out that, as we said in the *1992 Manitoba Language Reference*, the courts will not permit the circumvention of s. 133 by means of a disingenuous division of a legislative act into a number of discrete parts -- for instance, a "shell" statute incorporating by reference some other "non-legislative" unilingual document. To do otherwise would to be to invite the triumph of form over substance. As we told the Government of Manitoba, if the net effect of a series of discrete acts has a legislative character, then each of these component acts will also be imbued with this same character. Each will be subject to the requirement of mandatory bilingualism imposed by s. 133 of the *Constitution Act, 1867*.

[...]

[20] […] More fundamentally, however, we agree with the Court of Appeal that the National Assembly of Quebec has attempted to divide the legislative process into a number of discrete steps, and then to claim that each of these individual steps, considered alone and in isolation, lacks a legislative character. Chouinard J.A. said (at p. 317):

> [TRANSLATION] The process adopted by the legislature has the characteristics of delegated legislation, in the sense that it has divided the law into separate but necessary stages, the third and fourth surely being delegated legislation. It should be noted that the second stage was the order of the Minister of Municipal Affairs completing the draft agreement, the third the order of the government ordering the amalgamation, and the fourth the notice of issuance of letters patent and their publication in the *Gazette officielle*.

[...]

[23] An instrument which creates new local governmental institutions cannot escape the operation of s. 133 of the *Constitution Act, 1867* simply by a circuitous path of enactment. Had the National Assembly chosen to amalgamate Rouyn and Noranda on terms imposed by statute, this statute, and these terms, would have been required to be published in the French and English languages. This requirement cannot be circumvented by following the procedure that the Government of Quebec saw fit to adopt.

[...]

[28] *Bill 190* [*An Act respecting the cities of Rouyn and Noranda*] is virtually a "shell" statute if considered by itself. Indeed, the only salient difference between *Bill 190* and the situation in *Brunet* is that the challenged statutes in Brunet incorporated by reference unilingual documents already in existence, whereas *Bill 190* incorporated by reference a unilingual document which the Minister of Municipal Affairs had yet to issue. If anything, this is a worse abuse than occurred in Brunet. We are all of the opinion, therefore, that the order in lieu of a draft agreement is properly considered as an integral part of *Bill 190*, and was subject to the requirements of s. 133.

[...]

[30] Viewed in isolation, it would not immediately be clear that this order [postponing the municipal elections] constituted a legislative act. However, as has already been made clear, it is incorrect to view

individually the component parts of what is essentially a legislative process. The postponement of municipal elections in Rouyn was as much a part of the entire legislative scheme for amalgamation as the referendum, the issuance of the letters patent, and the notice of their issuance in the *Gazette officielle du Québec*. One cannot excise this step from the rest of the process for the purposes of the operation of s. 133 of the *Constitution Act, 1867*. Consequently, we are of the opinion that the ministerial order of September 4, 1985, like the other instruments under challenge in this appeal, was of a legislative nature and ought to have been published in the French and English languages.

[31] All of the instruments challenged by the respondents in this appeal, from the ministerial order postponing the municipal elections in Rouyn, to the final notification of the issuance of the letters patent for the city of Rouyn-Noranda in the *Gazette officielle du Québec*, were part of a process which, when viewed in its entirety, was undoubtedly legislative. Accordingly, all of them were subject to the requirements of s. 133 of the *Constitution Act, 1867*, no less than was *Bill 190* itself. The requirements of s. 133 cannot be circumvented by the disingenuous division of the legislative process into a series of discrete steps, and then claiming that each of these steps, when examined in isolation, lacks a legislative character.

[32] All of the instruments in question were printed and published in the French language only, or were not officially published at all. Clearly, therefore, the requirements of s. 133 were not complied with. It follows that all of them are, and have always been, nullities and of no legal force and effect. One cannot ignore, however, that, *de facto*, a new city of Rouyn-Noranda has been in existence since 1986, operating on the faith of purported letters patent establishing its constitution. This purported municipal constitution, and consequently all acts performed pursuant to it are, and have been, illegal and of no force and effect.

[33] It would be wrong to throw the affairs of the citizens of Rouyn and Noranda into a state of chaos on account of the procedure chosen by the National Assembly of Quebec to effect their purported amalgamation into the new city of Rouyn-Noranda. This is an appropriate case for this Court to exercise its suspensive power by declaring that the instruments in this appeal, while invalid for non-compliance with s. 133 of the *Constitution Act, 1867*, shall continue in force for a period of time in order to permit the National Assembly to take what steps it sees fit to remedy the constitutional defects. This period of time shall be for one year from the date of this judgment.

Reference re Manitoba Language Rights, [1992] 1 S.C.R. 212, 1992 CanLII 115 (SCC)

[8] Section 23 of the *Manitoba Act, 1870*, S.C. 1870, c. 3 (reprinted in R.S.C., 1985, App. II, No. 8), provides: [...]

[9] The requirements of s. 133 of the *Constitution Act, 1867* are virtually identical. Section 133 provides: [...]

[11] In *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312 ("*Blaikie No. 2*"), the question of the scope of s. 133 of the *Constitution Act, 1867*, was addressed, particularly, whether it extended to delegated legislation as distinct from the orders in council and ministerial orders or regulations considered in *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016 ("*Blaikie No. 1*"). The Court articulated the following principles to guide the interpretation of s. 133, and by implication s. 23:

> First, the proliferation of these other regulations was at least as unforeseeable as that of Government regulations which, unlike municipal and school board by-laws could not have been originally intended to escape the operation of s. 133 of the *B.N.A. Act*.
>
> Second, while the ordinary meaning of the words "Acts ... of the Legislature" in s. 133 must be departed from to prevent the requirements of the section from being frustrated, it cannot be stretched beyond what is necessary to accomplish this purpose.
>
> (*Blaikie No. 2*, at p. 328.)

[12] Working within these principles, this Court concluded in that case that s. 133 applies to regulations enacted by the Government of Quebec, a minister or a group of ministers, and to regulations of the civil administration and of semi-public agencies which, to come into force, are subject to the approval of that Government, a minister or a group of ministers. The application of the section to such regulations was explicitly narrowed to those which constitute delegated legislation properly so called and not rules or directives of internal management. This Court further concluded that the section applies to rules of practice enacted by courts and quasi-judicial tribunals, but not to the by-laws of municipal or school bodies even when subject to the approval of the Government, a minister or a group of ministers.

[...]

[15] In so determining the scope of s. 23, it is important to place the section within the proper historical context. It, like ss. 93 and 133 of the *Constitution Act, 1867*, is an embodiment of a political compromise. It is not a sweeping guarantee designed to achieve complete linguistic equality, but rather a compromise designed to achieve a level of harmony in the demographic reality of Manitoban society. The following statement of Beetz J. in *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, at p. 496, regarding s. 133 is applicable here:

> This incomplete but precise scheme is a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union. The scheme is couched in a language which is capable of containing necessary implications, as was held in *Blaikie No. 1* and *Blaikie No. 2* with respect to certain forms of delegated legislation. It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation, as was held in the Jones case. And it is a scheme which can of course be modified by way of constitutional amendment. But it is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise.

See also *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, at p. 578, and *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377, at pp. 401-2. To extend the application of s. 23 beyond instruments of a legislative nature would be to improve upon this constitutional compromise under the guise of interpretation.

Ford v. Québec (Attorney General), [1988] 2 S.C.R. 712, 1988 CanLII 19 (SCC)

[43] […] These special guarantees of language rights do not, by implication, preclude a construction of freedom of expression that includes the freedom to express oneself in the language of one's choice. A general freedom to express oneself in the language of one's choice and the special guarantees of language rights in certain areas of governmental activity or jurisdiction – the legislature and administration, the courts and education – are quite different things. The latter have, as this Court has indicated in *MacDonald*, *supra*, and *Société des Acadiens*, *supra*, their own special historical, political and constitutional basis. The central unifying feature of all of the language rights given explicit recognition in the Constitution of Canada is that they pertain to governmental institutions and for the most part they oblige the government to provide for, or at least tolerate, the use of both official languages. In this sense they are more akin to rights, properly understood, than freedoms. They grant entitlement to a specific benefit from the government or in relation to one's dealing with the government. Correspondingly, the government is obliged to provide certain services or benefits in both languages or at least permit use of either language by persons conducting certain affairs with the government. They do not ensure, as does a guaranteed freedom, that within a given broad range of private conduct, an individual will be free to choose his or her own course of activity. The language rights in the Constitution impose obligations on government and governmental institutions that are in the words of Beetz J. in *MacDonald*, a "precise scheme", providing specific opportunities to use English or French, or to receive services in English or French, in concrete, readily ascertainable and limited circumstances. […]

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 1986 CanLII 66 (SCC)

[50] Subject to minor variations of style, the language of ss. 17, 18 and 19 of the *Charter* has clearly and deliberately been borrowed from that of the English version of s. 133 of the *Constitution Act, 1867* of which no French version has yet been proclaimed pursuant to s. 55 of the *Constitution Act, 1982*. It would accordingly be incorrect in my view to decide this case without considering the interpretation of s. 133 which provides: [...]

[51] The somewhat compressed and complicated statutory drafting exemplified in s. 133 has been shortened and simplified in ss. 17 to 19 of the *Charter*, as befits the style of a true constitutional instrument. The wording of the relevant part of s. 133 ("may be used by any Person or in any Pleading or Process in or issuing from ... all or any of the Courts of") has been changed to "may be used by any person in, or in any pleading in or process issuing from, any court of". I do not think that anything turns on this change, which is one of form only.

[52] Furthermore, in my opinion, s. 19(2) of the *Charter* does not, anymore than s. 133 of the *Constitution Act, 1867*, provide two separate rules, one for the languages that may be used by any person with respect to in-court proceedings and the languages that may be used in any pleading or process. A proceeding as well as a process have to emanate from someone, that is from a person, whose language rights are thus protected in the same manner and to the same extent, as the right of a litigant or any other participant to speak the official language of his choice in court. Under both constitutional provisions, there is but one substantive rule for court processes and in-court proceedings and I am here simply paraphrasing what has been said on this point in the *MacDonald* case, in the reasons of the majority, at p. 484.

[53] It is my view that the rights guaranteed by s. 19(2) of the *Charter* are of the same nature and scope as those guaranteed by s. 133 of the *Constitution Act, 1867* with respect to the courts of Canada and the courts of Quebec. As was held by the majority at pp. 498 to 501 in *MacDonald*, these are essentially language rights unrelated to and not to be confused with the requirements of natural justice. These language rights are the same as those which are guaranteed by s. 17 of the *Charter* with respect to parliamentary debates. They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice.

[...]

[58] The scheme has now been made more comprehensive in the *Charter* with the addition of New Brunswick to Quebec--and Manitoba--and with new provisions such as s. 20. But where the scheme deliberately follows the model of s. 133 of the *Constitution Act, 1867*, as it does in s. 19(2), it should, in my opinion, be similarly construed.

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 1986 CanLII 65 (SCC)

[55] The real issue then that needs to be decided on the facts in this case, is whether the charge, being expressed in the French language only, and not in the language of the English-speaking accused, offends the provisions of s. 133 of the *Constitution Act, 1867*, resulting in a total absence of jurisdiction of the court to try him on this charge. The constitutional question stated in the case should accordingly be read as including this issue.

[56] I should add that the charge, triggering as it does the whole judicial proceeding and being essential to its validity, is as much and all the more a process in or issuing from a court as is the command to appear before it, and I agree with what Meyer J. said in the quotation above that:

> Summonses and complaints are clearly among the documents covered by the first *Blaikie* decision.

[...]

[58] The appellant's main submission was stated above. That submission is to the effect that s. 133 of the *Constitution Act, 1867* gives to any person, anglophone or francophone, the right to be summoned before any court of Canada and any court of Quebec by a process issued in his own language, at least where the "State" is a party to the proceedings, such as penal or criminal proceedings.

[59] This submission is erroneous, in my respectful opinion. It fails to meet the above-quoted reasons of Hugessen A.C.J. in *Walsh* which I find conclusive and with which I agree. Furthermore, it is contrary to the plain meaning of s. 133 as construed by this Court in *Attorney General of Quebec v. Blaikie*, 1979 CanLII 21 (SCC), [1979] 2 S.C.R. 1016 (*Blaikie No. 1*), and *Attorney General of Quebec v. Blaikie*, 1981 CanLII 14 (SCC), [1981] 1 S.C.R. 312 (*Blaikie No. 2*).

[60] […] It is clear that the rights preserved in Parliamentary debates are those of the speaker only. Those who listen to the speaker cannot have a right to be addressed in the language of their choice without defeating the speaker's own right to use the language of his choice and making the constitutional provisions nonsensical. Also, the speaker might be unilingual and find it impossible to address his listeners in the language of their choice. Furthermore, the choice of the listeners might vary, making it impossible to accommodate each of them. The use of interpreters or simultaneous translation which, in any event, has nothing to do with s. 133, would not meet the essential thrust of appellant's submission that he has the right to be addressed in the language of his choice by the very person or body who is purporting to address him.

[61] The same reasoning applies to the language spoken in the courts covered by s. 133 and in the written pleadings in and processes of such courts: the language rights then protected are those of litigants, counsel, witnesses, judges and other judicial officers who actually speak, not those of parties or others who are spoken to; and they are those of the writers or issuers of written pleadings and processes, not those of the recipients or readers thereof. The appellant exercised his constitutionally protected language right when he presented his oral and written argument in English before Judge Bourassa, and the latter exercised his own right when he delivered judgment partly in French and partly in English. In my view, under s. 133 of the *Constitution Act, 1867*, and apart from other legal principles or statutory provisions such as the *Official Languages Act*, R.S.C. 1970, c. O-2, the appellant was not entitled to a summons in English only, any more than to a judgment in English only, from the Municipal Court or from any court contemplated by s. 133, including this Court.

[62] The appellant's main submission is not bolstered by his reference to the "State". Whether or not the State is a person or has rights under s. 133, it was held in *Blaikie No. 1* that the option to use either language under this section extends to the courts themselves in documents emanating from them or issued under their name or under their authority. As I have said above, the summons is a process in or issuing from the Municipal Court. Furthermore, the issuer of the summons in the case at bar had by law to be either the clerk or a judge of the Municipal Court. These are physical persons whose language rights under s. 133 receive the same protection as those of the appellant.

[...]

[66] Since s. 133 confers no language right to the appellant as the recipient of a summons, it imposes no correlative duty on the State or anyone else.

[67] The only positive duty that I can read in s. 133 is the one imposed on the Houses of Parliament of Canada and the Legislature of Quebec to use both the English and the French languages in the respective Records and Journals of those Houses, as well as the duty to legislate in both languages, that is to enact, print and publish federal and provincial acts in both languages: *Blaikie No. 1* at p. 1022. In *Forest v. Registrar of Court of Appeal of Manitoba*, 1977 CanLII 1635 (MB CA), [1977] 5 W.W.R. 347 at p. 355, it seems to have been suggested by Freedman C.J.M. that s. 23 of the *Manitoba Act, 1870*, imposed a duty to provide the legislature with simultaneous translation for the purposes of parliamentary

debate but, with respect for the contrary view, I fail to see the imposition of any such duty in either provision.

[68] A negative duty is also imposed by s. 133 on everyone not to infringe language rights conferred by the section with respect to the language of Parliamentary debates and court proceedings. These are constitutionally protected rights and it would be unlawful for instance to expel a member of the House of Commons or of the Quebec National Assembly on the ground that he uses either French or English in debates, or for a judge of a Quebec or a federal court to prevent the use of either language in his court. But this duty is not the positive one which the appellant invokes.

[...]

[84] Section 133 of the *Constitution Act, 1867*, far from distinguishing between courts of civil and of criminal jurisdiction, and civil and criminal pleadings and processes, applies by its express terms to *any Pleading or Process*, to *any Court* of Canada and to *all or any of the Courts* of Quebec.

[...]

[103] [...] Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism at the option of the speaker in Parliamentary debates and at the option of the speaker, writer or issuer in judicial proceedings or processes. Such a limited scheme can perhaps be said to facilitate communication and understanding, up to a point, but only as far as it goes and it does not guarantee that the speaker, writer or issuer of proceedings or processes will be understood in the language of his choice by those he is addressing.

[104] This incomplete but precise scheme is a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union. The scheme is couched in a language which is capable of containing necessary implications, as was held in *Blaikie No. 1* and *Blaikie No. 2* with respect to certain forms of delegated legislation. It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation, as was held in the *Jones* case. And it is a scheme which can of course be modified by way of constitutional amendment. But it is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise.

[...]

[108] It should be stated at the outset that compliance with s. 133, as this section provides for a minimum constitutional protection of language rights, may very well fall short of the requirements of natural justice and procedural fairness. These requirements protect not language rights but other rights, referred to as legal rights in the *Charter*, which s. 133 was never intended to safeguard in the first place and to which it is entirely unrelated.

[...]

[116] This is not to put the English and the French languages on the same footing as other languages. Not only are the English and the French languages placed in a position of equality, they are also given a preferential position over all other languages. And this equality as well as this preferential position are both constitutionally protected by s. 133 of the *Constitution Act, 1867*. Without the protection of this provision, one of the two official languages could, by simple legislative enactment, be given a degree of preference over the other as was attempted in Chapter III of Title 1 of the *Charter of the French Language*, invalidated in *Blaikie No. 1*. English unilingualism, French unilingualism and, for that matter, unilingualism in any other language could also be imposed by simple legislative enactment. Thus it can be seen that, if s. 133 guarantees but a minimum, this minimum is far from being insubstantial.

[117] It would constitute an error either to import the requirements of natural justice into the language rights of s. 133 of the *Constitution Act, 1867*, or vice versa, or to relate one type of right to the other under the pretext of re-enforcing both or either of them. Both types of rights are conceptually different. Also, language rights such as those protected by s. 133, while constitutionally protected, remain peculiar to Canada. They are based on a political compromise rather than on principle and lack the universality, generality and fluidity of basic rights resulting from the rules of natural justice. They are expressed in more precise and less flexible language. To link these two types of rights is to risk distorting both rather than re-enforcing either.

Re Manitoba Language Rights, [1985] 1 S.C.R. 721, 1985 CanLII 33 (SCC)

[4] The provisions of s. 133 of the *Constitution Act, 1867* are virtually identical to those of s. 23 of the *Manitoba Act, 1870*. Section 133 provides: [...]

[25] For present purposes, it seems clear that the bilingual record-keeping and the printing and publication requirements of s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867* are mandatory in the sense that they were meant to be obeyed.

[26] Section 23 of the *Manitoba Act, 1870*, provides that both English and French "shall be used in the ... Records and Journals" of the Manitoba Legislature. It further provides that "[t]he Acts of the Legislature shall be printed and published in both those languages. Section 133 of the *Constitution Act, 1867*, is strikingly similar. It provides that both English and French "shall be used in the respective Records and Journals" of Parliament and the Legislature of Quebec. It also provides that "[t]he Acts of the Parliament of Canada and the Legislature of Quebec shall be printed and published in both those Languages".

[27] As used in its normal grammatical sense, the word "shall" is presumptively imperative. See Odgers' *Construction of Deeds and Statutes* (5th ed. 1967) at p. 377; *The Interpretation Act*, 1867 (Can.), 31 Vict., c. 1, s. 6(3); *Interpretation Act*, R.S.C. 1970, c. I-23, s. 28 ("shall is to be construed as imperative"). It is therefore incumbent upon this Court to conclude that Parliament, when it used the word "shall" in s. 23 of the *Manitoba Act*, 1870 and s. 133 of the *Constitution Act, 1867*, intended that those sections be construed as mandatory or imperative, in the sense that they must be obeyed, unless such an interpretation of the word "shall" would be utterly inconsistent with the context in which it has been used and would render the sections irrational or meaningless. See, *e.g. Re Public Finance Corp. and Edwards Garage Ltd.* (1957), 22 W.W.R. 312, p. 317 (Alta. S.C.).

[28] There is nothing in the history or the language of s. 23 of the *Manitoba Act, 1870* or s. 133 of the *Constitution Act, 1867* to indicate that "shall" was not used in its normal imperative sense. On the contrary, the evidence points ineluctably to the conclusion that the word "shall" was deliberately and carefully chosen by Parliament for the express purpose of making the bilingual record-keeping and printing and publication requirements of those sections obligatory. In particular Parliament's use of the presumptively imperative word "shall" twice in s. 23 of the *Manitoba Act, 1870* and twice in s. 133 of the *Constitution Act, 1867* contrasts starkly with its use of the presumptively permissive word "may" twice in the same sections. Section 23 provides that either English or French "may be used" by anyone in the debates of the Manitoba Legislature and that either language "may be used" by anyone in the Manitoba courts. Similarly, s. 133 provides that either English or French "may be used" by anyone in the debates of Parliament and the Legislature of Quebec, and in the courts of Canada and Quebec.

[29] The French versions of both sections leave no doubt that the choice of these contrasting terms was deliberate. In the French version of s. 23, "shall" appears as "sera obligatoire" and "seront", while "may" appears as "sera facultatif" and "pourra être ... à faculté". Similarly, in the French version of s. 133, "shall" is expressed as "sera obligatoire" at one point, and as "devront être" at another, while "may" is expressed as "sera facultatif" in the first clause in which it appears and as "pourra être ... à faculté" in the second.

[...]

[31] If more evidence of Parliament's intent is needed, it is necessary only to have regard to the purpose of both s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, which was to ensure full

and equal access to the legislatures, the laws and the courts for francophones and anglophones alike. The fundamental guarantees contained in the sections in question are constitutionally entrenched and are beyond the power of the provinces of Quebec or Manitoba to amend unilaterally: *Blaikie No. 1*, *supra*; *Attorney General of Manitoba v. Forest*, *supra*. Those guarantees would be meaningless and their entrenchment a futile exercise were they not obligatory.

[32] That this was recognized by the drafters of s. 133, after which s. 23 was modeled, is clear from the former section's legislative history. Early drafts of s. 133 used the permissive word "may". This generated considerable concern and comment during the Confederation Debates, and in the third draft of s. 133 in February 1867 the word "may" was replaced by the word "shall" in the provision regarding the use of both languages in the records and journals of Parliament and the Legislature of Quebec. In the final draft of s. 133 of the *British North America Act, 1867* (as it was then called) the provision for printing and publication of all laws in both languages was added, the word "shall" again being used.

[33] The conclusion seems inescapable that the drafters of the *Constitution Act, 1867* deliberately selected the imperative term "shall" in preference to the permissive term "may" because they intended s. 133's language guarantees to be just that – *guarantees*. And the use by Parliament only three years later of nearly identical language in s. 23 of the *Manitoba Act, 1870* is strong evidence of a similar intendment with regard to the language provisions of that *Act*. The requirements of s. 133 of the *Constitution Act, 1867* and of s. 23 of the *Manitoba Act, 1870* respecting the use of both English and French in the Records, Journals and Acts of Parliament and the Legislatures of Quebec and Manitoba are "mandatory" in the normally accepted sense of that term. That is, they are obligatory. They must be observed.

[...]

[42] The requirements of s. 23 of the *Manitoba Act, 1870* pertain to "Acts of the Legislature". These words are, in all material respects, identical to those found in s. 133 of the *Constitution Act, 1867*. As we have already indicated, in *Blaikie No. 2*, *supra*, this Court held that s. 133 applied to regulations enacted by the Government of Quebec, a Minister of the Government or a group of Ministers and to regulations of the civil administration and of semi-public agencies which required the approval of that Government, a Minister or group of Ministers for their legal effect. It was emphasized that only those regulations which could properly be called "delegated legislation" fell within the scope of s. 133; rules or directives of internal management did not. It was also held that s. 133 applied to rules of practice enacted by courts and quasi-judicial tribunals, but that it did not apply to the by-laws of municipal bodies or the regulations of school bodies.

[43] Given the similarity of the provisions, the range of application of s. 23 of the *Manitoba Act, 1870*, should parallel that of s. 133 of the *Constitution Act, 1867*. All types of subordinate legislation that in Quebec would be subject to s. 133 of the *Constitution Act, 1867*, are, in Manitoba, subject to s. 23 of the *Manitoba Act, 1870*.

[...]

[130] To summarize, *Blaikie No. 1* stands for the proposition that s. 133 of the *Constitution Act, 1867* requires (i) simultaneous enactment of legislation in both English and French, and (ii) equal authority and status for both the English and the French versions. Nothing less would adequately preserve the linguistic guarantees of those sections or ensure that the law was equally accessible to francophones and anglophones alike.

[131] As we have said, s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867* are coterminous. *Blaikie No. 1* is therefore controlling on the question of the effect of s. 23 of the *Manitoba Act, 1870* on the similar legislation in issue here. Applying the criteria as laid down in *Blaikie No. 1* to the present case, it is clear that the 1980 Act does not meet the requirements of s. 23 of the *Manitoba Act, 1870.*

See also: Order: Manitoba Language Rights, [1985] 2 S.C.R. 347, 1985 CanLII 9 (SCC)

Attorney General of Quebec v. Blaikie et al., [1981] 1 S.C.R. 312, 1981 CanLII 14 (SCC)

[p. 320] The Government of the province is not a body of the Legislature's own creation. It has a constitutional status and is not subordinate to the Legislature in the same sense as other provincial legislative agencies established by the Legislature. Indeed, it is the Government which, through its majority, does in practice control the operations of the elected branch of the Legislature on a day to day basis, allocates time, gives priority to its own measures and in most cases decides whether or not the legislative power is to be delegated and, if so, whether it is to hold it itself or to have it entrusted to some other body.

Legislative powers so delegated by the Legislature to a constitutional body which is part of itself must be viewed as an extension of the legislative power of the Legislature and the enactments of the Government under such delegation must clearly be considered as the enactments of the Legislature for the purposes of s. 133 of the *B.N.A.* [*British North America*] *Act*.

[...]

[p. 324] Last but not least, municipal institutions constitute a distinct albeit subordinate order of government at the local level, the administration of which is usually in the hands of locally elected mayors and members of council. Their growth and the multiplication of their regulations were inherent in their nature and accordingly foreseeable. Since the provinces were explicitly given the power to make laws relating to those institutions in s. 92(8) of the *B.N.A. Act*, the absence of any reference to them in s. 133 cannot possibly be viewed as an oversight. It is a purposeful silence to which effect must be given if the intent of the Fathers of Confederation is to be respected.

Much the same can be said, a fortiori, about school bodies regulations. Education falls under provincial legislative authority subject to the denominational principles stated in s. 93 of the *B.N.A. Act*. It was quite foreseeable that school districts and school bodies would be organized along even more homogeneous linguistic lines than municipal corporations. Yet, the safeguards provided by s. 93 are of a religious, not of a linguistic nature. […]

[p. 325] Since the *B.N.A Act* is explicit on the subject of religious safeguards with respect to education, its silence on the language of school by-laws is also a deliberate one. It is a silence which speaks and it speaks against the application of s. 133 to school by-laws.

[…]

Municipal by-laws constitute a separate and distinct class of regulations. As we have seen, they are the legislative enactments of a third level of government clearly contemplated by the *B.N.A. Act* and yet not mentioned in s. 133. The fact that they may be subject to the control or supervision of the Government by way of required approval or potential disallowance does not alter their municipal character nor the constitutional intent to subtract them from the operation of s. 133.

[...]

[p. 328] In order to determine the proper test, one must keep two sets of considerations in mind.

First, the proliferation of these other regulations was at least as unforeseeable as that of Government regulations which, unlike municipal and school board by-laws could not have been originally intended to escape the operation of s. 133 of the *B.N.A. Act*.

Second, while the ordinary meaning of the words "Acts … of the Legislature" in s. 133 must be departed from to prevent the requirements of the section from being frustrated, it cannot be stretched beyond what is necessary to accomplish this purpose.

[p. 329-330] […] It is because in our constitutional system the enactments of the Government should be assimilated with the enactments of the Legislature that they are governed by s. 133. Other regulations must in our opinion be viewed in the same light when they can also properly be said to be the enactments of the Government.

This happens whenever these other regulations are made subject to the approval of the Government.

The particular form of words used in this respect by various statutes matters little. Whether it be provided that some regulations “shall have no force and effect until approved and sanctioned by the Lieutenant-Governor in Council” or “shall not be carried into execution until approved by the Lieutenant-Governor in Council” or “shall not have force and effect until confirmed by the Lieutenant-Governor in Council”, they can be assimilated with the enactments of the Government and therefore of the Legislature as long as positive action of the Government is required to breathe life into them. Without such approval or confirmation, they are a nullity (*North Coast Air Services Ltd. v. Canadian Transport Commission*) or at least inoperative. The Government does legislate in approving them in the same way as one house legislates in a bicameral legislature when it passes a bill already passed by the other house, or the Lieutenant-Governor when he assents to a bill passed by the house of the now unicameral Legislature.

[...]

[p. 332] Rules of practice [of courts] are not expressly referred to in s. 133 of the *B.N.A. Act*. Given the circumstances described above, they are unlikely to have been overlooked but in our view the draftsmen must have thought that they were subject to the section by necessary intendment.

[p. 332] The point is not so much that rules of practice partake of the legislative nature of the Code of which they are the complement. A more compelling reason is the judicial character of their subject-matter for which s. 133 makes special provision. Rules of practice may regulate not only the proper manner to address the court orally and in writing, but all proceedings, processes, certificates, styles of cause and the form of court records, books, indexes, rolls, registers, each of which may under s. 133, be written in either language. Rules of practice may also prescribe and do prescribe specific forms for proceedings and processes, such for instance as the motion for authorization to institute a class action or a judgment in a class action (Rules of Practice of the Superior Court of the Province of Quebec in civil matters, November 10, 1978, ss. 49 to 56), a proceeding in the Superior Court, a process of the Superior Court. All litigants have the fundamental right to choose either French or English and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only.

[p. 333] Furthermore, and as was noted by Deschênes C.J.S.C., (at p. 49 of his reasons), this fundamental right is also guaranteed to judges who are at liberty to address themselves to litigants in the language of their choice. When they so address themselves collectively to litigants as they peremptorily do in rules of practice, they must necessarily use both languages if they wish to safeguard the freedom of each judge.

We accordingly reach the conclusion that, given the nature of their subject-matter, rules of court stand apart and are governed by s. 133 of the *B.N.A. Act*.

[...]

Section 133 of the *British North America Act* applies to regulations enacted by the Government of Quebec, a minister or a group of ministers and to regulations of the civil administration and of semi-public agencies contemplated by the *Charter of the French Language* which, to come into force, are subject to the approval of that Government, a minister or a group of ministers. Such regulations are regulations or orders which constitute delegated legislation properly so called and not rules or directives of internal management.

Section 133 also applies to rules of practice enacted by courts and quasi-judicial tribunals.

[p. 334] Section 133 does not apply to municipal or school bodies by-laws even when subject to the approval of the Government, a minister or a group of ministers.

Att. Gen. of Quebec v. Blaikie et al., [1979] 2 S.C.R. 1016, 1979 CanLII 21 (SCC)

[p. 1022] Sections 8 and 9 of the *Charter of the French language*, reproduced above, are not easy to reconcile with s. 133 which not only provides but requires that official status be given to both French and English in respect of the printing and publication of the Statutes of the Legislature of Quebec. It was urged before this Court that there was no requirement of enactment in both languages, as contrasted with printing and publishing. However, if full weight is given to every word of s. 133 it becomes apparent that this requirement is implicit. What is required to be printed and published in both languages is described as "Acts" and texts do not become "Acts" without enactment. Statutes can only be known by being printed and published in connection with their enactment so that Bills be transformed into Acts. Moreover, it would be strange to have a requirement, as in s. 133, that both English and French "shall be used in the ... Records and Journals" of the Houses (there were then two) of the Quebec Legislature and not to have this requirement extend to the enactment of legislation.

So, too, is there incompatibility when ss. 11 and 12 of the *Charter* would compel artificial persons to use French alone and make it the only official language of "procedural documents" in judicial or quasi-judicial proceedings, while section 133 gives persons involved in proceedings in the Courts of Quebec the option to use either French or English in any pleading or process. […]

[p. 1026-1027] What the *Jones* case decided was that Parliament could enlarge the protection afforded to the use of French and English in agencies and institutions and programmes falling within federal legislative authority. There was no suggestion that it could unilaterally contract the guarantees or requirements of s. 133. Yet it is contraction not enlargement that is the object and subject of Chapter III, Title I of the *Charter of the French language*. But s. 133 is an entrenched provision, not only forbidding modification by unilateral action of Parliament or of the Quebec Legislature but also providing a guarantee to members of Parliament or of the Quebec Legislature and to litigants in the Courts of Canada or of Quebec that they are entitled to use either French or English in parliamentary or legislative assembly debates or in pleading (including oral argument) in the Courts of Canada or of Quebec.

[p. 1027] Dealing now with the question whether "regulations" issued under the authority of acts of the Legislature of Quebec are "Acts" within the purview of s. 133, it is apparent that it would truncate the requirement of s. 133 if account were not taken of the growth of delegated legislation. This is a case where the greater must include the lesser. […]

[p. 1028] Even if this not be the view of the Quebec Legislature in enacting ss. 11, 12 and 13 above-mentioned, the reference in s. 133 to "any of the Courts of Quebec" ought to be considered broadly as including not only so-called s. 96 Courts but also Courts established by the Province and administered by provincially-appointed Judges. It is not a long distance from this latter class of tribunal to those which exercise judicial power, although they are not courts in the traditional sense. If they are statutory agencies which are adjudicative, applying legal principles to the assertion of claims under their constituent legislation, rather than settling issues on grounds of expediency or administrative policy, they are judicial bodies, however some of their procedures may differ not only from those of Courts but also from those of other adjudicative bodies. […]

[p. 1030] It follows that the guarantee in s. 133 of the use of either French or English "by any person or in any pleading or process in or issuing from ... all or any of the Courts of Quebec" applies to both ordinary Courts and other adjudicative tribunals. Hence, not only is the option to use either language given to any person involved in proceedings before the Courts of Quebec or its other adjudicative tribunals (and this covers both written and oral submissions) but documents emanating from such bodies or issued in their name or under their authority may be in either language, and this option extends to the issuing and publication of judgments or other orders.

Attorney General of Manitoba v. Forest, [1979] 2 S.C.R. 1032, 1979 CanLII 242 (SCC)

[pp. 1034-1035] THE COURT—For the detailed and extensive reasons written by Freedman C.J., concurred in by Monnin, Hall, Matas and O'Sullivan JJ.A. (1979 CanLII 2509 (MB CA), [1979] 4 W.W.R. 229) the Manitoba Court of Appeal granted to the respondent-plaintiff, Georges Forest, a declaration that *The Official Language Act* enacted by 1890 (Man.), c. 14, and now being R.S.M. 1970, c. O10, "is inoperative in so far as it abrogates rights, including the right to use the French language in the Courts of Manitoba, as conferred by Sec. 23 of *The Manitoba Act, 1870*, confirmed by the *British North America Act, 1871*". In the Court of Queen's Bench the plaintiff had been denied standing but, in this Court, the reversal of the trial judge on that point was not questioned. Thus the only issue is that which is set out in the constitutional question determined by order of the Chief Justice:

> Are the provisions of "*An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba*" enacted by S.M. 1890, c. 14 (now R.S.M. 1970, c. O10) or any of those provisions, *ultra vires* or inoperative in so far as they abrogate the provisions of s. 23 of the *Manitoba Act, 1870*, 33 Vict., c. 3 (Can.) validated by the *British North America Act, 1871*, 34-35 Vict., c. 28 (U.K.)?

The Attorney General of Canada and the Attorney General of New Brunswick have intervened in support of the respondent-plaintiff.

The *Official Language Act* adopted in 1890 by the Legislature of Manitoba provides:

> 1(1) Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the Legislative Assembly of Manitoba, and in any pleadings or process in or issuing from any court in the Province of Manitoba.
>
> (2) The Acts of the Legislature of Manitoba need be printed and published only in the English language.
>
> 2 This Act applies only so far as the Legislature has jurisdiction to enact.

[pp. 1035-1036] Section 23 of *The Manitoba Act, 1870* passed by the Parliament of Canada (33 Vict., c. 3 (Can.)) reads:

> 23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the *British North America Act, 1867*, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

The conflict between the two provisions is obvious and the only basis on which the Manitoba enactment was sought to be supported is the power conferred upon provincial legislatures by s. 92(1) of the *B.N.A. Act*, as follows:

> 92. In each Province the Legislature may exclusively make Laws in relation to matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—
>
> 1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

The scope of this provision with particular reference to language rights recently came for consideration before the Courts of Quebec. In the Superior Court, Deschênes C.J. came to the conclusion, as mentioned by Freedman C.J. herein, that language rights under s. 133 of the *B.N.A. Act* did not come within the ambit of the expression "the Constitution of the Province" in s. 92(1). This conclusion was

unanimously affirmed by the Quebec Court of Appeal and is upheld by judgment being delivered today on the appeal to this Court. In view of the close similarity noted by Freedman C.J. between s. 23 of The *Manitoba Act* and s. 133 in its provincial aspect, it is unnecessary to dwell upon the reasons for which the latter enactment is not to be considered as part of "the Constitution of the Province" within the meaning of s. 92(1). It will therefore be convenient to consider only whether anything in Manitoba's situation requires a different conclusion.

[pp. 1036-1037] The wording of s. 133 exhibits a first difference in referring to the Parliament of Canada and its Acts as well as to the provincial Legislature of Quebec and its Acts,

> 133. Either the English or the French Language may be used by any Person in the Debates of the Houses of Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

In the second place, the *B.N.A. Act* is divided into parts, Part V being entitled "Provincial Constitutions". Section 133 is not under that heading, but in Part IX "Miscellaneous Provisions". Substantial importance was attached to this point in the Quebec case, but it was not relied on by the Manitoba Court of Appeal.

[…]

[p. 1039] If *The Manitoba Act* is to be taken as the constitution of Manitoba for the purpose of its Legislature's amending power, where will one find the power to amend notwithstanding this statute? If reliance is put on the "notwithstanding" in the *B.N.A. Act* it must be observed that it refers to "this Act". Therefore in order to claim some authority under that provision Manitoba must take it as it is and accept that it refers only to such provision as would fall within its scope if included in the *B.N.A. Act*. For reasons already stated, which include those in the other case, the conclusion must be that this does not include language rights. If, on the other hand, T*he Manitoba Act* is taken by itself it must be observed that this is a federal statute which means that, unless otherwise provided, it is subject to amendment by the Parliament that enacted it and no other. It is, however, otherwise provided in s. 6 of the *British North America Act, 1871*. This section denies any amending power to the federal Parliament and the only amending power it allows to the Legislature of Manitoba is "to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly and to make laws respecting elections in the said Province".

[pp. 1039-1040] It is unnecessary to consider in the present case whether this enactment implies a restriction of the amending power derived from s. 92(1) by virtue of s. 2 of *The Manitoba Act*. It is enough to note that on any view it certainly cannot result in Manitoba's Legislature having towards s. 23 of *The Manitoba Act* an amending power which Quebec does not have towards s. 133. Section 2 of *The Manitoba Act* reads:

> 2. On, from and after the said day on which the Order of the Queen in Council shall take effect as aforesaid, the provisions of the *British North America Act, 1867*, shall, except those parts thereof which are in terms made, or, by reasonable intendment, may be held to be specially applicable to, or only to affect one or more, but not the whole of the Provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way, and to the like extent as they apply to the several Provinces of Canada, and as if the Province of Manitoba had been one of the Provinces originally united by the said Act.

The appeal must be dismissed with costs to the respondent.

Jones v. A.G. of New Brunswick, [1975] 2 S.C.R. 182, 1974 CanLII 164 (SCC)

[p. 192-3] I do not think that any assistance on the scope or effect of s. 133 can be obtained from such governmental documents as “A Canadian Charter of Human Rights” published in 1968, or “Federalism for the Future”, also published in 1968, or the Final Report of the Royal Commission on Bilingualism and Biculturalism Volume 1, “The Official Languages”, published in 1967. What those documents recommend, in relation to what I may term linguistic rights and going beyond the specifications of s. 133, is constitution entrenchment, but that is hardly a support for the contention that there can be no advance upon s. 133 without constitutional amendment. Certainly, what s. 133 itself gives may not be diminished by the Parliament of Canada, but if its provisions are respected there is nothing in it or in any other parts of the British North America Act (reserving for later consideration s. 91(1)) that precludes the conferring of additional rights or privileges or the imposing of additional obligations respecting the use of English and French, if done in relation to matters within the competence of the enacting Legislature.

[p. 193] The words of s. 133 themselves point to its limited concern with language rights; and it is, in my view, correctly described as giving a constitutionally based right to any person to use English or French in legislative debates in the federal and Quebec Houses and in any pleading or process in or issuing from any federally established Court or any Court of Quebec, and as imposing an obligation of the use of English and French in the records and journals of the federal and Quebec legislative Houses and in the printing and publication of federal and Quebec legislation. There is no warrant for reading this provision, so limited to the federal and Quebec legislative chambers and their legislation, and to federal and Quebec Courts, as being in effect a final and legislatively unalterable determination for Canada, for Quebec and for all other Provinces, of the limits of the privileged or obligatory use of English and French in public proceedings, in public institutions and in public communications. On its face, s. 133 provides special protection in the use of English and French; there is no other provision of the *British North America Act* referable to the Parliament of Canada (apart from s. 91(1)) which deals with language as a legislative matter or otherwise. I am unable to appreciate the submission that to extend by legislation the privileged or required public use of English and French would be violative of s. 133 when there has been no interference with the special protection which it prescribes. I refer in this respect particularly to s. 11(4) of the *Official Languages Act*, already quoted. [19] […] Section 91(1) aside, there are no express limitations on federal legislative authority to add to the range of privileged or obligatory use of English and French in institutions or activities that are subject to federal legislative control. Necessary implication of a limitation is likewise absent because there would be nothing inconsistent or incompatible with s. 133, as it relates to the Parliament of Canada and to federal Courts, if the position of the two languages was enhanced beyond their privileged and obligatory use under s. 133. It is one thing for Parliament to lessen the protection given by s. 133; that would require a constitutional amendment. It is a different thing to extend that protection beyond its present limits.

[...]

[p. 195] I am unable to agree that an implicit constitutional limitation must be read into the *British North America Act* as a deduction from the enactment of s. 133. This is the burden of the appellant’s submission and, in my opinion, it runs counter to the principle of exhaustiveness which the Courts have ascribed to the distribution of legislative power under the *British North America Act*.

That principle was stated by the late Mr. Justice Rand in *Murphy v. C.P.R.*, at p. 643, as follows:

> It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself.

Section 91(1) aside, there are no express limitations on federal legislative authority to add to the range of privileged or obligatory use of English and French in institutions or activities that are subject to federal legislative control. Necessary implication of a limitation is likewise absent because there would be nothing inconsistent or incompatible with s. 133, as it relates to the Parliament of Canada and to federal Courts, if the position of the two languages was enhanced beyond their privileged and obligatory use under s. 133.

It is one thing for Parliament to lessen the protection given by s. 133; that would require a constitutional amendment. It is a different thing to extend that protection beyond its present limits.

Miller and Kyling v. R., [1970] S.C.R. 214, 1969 CanLII 116 (SCC)

[p. 216] At the trial, counsel for the accused sought to use the French language in the examination of French-speaking witnesses. The judge refused to allow him to do so considering that the two accused were English-speaking, that they had elected to be tried by a jury made up entirely of jurors speaking that language, that such was effectively the actual composition of the jury and that, in addition, counsel for the accused, although French-speaking, was perfectly familiar with the English language.

There is nothing to indicate, nor has it been contended before us, that the request made by counsel for the accused was intended to obstruct the regular course of the proceedings. It should therefore be said that, in view of the provisions of s. 133 of the *British North America Act*, the refusal by the presiding judge to accede to the request is an error on a question of law. It may be added that, in answer to a question put on that point to counsel for the respondent at the outset of the hearing of the motion, the latter did not hesitate to concede that this was indeed an error.

Industrielle Alliance, Assurance et services financiers inc. v. Mazraani, 2017 FCA 80 (CanLII)

[8] It is trite law that English and French are the official languages of Canada and have equality of status and equal rights and privileges in courts established by Parliament, including the TCC [Tax Court of Canada]. Hence, any person who appears before or submits written pleadings to a federal court has the constitutional right to use the official language of his or her choice: see section 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. This constitutional right is also reflected and confirmed in sections 16 and 19 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

[9] The Supreme Court of Canada in *MacDonald v. City of Montreal*, 1986 CanLII 65 (SCC), [1986] 1 S.C.R. 460 at 483, 27 D.L.R. (4th) 321 recalled that the constitutional right to use the official language of one's choice in courts covered by section 133 of the *Constitution Act, 1867* applies broadly to "litigants, counsel, witnesses, judges and other judicial officers".

[10] Significantly, a person's ability to express him or herself in both official languages does not impact such person's constitutional right to choose either French or English in the context of court proceedings. One's ability to speak both official languages is "irrelevant". In the words of the Supreme Court of Canada in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 at paragraph 45 [*Beaulac*]:

> In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity. …

[11] The Supreme Court of Canada further observed:

> Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. [Emphasis added.]

Ford v. Quebec (Attorney General), 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712 at 748-749, 54 D.L.R. (4th) 577; cited in *Beaulac* at paras. 17, 34.

[…]

[22] In each instance, the Judge coaxed counsel and the witnesses to use English. In conducting the proceedings, the Judge favoured English over French in order to accommodate Mr. Mazraani's limited understanding of French. This resulted in a violation of counsel Turgeon and the witnesses' official language rights. The Judge exerted subtle pressure on counsel Turgeon and the witnesses to forego their right to speak in the official language of their choice, in this case French (Chiasson v. Chiasson, 222 N.B.R. (2d) 233 (C.A.); [1999] N.B.J. No. 621 (QL)). Mr. Mazraani contends that the witnesses and counsel Turgeon freely consented to speak in English and that Industrielle Alliance's reliance on language rights is merely strategic. The transcript of the proceedings simply does not support such a conclusion.

[…]

[26] In the end, the efforts of the Judge to be "pragmatic" in finding ways around adjourning and securing interpretation services resulted not only in the violation of the official language rights of counsel Turgeon and witnesses, but also the violation of Mr. Mazraani's official language rights. It simply was not open to the Judge to seek a shortcut around the official language rights of all those involved in the proceedings. The Judge's failure to exercise his duty to ensure that the official language rights at issue were protected not only resulted in their violation, but further resulted in delays that could have otherwise been avoided by an adjournment to secure proper interpretation services. Pragmatism does not trump the duty to respect the official language rights of all in the course of judicial proceedings.

Charlebois v. Mowat, 2001 NBCA 117 (CanLII)

[48] In this case, it is immediately apparent that the historical and legislative context of the enactment of subsection 18(2) of the *Charter* in 1982 is different from the context at the time of Confederation when section 133 of the *Constitution Act, 1867* was enacted. I therefore think that, in this case, subsection 18(2) should be interpreted according to the analysis made in *R. v. Big M Drug Mart Ltd.*, *supra*.

[…]

[90] In my view, the historical context in which section 133 was enacted in 1867 is fundamentally different from the context of 1982 when subsection 18(2) of the *Charter* was enacted. With respect to the historical context of 1867, it must be remembered that the ambit of section 133 was limited to federal institutions and the institutions of the province of Quebec. The purpose of section 133 was to impose minimum language guarantees and maintain the pre-Confederation status quo. It is "a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union". (See *MacDonald v. City of Montreal*, at page 496; *Blaikie No. 1*, at pages 1025-26; and *Jones v. Attorney General of New Brunswick*, at pages 192-93.) In *Manitoba Reference No. 2*, at page 222, the Supreme Court summarized the "constitutional minimum" of section 133 in these terms: "In so determining the scope of s. 23 [of the *Manitoba Act, 1870*], it is important to place the section within the proper historical context. It, like ss. 93 and 133 of the *Constitution Act, 1867*, is an embodiment of a political compromise. It is not a sweeping guarantee designed to achieve complete linguistic equality [...]."

[…]

[93] In light of the recent Supreme Court decisions already discussed concerning the larger objects of the *Charter* and the purposes of the provisions of subsection 16(2) and section 16.1, which have no equivalent in the *Constitution Act, 1867*, I believe that the historical and legislative context of the enactment of subsection 18(2) reflects a linguistic dynamic much more fertile in nature than the context which might have inspired the framers of section 133 at the time of Confederation. The principle of substantive equality of official languages and of the two official language communities entrenched in sections 16 and 16.1 and the corollary that language rights based thereon require government action for their implementation and therefore create obligations for the government has nothing to do with the minimum language guarantees provided for in section 133. Even if the right guaranteed under subsection 18(2) of the *Charter* results from a political compromise arrived at in 1982 between the elected representatives of this province, on behalf of the general public, the Supreme Court stated in *Beaulac* that

the existence of a political compromise is without consequence with regard to the scope of the resulting language rights. Moreover, as Wilson, J. stated in *Reference re Bill 30*, supra, at page 1176, it is open to the Court "to breathe life into a compromise that is clearly expressed". In my view, the interpretation of the expression "statutes of the legislature" in *Blaikie No. 2* is not determinative in this matter.

Noiseux v. Belval, 1999 CanLII 13667 (QC CA)

[23] In my view, section 841(3) of the [*Criminal*] *Code* does not conflict with section 133 of the *Constitution Act* since it imposes an obligation *on the state* to print bilingual forms while permitting individuals to choose either language when using them.

[24] It does not in any way diminish the right of any person to use either *English or French* in any process or pleading of any court in Canada or in Quebec.

[25] Moreover, the evident objective of section 841(3) is to facilitate the comprehension, through bilingual forms, of criminal proceedings by the persons concerned. There is no contradiction between this disposition and section 133 of the *Constitution Act, 1867*. Since section 133 provides that either French or English may be used in the proceedings, section 841(3) does not impose any restrictions on this constitutionally protected right.

[26] I agree with the Attorney General of Canada that this interpretation is supported by the legislative history of the provision, by its evident intent and by its context. It was adopted following the judgments of the Supreme Court of Canada relating to the interpretation of section 133 of the *Constitution Act, 1867*, article 23 of the *Manitoba Act, 1870* and section 19 of the *Charter*. Those judgments held that the Constitution established a minimum standard which could be supplemented or enlarged by the governments of Canada and of the provinces.

[...]

[30] *McDonald v. City of Montreal*, *supra*, as Justice Otis points out, held that s. 133 of the *Constitution Act, 1867*, does not create a constitutional right to be summoned before a Court of Quebec by a process issued in one's own language, be it English or French. Nor does that right exist in Manitoba or New Brunswick, which enjoy equivalent guarantees in virtue of corresponding constitutional provisions: *Bilodeau*, *supra*; *Société des Acadiens*, *supra*.

[31] But this hardly demonstrates, in my respectful view, that subs. 841(3) of the *Criminal Code* had as its purpose to require the state to provide *Criminal Code* forms in which the pre-printed portions are set out in one language only.

[33] The evident objective of that response was to supplement the guarantee enshrined in section 133 of the *Constitution Act, 1867* and the corresponding provisions applicable in Manitoba and New Brunswick.

[34] This was done by requiring the pre-printed portions of all Part XXVIII forms to be printed in both official languages for the benefit of the recipient of the "court process" while at the same time preserving the section 133 rights of the person originating that process. Subsection 841(3), as I explained earlier, permits the originator of the form to complete in his or her official language of choice the pre-printed part of the form that is, likewise, in his or her official language of choice.

Cross v. Teasdale, 1998 CanLII 13063 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

Section 133 of the *Constitution Act, 1867* has not been amended. It therefore continues to have full force and effect. As we have seen, the language rights that are guaranteed are those belonging to litigants, counsel, witnesses, judges and other officers of the court when they speak, not those of the parties and other individuals being spoken to.

In a criminal trial, an accused in attendance is always a spectator; he or she can choose whether to testify or not. As a spectator, the accused hears the witnesses, counsel and the judge speak. Under s. 133, each of them has the undisputed right to speak in English or French, just as the accused does if he or she decides to testify. According to the Supreme Court judgments cited above, s. 133 does not guarantee that the accused will understand the judge, counsel and the witnesses if they decide to speak in an official language that is not the accused's and that he or she does not understand.

[…]

I agree with the proposition that once the trial has started, the judge cannot, without violating s. 133, prevent a prosecutor who wishes to do so from speaking French, even if the English-speaking accused has already elected a trial by a judge and jury that, speak the language of the accused. With respect for the contrary opinion, I find however that the issue has not been settled. Indeed, I am of the opinion that the question of the language in which the prosecutor will be speaking must be raised at an early stage, that is, when choosing the prosecutor who will be conducting the proceedings.

[…]

When an order has been made pursuant to s. 530 [of the *Criminal Code*], a prosecutor whose mother tongue is different from the accused's can very well agree, as is common practice, to plead the case in the accused's language. If during the course of the trial it should happen that the prosecutor feels unable to properly discharge his or her mandate in a language other than his or her own and expresses the intention to speak English or French, as s. 133 permits, the judge certainly could not force the prosecutor to speak in the other official language. In such a case, the judge would have to suspend the hearing to allow the Attorney General to find a replacement prepared to carry on with the case in the accused's language. If that should prove impossible to arrange within a reasonable time, the judge presiding over a jury trial could declare a mistrial.

Section 530.1 [of the *Criminal Code*] does not apply to private prosecutors, which in my view and with respect for the contrary opinion suggests that in enacting s. 530.1, Parliament did not intend to reduce the rights granted by s. 133, but to require the Attorney General of a province to ensure that the prosecutor assigned to a case where an order has been made under s. 530 *Cr.C.* is able to speak the official language of the accused and agrees to do so.

Pilote v. Corporation de l'hôpital Bellechasse de Montréal, 1994 CanLII 6005 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[28] In short, from whatever angle s. 133 of the *Constitution Act, 1867* is analyzed, it seems to me that the case law very clearly states that this section gives the judge the constitutional right to choose to write his or her judgment in either English or French, whereas this same provision imposes no duty on the Crown to provide a certified translation.

[…]

[35] Finally, let us say in closing on this point that, as the Attorney General of Quebec submits, the Quebec government does indeed provide a service for translating English to French, and vice-versa, upon request by a party to the case. This is not a certified translation, nor is it an automated translation attached to the original. This service, however, is in my view sufficient to respond to every requirement under the *Charter of Rights and Freedoms*, even if we concluded that the *Charter* grants parties the right to demand such a translation, which I personally am not prepared to confirm.

R. v. Massia (C.A.), 1991 CanLII 7381 (ON CA)

As noted above, both the *Government Property Traffic Act* and the *Government Property Traffic Regulations* (the regulations) were enacted in both the English and French languages, and therefore, on their face, they comply with s. 133. However, it is now settled that there can be situations where legislation, which on its face complies with s. 133, can nevertheless violate the section.

[...]

[Section] 133 applies to the incorporated material if the incorporated material has no independent legal validity apart from the legislation adopting it. The second principle is that the essence and substance of the legislation, that is, the implementation of the legislative objective, must be enacted in both languages.

[…]

Because the *Ontario Highway Traffic Act* had legal validity apart from s. 6 of the regulations, it cannot be said that the incorporated legislation had "in itself, no force". I am of the opinion, therefore, that referral to the unilingual *Ontario Highway Traffic Act* in the regulations does not violate s. 133.

[...]

In terrorem arguments have no place in the interpretation of the Constitution. Nevertheless, I am unable to close my eyes to the fact that holding the incorporation by the federal government of valid provincial laws to be offensive to s. 133 would cause difficulty and uncertainty in the law in many fields from one end of the country to the other. Canada is not an easy country to govern, and it is appropriate to interpret the Constitution, where it can properly be done, in a way which does not make it more difficult to govern than need be.

A.-G. Quebec v. Collier, 1985 CanLII 3056 (QC CA)

[32] The Attorney-General claims that the legislative technique used [incorporation by reference] in the two disputed Bills is valid. I see no objection to this statement provided, however, that it does not have the effect, voluntary or involuntary, of rendering inoperative the provisions of s. 133 of the *Constitution Act, 1867*. Otherwise this technique would become a simplistic way to avoid the linguistic requirements of the Constitution by rendering s. 133 of no effect. It does not much matter that the Legislature has occasionally used this method. That would not justify subsequent legislation which is incompatible with the provisions of s. 133. And, if the constitutionality of legislation enacted in this way is in dispute, it cannot be disputed that the principles of s. 133 must be applied without regard to the practice which the National Assembly might occasionally have followed up to that time.

[33] What about the application of s. 133 when the contents of a Bill are wholly or partially contained in a so-called sessional paper tabled before the National Assembly along with the Bill which refers to it? I think, as does Mr. Justice Deschênes, that the solution depends upon the relationship between the bill in dispute and the sessional paper to which it refers.

[34] In this case, the sessional papers to which *Bills 70* [*Act respecting remuneration in the public sector, 1982 (Que.), c. 35*] *and 105* [*Act respecting the conditions of employment in the public sector, 1982 (Que.), c. 45*] refer include all measures related to salaries and all working conditions which the government has prepared and which it proposes with a view to their enactment by the National Assembly. Without the papers we would not even approximately know the contents of *Bills 70* and *105*. […]

[35] The two Acts themselves contain nothing or almost nothing which could, in itself, be considered as an implemention of its objectives. Therefore, everything is contained in the sessional papers and nothing in the actual provisions of the Act, aside from the reference to the sessional papers themselves. The papers are, therefore, in my view, the very essence and substance of *Bills 70* and *105*, which, without the papers, have no *raison d'être*. […]

[38] I must, therefore, conclude that the sessional papers should have been tabled before the National Assembly in both languages so that *Bill 70 and Bill 105* could be enacted in both languages as required by the Canadian Constitution.

N.B. These reasons have been adopted on appeal by the Supreme Court of Canada: Quebec (Attorney General) v. Brunet; Quebec (Attorney General) v. Albert; Quebec (Attorney General) v. Collier, [1990] 1 S.C.R. 260, 1990 CanLII 126 (SCC).

Motard v. Canada (Procureure générale), 2016 QCCS 588 (CanLII)

[156] The *2013 Act* [*Succession to the Throne Act, 2013*] was enacted simultaneously in French and English, pursuant to the constitutional requirements under section 133 of the *1867 Act* and subsection 18(1) of the *1982 Act*.

[157] In addition, when the Canadian bill was introduced, a French version of the bill of the Parliament of the United Kingdom was created by the Minister of Justice Canada for informational purposes and entitled “Un projet de loi visant à établir que l’ordre de succession à la Couronne est déterminé indépendamment du sexe et prévoyant des mesures concernant les mariages royaux et des mesures connexes” was presented by the Minister of Justice before the House of Commons.

[158] Finally, the *2013 Act* did not give force of law to the British Act [*Succession to the Crown Act 2013 (c. 20)*], or extend its application to Canada, either directly or through incorporation by reference.

[159] There is therefore no violation of section 133 of the *1867 Act*.

Contenants industriels Ltée v. Québec (Commission des lésions professionnelles), [2002] J.Q. no 432 (QC CS) [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[41] As mentioned above, the main criticism of the Commissioner of the CLP [Commission des lésions professionnelles] is that there was a violation of the charters, constitutional rights, fundamental rights and the rules of natural justice when two Francophone witnesses testified in English.

[…]

[54] Given that Mr. Biggart represented himself and knew little if any French, all the parties agreed to proceed in English. Even though for efficiency’s sake, the parties, the Commissioner and counsel, without raising the slightest reservation or objection, agreed to proceed in this manner without pointing out the difficulties that such an approach could present, they cannot subsequently, after agreeing to do so, raise this ground to have the decision declared null.

[55] According to the respondent, the testimony given in English did not have the same spontaneity, and the witnesses were not able to give the same nuances that they could have if they had given their testimony in French. This is very possible, but this alone cannot justify having the Court intervene to annul the Commissioner’s decision on the ground that there was a violation of the witnesses’ fundamental rights. Indeed, if a witness freely agrees to testify in a language other than his or her mother tongue without raising the slightest objection in this regard and can without any problem use his or her mother tongue should he or she run into difficulties, then that witness cannot later argue that his or her testimony is incomplete, less precise or tainted with irregularities such that an application for review would be justified on the basis that his or her right to use the language of his or her choice was infringed.

[56] Beyond the overarching legal principles, there are the facts specific to each case, and the Court was unable to find that the Commissioner committed even the most minor abuse or violation of the rules of natural justice or of the right of a witness to address the Court in the language of his or her choice.

[57] It often happens, for multiple reasons, that a lawyer, party or witness will choose to address the Court in a language other than his or her mother tongue.

[58] Unless the reason for this choice was the tribunal chairperson's refusal to recognize the right of these persons to speak in their mother tongue, it cannot later be claimed that the process is invalid by arguing that the person concerned was uncomfortable and that none of the intended nuances could be made.

[59] The Commissioner's intervention in this case in the circumstances described above cannot, as the respondent argues, constitute an abuse of right.

[60] The Court therefore rejects the argument that the Commissioner exceeded his jurisdiction when he asked the witnesses if they saw any inconvenience in continuing in English while confirming that they could, if necessary, answer in French to provide any nuances they deemed appropriate in the circumstances, without the slightest objection by the respondent or her counsel.

R. v. Cotton, 1991 CarswellQue 1235, J.E. 91-735, EYB 1991-75882 (QC CS) [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[15] It therefore appears from the foregoing that processes issuing from Quebec courts can be written in French or English, pursuant to the rights guaranteed by s. 133 of the *British North America Act*. An informant who, under s. 504 of the *Criminal Code*, appears before a justice to file an information can choose to use English or French. This right is guaranteed by the Canadian Constitution.

[16] Here, the debate centres on the validity of the information. The informant chose to express himself in French, in accordance with his right under s. 133, *supra*.

[17] The constitutional validity of s. 841(3) of the *Criminal Code* was not raised in this case. This provision is therefore presumed to be valid.

[18] Parliament does not have the power to amend s. 133, at least not with regard to the language that may be used in court in Quebec. It must be presumed that in enacting s. 841(3), Parliament did not change the scope of the rights guaranteed by s. 133.

[19] In light of the recognized rules of interpretation, it is therefore important to give s. 841(3) an interpretation whose scope is consistent with the rights guaranteed by s. 133. In fact, if the legislative text lends itself to two interpretations, we must choose the interpretation that is in harmony with the Constitution.

[…]

[28] Requiring the information to be bilingual would be contrary to s. 133 of the *British North America Act*. Subsection 841(3) of the *Criminal Code* cannot be interpreted as having such a scope; if it did, this provision would violate the rights guaranteed by s. 133.

Alcan Aluminium Limitée v. R. (June 15 1995), Chicoutimi 150-27-001626-908 (QC CQ) [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[p. 32] The Court concedes that the 1921 proclamation was published in French and English; accordingly, s. 4 of the cited act [*An Act Respecting the Office of Queen's Printer and the Public Printing*, S.C. 1869, c. 7] was respected, as was this provision of s. 133 specifically dealing with the publication of the statutes of the Parliament of Canada and the Quebec legislature.

[pp. 32-33] It is true that publishing the Canada Gazette in both languages creates a presumption that the original of the instrument published therein was also drafted in both languages. However, this is not an absolute presumption.

[p. 33] To borrow phrases found in another field of law, this presumption is "*juris tantum*", not "juris et de jure".

[p. 33] Despite the publication and the presumption arising from it, one fact is indisputable and entirely proven: this instrument was enacted in English only.

[p. 34] In *Reference re Manitoba Language Rights*, the Supreme Court clearly stated that such is the sanction that results from failing to enact statutes and regulations in both official languages. This failure leads to "inconsistency and thus invalidity".

Walsh v. City of Montreal, 1980 CarswellQue 330, [1980] C.S. 1054, 55 C.C.C. (2d) 299, J.E. 80-879 (QC SC) [hyperlink not available]

[3] […] It is clear that the Municipal Court of Montreal is a court of Quebec within the meaning of the section [133]. It is equally clear that the summons addressed to Mr. Walsh is a process issuing from such court. Mr. Walsh claims that being English-speaking he has the right to receive process in English or, at the very least, in both English and French.

[4] The argument is untenable. Section 133 does not want for clarity. In certain cases (the Records and Journals of Parliament and the Legislature, and the Statutes passed by those bodies), the use of both English and French is obligatory. The word used is "shall". In other cases (Debates in Parliament and the Legislature, and proceedings in Federal and Quebec courts), there is a choice of either one or the other of the two languages. The word used is "may".

[5] If there is a right to use either language, there can be no obligation to use the other. Still less can there be an obligation to use both.

[6] It was suggested in argument that the right to use either language in pleading or process must apply as much to the person receiving, the reader or listener, as to the person transmitting, the writer, speaker or issuer. Such an interpretation is not possible for it makes a nonsense of the words used. Obviously if the recipient of a pleading or process has the right to choose which of the two languages it shall be in, the issuer loses his right to make use of either language. The hardship that would be worked on pleaders in civil cases is obvious, for every pleading would have to be made in both languages in order to satisfy the rights of the other party. Nor can I see any ground for distinction between a case such as this, where one of the parties is a public body (but nonetheless a "person" within the meaning of the Section), and cases where both parties are private.

[7] In the case of parliamentary debates, where the essential words of the text are identical ("either... may be used by any Person), it is clear that the rights preserved are those of the speaker only. The situation cannot be different for court proceedings.

Vaskaganish Band v. Blackned, 1986 CarswellQue 559, [1986] 3 C.N.L.R. 168 (QC PC) [hyperlink not available]

[47] Under these circumstances, it would seem to me that the band council constitutes an autonomous level of government when it exercises the powers conferred upon it by the *Cree-Naskapi (of Quebec) Act*. As long as it remains within the powers so conferred, the band council represents a level of government independent from the Canadian Parliament and the Quebec legislature. Its members are the elected representatives of the community who, in giving them their mandate, invest them with the powers granted to the band under the *Treaty Convention* and especially the *Cree-Naskapi (of Quebec) Act*. It is to the band members that the council is accountable for its administration and the exercise of its powers, and not to Parliament, of which it is not an agent.

[48] As a result, based on the principles set out in the *Blaikie* decisions, it must be concluded that s.133 of the *B.N.A. Act* [*Constitution Act, 1867*] does not apply to the "acts" of the Waskaganish Band Council and that s.32 of the *Cree-Naskapi (of Quebec) Act* is valid.

[49] For the same reasons, I am of the opinion that s.18(1) of the *Canadian Charter of Rights and Freedoms* does not lead to a different conclusion. Indeed, s.18(1) does not appear to me to deserve a greater extension than s.133 of the *B.N.A. Act* [*Constitution Act, 1867*], as interpreted in the *Blaikie* decisions.

Kennedy et Danesco Inc., 1999 CanLII 24638 (QC CLP) [judgment available in French only]

[OUR TRANSLATION]

Section 9 of the *Charter of the French Language* is consistent with the principle derived from section 133 of the *Constitution Act, 1867*:

> 133. . . . [E]ither of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The employee's constitutionally guaranteed language right involves having the right to receive a CSST decision written in English and the right to express oneself in English before the Commission des lésions professionnelles and to receive a decision translated into English. In the present case, these rights were respected.

The language rights granted by the charters do not have the scope ascribed to them by the employee, since they are applicable only in a judicial or quasi-judicial proceeding and do not extend to all written documentation that may be produced at the hearing.

These are the limits to the employee's constitutionally guaranteed language right. Moreover, the position of the Supreme Court, which has been asked on many occasions to rule on language rights in judicial or quasi-judicial proceedings, is that the corollary to the right of a party or the court to proceed in one of the two official languages of Canada or the other, that is, the right to be understood and to understand what is being said, is not a constitutional right but a right deriving from the rules of natural justice.

SEE ALSO:

Re Bachmann and St. James-Assiniboia School, 1984 CanLII 3036 (MB CA)

Ferncraft Leather inc. v. Roll, Harris, Hersh & Dainow, [1979] J.Q. no 268 (QC CA) [hyperlink not available] [judgment available in French only]

Deschambault v. R., 2010 QCCS 6851 (CanLII) [judgment available in French only]

Lavigne v. Quebec (Attorney General), 2000 CanLII 30033 (QC CS) [judgment available in French only]

Ville d'Outremont v. Habitations Mont-Pinacle Ltée (September 12, 2001), Montréal No. 001 1000-14751, juge Raiche [hyperlink not available]

Morand et al. v. P.G. du Québec (August 19, 1991), Montréal 500-05-003482-872 (QC CS) [hyperlink not available] [judgment available in French only]

Syndicat professionnel des infirmières et infirmiers de Chicoutimi v. Hôpital de Chicoutimi inc., [1989] J.Q. no 2409 (QC CS) [hyperlink not available] [judgment available in French only]

Développement des ressources humaines Canada v. Société canadienne des postes, 2006 QCCQ 16815 (CanLII) [judgment available in French only]

R. v. May, 2008 ABPC 59 (CanLII)

Allen Entrepreneur général inc. et Couturier, 2017 QCTAT 2949 (CanLII) [judgment available in French only]

Other Constitutional Laws

Rupert's Land and North-Western Territory Order (1870) U.K. (Reprinted in R.S.C. 1985, App. II. No. 9)

It is hereby Ordered and declared by Her Majesty, by and with the advice of the Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Acts of Parliament, that from and after the fifteenth day of July, one thousand eight hundred and seventy, the said North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first hereinbefore recited Address, and that the Parliament of Canada shall from the day aforesaid have full power and authority to legislate for the future welfare and good government of the said Territory. And it is further ordered that, without prejudice to any obligations arising from the aforesaid approved Report, Rupert's Land shall from and after the said date be admitted into and become part of the Dominion of Canada upon the following terms and conditions, being the terms and conditions still remaining to be performed of those embodied in the said second address of the Parliament of Canada, and approved of by Her Majesty as aforesaid: --

[…]

15. The Governor in Council is authorized and empowered to arrange any details that may be necessary to carry out the above terms and conditions.

[...]

Schedule A

Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada.

[...]

That in the event of your Majesty's Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada will be ready to provide that the legal rights of any corporation, company or individual within the same shall be respected, and placed under the protection of Courts of competent jurisdiction.

[LAST UPDATE: AUGUST 2017]

ANNOTATIONS

Caron v. Alberta, [2015] 3 S.C.R. 511, 2015 SCC 56 (CanLII)

[1] These appeals sit at a contentious crossroads in Canadian constitutional law, the intersection of minority language rights and provincial legislative powers. The province of Alberta's *Languages Act*, R.S.A. 2000, c. L-6, provides that laws may be enacted in English only. The appellants claim that this is unconstitutional. While they take no issue with the general rule that the language of provincial legislation is a matter for the Province to decide, they say that an exception to this general rule applies here: there is a constitutional right, from which the Province may not derogate, to have Alberta laws enacted in both English and French. We will refer to this as a right to legislative bilingualism. The Province maintains that there is no such right.

[2] The appellants' arguments take us back to the period leading up to 1870 when the vast western territory under the control of the Hudson's Bay Company ("HBC") became part of Canada. The terms of this Canadian expansion were largely the result of negotiations and agreement between Canadian officials and representatives of the territories. The result was that the new province of Manitoba was added by the *Manitoba Act, 1870*, S.C. 1870, c. 3. Further, the remainder of what had been the North-Western Territory and Rupert's Land — a vast land mass including most of what is now Alberta, Saskatchewan, Nunavut, the Yukon, the Northwest Territories, and parts of Ontario and Quebec — was annexed as a new Canadian territory under federal administration by the 1870 *Rupert's Land and North-Western Territory Order* (U.K.) (reprinted in R.S.C. 1985, App. II, No. 9) (the "*1870 Order*"). The *Manitoba Act, 1870* expressly provided for legislative bilingualism. The *1870 Order* did not.

[3] The appellants contend, however, that legislative bilingualism was in fact guaranteed for both areas and therefore extends to the modern province of Alberta, which was created out of the new territory. Their argument is intricate and has changed over time, but rests on one key proposition: an assurance given by Parliament in 1867 (the "*1867 Address*") that it would respect the "legal rights of any corporation, company, or individual" in the western territories must be understood as a promise of legislative bilingualism. And that promise is an entrenched constitutional right because the *1867 Address* became Schedule A to the *1870 Order* which created the new western Canadian territory and which is part of the Constitution of Canada by virtue of s. 52(2)(b) and the Schedule to the *Constitution Act, 1982*.

[4] The appellants' position, however, is inconsistent with the text, context, and purpose of the documents on which they rely and must be rejected. The words "legal rights" or "*droits aquis*" / "*droits légaux*", read in their full context and in light of their purpose, simply cannot bear the weight the appellants seek to attach to them. Specifically:

(i) Never in Canada's constitutional history have the words "legal rights" been taken to confer linguistic rights;

(ii) Legislative bilingualism is expressly provided for in the *Manitoba Act, 1870* but is not mentioned in either the *1867 Address* or the *1870 Order*, the documents upon which the appellants rely. It is inconceivable that such an important right, if it were granted, would not have been granted in explicit language as it was in the Canadian Constitution and in the *Manitoba Act, 1870*, which was enacted at the same time as the *1870 Order* was made;

(iii) The contemporary discussions show that neither Canada nor the representatives of the territories ever considered that the promise to respect "legal rights" in the *1867 Address* referred to linguistic rights;

(iv) The contemporary evidence also shows that the territorial representatives themselves considered that their linguistic rights had been assured through the *Manitoba Act, 1870*, not the *1867 Address* or the *1870 Order*;

[...]

[14] In December 1867, the Parliament of Canada delivered an address to the Queen asking the Imperial Parliament to "unite Rupert's Land and the North-Western Territory with this Dominion" and to grant Canada authority to legislate in respect of the territories (*1867 Address*). As part of the address, Canada promised that, in the event of a transfer, Canada "will be ready to provide that the legal rights of any corporation, company, or individual within the same shall be respected". The appellants attach great weight to the undertaking by Canada in this *1867 Address* to respect the "legal rights" of those in the territories, submitting that when read in their full context, these words gave assurance that there would be legislative bilingualism in the territories and hence in what eventually became the province of Alberta.

[15] Although the English text of the *1867 Address* remains unchanged, the French text has evolved over time. In the initial version published in the *Journaux de la Chambre des communes de la Puissance du Canada*, the phrase "legal rights" is translated as "*droits acquis*" (vol. I, 1st Sess., 1st Parl., December 12, 1867). But in the text of the *1867 Address* that was eventually annexed as a schedule to the *1870 Order*, the phrase used is "*droits légaux*". We also note that the French constitutional drafting committee later recommended a third version of the *1867 Address*, which simply used the word "*droits*". However, Parliament did not adopt this recommendation. In any event, our analysis does not depend upon which version of the French text is used. Whether the French version reads "*droits acquis*" or "*droits légaux*", our conclusion remains the same.

[...]

[24] As agreed, Parliament passed the *Manitoba Act, 1870* in May 1870, which created the province of Manitoba out of part of the territories; this included the Red River Settlement within its boundaries. In June 1870, the Queen in Council issued the *1870 Order*, which ordered the admission of Rupert's Land and the North-Western Territory into Canada as a territory on the terms and conditions set forth in the addresses made by Canada. The *1867 Address* and the *1869 Address* were attached as schedules to the *1870 Order*. The *1870 Order*, with its schedules, was subsequently included in the schedule to the *Constitution Act, 1982*.

[…]

[39] For many reasons, we reject the appellants' submission that the guarantee of legal rights in the *1867 Address* created a constitutional right to legislative bilingualism.

(1) Never in Canada's Constitutional History Have the Words "Legal Rights" Been Understood to Confer Linguistic Rights — Contemporaneous Guarantees of Language Rights Were Explicit and Clear

[40] As our brief historical overview shows, linguistic rights have always been dealt with expressly from the beginning of our constitutional history. Language rights were dealt with explicitly in s. 133 of the *Constitution Act, 1867* and in the *Manitoba Act, 1870* in very similar and very clear terms. The total absence of similar wording in the contemporaneous *1870 Order* counts heavily against the appellants' contention that the terms "legal rights" or "*droits acquis*" / "*droits légaux*" in the *1867 Address* (attached to that order) should be understood to include language rights.

[41] The year 1867 saw both the Confederation of Canada and the adoption by Parliament of the *1867 Address*. As our colleagues note, the negotiations surrounding Confederation turned in no small part on the issue of language rights. When these rights were addressed in the *Constitution Act, 1867*, they were addressed explicitly, not by means of implied inclusion in a general term such as "legal rights".

[42] Subsequently, the *Manitoba Act, 1870* and the *1870 Order* formed a comprehensive political arrangement regarding annexation. Section 23 of the *Manitoba Act, 1870* expressly provided for legislative bilingualism in terms very similar to those found in s. 133 of the *Constitution Act, 1867*:

> 23. [English and French languages to be used] Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall

be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the *Constitution Act, 1867*, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

[43] The *Constitution Act, 1871* (U.K.), 34 & 35 Vict., c. 28, an Imperial statute, confirmed the *Manitoba Act, 1870* and provided that the Canadian Parliament could not amend it: s. 6. In contrast, there is no similar express reference to legislative bilingualism in the *1870 Order* or the *1867 Address* annexed to it.

[...]

[46] The relevant time period of these provisions — 1867 to 1870 — coincides with the events and instruments on which the appellants rely. Given this contemporaneity, the express and mandatory language respecting legislative bilingualism used by the Imperial Parliament in s. 133 in the *Constitution Act, 1867* and by the Parliament of Canada in the *Manitoba Act, 1870* stands in marked contrast to the complex web of instruments, vague phrases, political pronouncements and historical context on which the appellants' claims depend.

[47] Had the intent been to accord constitutional protection to language rights in the annexed territories outside Manitoba, wording similar to s. 23 of the *Manitoba Act, 1870* would have been used in the *1870 Order*. But there is no similarity between, on the one hand, the specific guarantees of language rights in s. 133 and s. 23 and, on the other, the general reference to "legal rights" or "*droits acquis"* / "*droits légaux*" found in the schedule to the *1870 Order*.

[48] In sum, contemporaneous guarantees of language rights were explicit and clear: legislative bilingualism was provided for expressly in the *Constitution Act, 1867* and the *Manitoba Act, 1870*. And, as we shall see, the subject of legislative bilingualism was addressed — explicitly — in the amendments to *The North-West Territories Act* in 1877 and 1891 (*The North-West Territories Act, 1877*, S.C. 1877, c. 7; *An Act to amend the Acts respecting the North-West Territories*, S.C. 1891, c. 22). Never in Canada's constitutional history have the words "legal rights" been understood to confer linguistic rights. These facts considerably undermine the appellants' position.

[49] But it is not just the documents themselves that belie the appellants' claim. The context surrounding the creation of these documents further illuminates the point that "legal rights" are and always have been distinct from language rights. Let us turn to that context.

(2) The Representatives of the Territories Never Considered That the Promise to Respect "Legal Rights" Referred to Linguistic Rights

[50] The political leaders in the territories treated language-related demands as distinct from the protection of other, more general or proprietary, rights.

[51] For example, the second List of Rights produced in February 1870 included specific language claims at arts. 12 and 13:

12. That the English and French languages be common in the Legislature and Courts, and that all public documents and Acts of the Legislature be published in both languages.

13. That the Judge of the Supreme Court speak the French and English languages.

By contrast, art. 16 in the same List of Rights contained an independent claim related to other, more general rights:

16. That all properties, rights and privileges, as hitherto enjoyed by us, be respected . . . .

The words “rights and privileges” are similar to those used in the *1867 Address* (and the *1869 Proclamation*).

[52] In short, the Lists of Rights demonstrate that political leaders in the territories themselves expressly provided for language rights when they were meant to be protected and those rights were differentiated from other, more general, rights.

[…]

[55] The Minister’s understanding of “legal rights” was shared by other members of Parliament: see e.g. *Debates*, December 4, 5, 6, 9 and 11, 1867, at pp. 181, 183, 194-96, 200, 203, 205, 208, 222-25, 244 and 254. One Member of Parliament stated that the HBC had “no legal right” in the sense that it had no “claim to the territory” (December 4, 1867, at p. 183). Similarly, while referring to the “rights” that might be claimed by existing corporations, Prime Minister John A. Macdonald gave assurance that the promises in the *1867 Address* “would forbid the suspicion that any confiscation was mediated” (December 6, 1867, at p. 200). Clearly, his focus was on rights that were capable of confiscation. Language rights, by their very nature, are not.

[56] Of course, this is not to suggest that the intentions of Parliament occupy a position of privilege over those of the territorial inhabitants negotiating three years later in 1870. On the contrary, the understanding and intention of the representatives and negotiators also informs the context of the negotiations in 1870. However, there is no evidence that they used the words “legal rights” from the *1867 Address* in the broad manner suggested by the appellants.

(4) Contemporary Evidence Shows That the Parties Thought That Linguistic Rights Were Addressed in the *Manitoba Act, 1870* But Not in the *1870 Order*

[…]

[58] While there can be no debate that there was a political compromise or that constitutional provisions must be interpreted purposively, we cannot accept the appellants’ conclusion. The end result of the negotiations regarding legislative bilingualism was the enactment of the *Manitoba Act, 1870*. Conversely, it was never the objective of the *1870 Order* to dictate that French and English must be used by the legislative body governing the newly established North-Western Territory.

[...]

[60] However, there is no doubt the delegates sought to entrench bilingual rights, just as there is no doubt they sought for the territories to enter Canada as a province. That being said, the contrast between the two contemporaneous documents in relation to legislative bilingualism could not be more stark. As discussed above, there is express provision in the *Manitoba Act, 1870* for legislative bilingualism in terms that were very similar to those used in s. 133 of the *Constitution Act, 1867*. However, in the *1870 Order*, there is no express reference — none — to legislative bilingualism. This strongly suggests that while legislative bilingualism was successfully negotiated and established for the new province of Manitoba (per s. 23 of the *Manitoba Act, 1870*), there was no similar agreement or provision for legislative bilingualism in the newly annexed territories. It is noteworthy that the major population centre of the Red River Settlement became part of the province of Manitoba, while the sparsely populated areas of Rupert’s Land and the North-Western Territory became a federally administered territory.

[...]

[62] The purpose of the *1870 Order* was simply to effect the transfer of Rupert’s Land and the North-Western Territory to Canada. To the extent that an historic compromise was reached to entrench legislative bilingualism as part of the annexation of Rupert’s Land and the North-Western Territory, this took the form of s. 23 of the *Manitoba Act, 1870*. As this Court explained in *Mercure*:

> After some tense confrontations, in which demands were made that English and French be used in the legislature and that judges speak both languages, the Canadian government acceded to the demands of the people of the Territories. To that end, Canada enacted the *Manitoba Act, 1870*, S.C. 1870, c. 3, which created the province of Manitoba out of the Red River settlement and surrounding lands, and by s. 23, provided certain guarantees regarding the use of the English and French languages in the Manitoba Legislature and in its courts. [p. 249]

[…]

[70] The fact is that by accepting the creation of the province of Manitoba plus the North-Western Territory, the representatives and negotiators *did* make sacrifices with respect to the outlying regions. Far from being implausible, this reflects the very essence of negotiations: making compromises to reach an agreement. This is especially so in light of the fact that the representatives framed the demand as follows: "That the English and French languages be common in the Legislature . . . ." Like many other demands in the Lists of Rights, this was tied to the very first demand in the third List of Rights — namely, the demand for entry as a province, with the creation of a provincial legislature for the whole annexed territories. It thus follows that the agreement regarding bilingualism was entrenched in the *Manitoba Act, 1870*, and not elsewhere.

(5) The *1867 Address* Does Not Embody the Compromise Reached in 1870

[71] The appellants' assertion that the *1870 Order* embodies a wide-ranging historic compromise with regard to legislative bilingualism is further undermined by a chronological obstacle. The words "legal rights" or "*droits acquis*" / "*droits légaux*" relied upon by the appellants are found in the *1867 Address*, incorporated as a schedule to the *1870 Order*. It would be incongruous for an 1867 document to embody a compromise reached only three years later in 1870. Rather, this tends to confirm that the end result of the negotiations was the *Manitoba Act, 1870* — a bill adopted at the *culmination* of the negotiations.

[...]

[73] On the contrary, it is much more plausible that the Imperial government believed that the *Manitoba Act, 1870* was the end result of the compromise. This remains the case today. Ultimately, there is no basis to interpret the *1867 Address* in light of an historic compromise reached in 1870.

[...]

[84] When, in *Mercure*, La Forest J. referred to the principle that statutes are not to be read as interfering with "vested rights/*droits acquis*" unless that intention is declared expressly or by necessary implication, he was referring to rights that had already been explicitly granted, such as the language rights expressly provided for in s. 110 of *The North-West Territories Act*: pp. 265-66. This is very different from the use of the words "legal rights" or "*droits acquis*" / "*droits légaux*" in the *1870 Order*, and does not assist the appellants in demonstrating that language rights are subsumed under the term "*droits acquis*" / "*droits légaux*".

[...]

[91] Ultimately, the events of this period do not assist the appellants in demonstrating that the *1870 Order* contained a guarantee of legislative bilingualism for the North-Western Territory. We are therefore of the view that the provincial court judge erred in concluding that the bilingual joint administration in the years after 1870 demonstrates the existence of an entrenched right to legislative bilingualism (paras. 323 and 351-54). The legal instruments, properly interpreted, not only provide no support for this view but in fact

[…]

[101] At their most basic, the essence of these lines of reasoning is as follows: the inhabitants of the territories demanded legislative bilingualism in the negotiations with Canada, and we must hold that Canada acceded to this demand and granted a constitutionally protected right throughout the territories, either because Parliament assured the inhabitants in the *1867 Address* that their "legal rights" would be respected and this was attached to the *1870 Order*, or because of the assurances given by the Governor General in 1869.

[…]

[103] However, these arguments cannot be sustained in the face of the historical record and the underlying principles of constitutional interpretation. Absent some entrenched guarantee, a province has the authority to decide the language or languages to be used in its legislative process. Clearly, a province may choose to enact its laws and regulations in French and English. But we cannot simply infer a guarantee of legislative bilingualism that would override this exclusive provincial jurisdiction absent clear textual and contextual evidence to support an entrenched right. It has never been the case in our constitutional history that a right to legislative bilingualism was constitutionalized by inference through the vehicle of the words "legal rights". The words in the *1867 Address* cannot support a constitutional guarantee of legislative bilingualism in the province of Alberta. Parliament knew how to entrench language rights and did so in the *Manitoba Act, 1870* but not in the *1867 Address*.

Manitoba Act, 1870, c. 3 (Reprinted in R.S.C. 1985, App. II, No. 8)

23. English and French Languages to be Used

23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the *British North America Act, 1867*, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

[LAST UPDATE: AUGUST 2017]

ANNOTATIONS

Caron v. Alberta, [2015] 3 S.C.R. 511, 2015 SCC 56 (CanLII)

[1] These appeals sit at a contentious crossroads in Canadian constitutional law, the intersection of minority language rights and provincial legislative powers. The province of Alberta's *Languages Act*, R.S.A. 2000, c. L-6, provides that laws may be enacted in English only. The appellants claim that this is unconstitutional. While they take no issue with the general rule that the language of provincial legislation is a matter for the Province to decide, they say that an exception to this general rule applies here: there is a constitutional right, from which the Province may not derogate, to have Alberta laws enacted in both English and French. We will refer to this as a right to legislative bilingualism. The Province maintains that there is no such right.

[2] The appellants' arguments take us back to the period leading up to 1870 when the vast western territory under the control of the Hudson's Bay Company ("HBC") became part of Canada. The terms of this Canadian expansion were largely the result of negotiations and agreement between Canadian officials and representatives of the territories. The result was that the new province of Manitoba was added by the *Manitoba Act, 1870*, S.C. 1870, c. 3. Further, the remainder of what had been the North-

Western Territory and Rupert's Land — a vast land mass including most of what is now Alberta, Saskatchewan, Nunavut, the Yukon, the Northwest Territories, and parts of Ontario and Quebec — was annexed as a new Canadian territory under federal administration by the 1870 *Rupert's Land and North-Western Territory Order* (U.K.) (reprinted in R.S.C. 1985, App. II, No. 9) (the "*1870 Order*"). The *Manitoba Act, 1870* expressly provided for legislative bilingualism. The *1870 Order* did not.

[3] The appellants contend, however, that legislative bilingualism was in fact guaranteed for both areas and therefore extends to the modern province of Alberta, which was created out of the new territory. Their argument is intricate and has changed over time, but rests on one key proposition: an assurance given by Parliament in 1867 (the "*1867 Address*") that it would respect the "legal rights of any corporation, company, or individual" in the western territories must be understood as a promise of legislative bilingualism. And that promise is an entrenched constitutional right because the *1867 Address* became Schedule A to the *1870 Order* which created the new western Canadian territory and which is part of the Constitution of Canada by virtue of s. 52(2)(*b*) and the Schedule to the *Constitution Act, 1982*.

[4] The appellants' position, however, is inconsistent with the text, context, and purpose of the documents on which they rely and must be rejected. The words "legal rights" or "*droits aquis*" / "*droits légaux*", read in their full context and in light of their purpose, simply cannot bear the weight the appellants seek to attach to them. Specifically:

> [...]
>
> (ii) Legislative bilingualism is expressly provided for in the *Manitoba Act, 1870* but is not mentioned in either the *1867 Address* or the *1870 Order*, the documents upon which the appellants rely. It is inconceivable that such an important right, if it were granted, would not have been granted in explicit language as it was in the Canadian Constitution and in the *Manitoba Act, 1870*, which was enacted at the same time as the *1870 Order* was made;
>
> [...]
>
> (iv) The contemporary evidence also shows that the territorial representatives themselves considered that their linguistic rights had been assured through the *Manitoba Act, 1870*, not the *1867 Address* or the *1870 Order*;

[...]

[24] As agreed, Parliament passed the *Manitoba Act, 1870* in May 1870, which created the province of Manitoba out of part of the territories; this included the Red River Settlement within its boundaries. In June 1870, the Queen in Council issued the *1870 Order*, which ordered the admission of Rupert's Land and the North-Western Territory into Canada as a territory on the terms and conditions set forth in the addresses made by Canada. The *1867 Address* and the *1869 Address* were attached as schedules to the *1870 Order*. The *1870 Order*, with its schedules, was subsequently included in the schedule to the *Constitution Act, 1982*.

[...]

[40] As our brief historical overview shows, linguistic rights have always been dealt with expressly from the beginning of our constitutional history. Language rights were dealt with explicitly in s. 133 of the *Constitution Act, 1867* and in the *Manitoba Act, 1870* in very similar and very clear terms. The total absence of similar wording in the contemporaneous *1870 Order* counts heavily against the appellants' contention that the terms "legal rights" or "*droits acquis*" / "*droits légaux*", attached in the *1867 Address*, should be understood to include language rights.

[…]

[42] Subsequently, the *Manitoba Act, 1870* and the *1870 Order* formed a comprehensive political arrangement regarding annexation. Section 23 of the *Manitoba Act, 1870* expressly provided for legislative bilingualism in terms very similar to those found in s. 133 of the *Constitution Act, 1867*:

> 23. [English and French languages to be used] Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the Constitution Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

[43] The *Constitution Act, 1871* (U.K.), 34 & 35 Vict., c. 28, an Imperial statute, confirmed the *Manitoba Act, 1870* and provided that the Canadian Parliament could not amend it: s. 6. In contrast, there is no similar express reference to legislative bilingualism in the *1870 Order* or the *1867 Address* annexed to it.

[44] When Manitoba tried to amend s. 23 to provide for English language only legislation, the amendment was ruled unconstitutional by Manitoba courts in 1892, 1909, and 1976, and by this Court in 1979 in *Attorney General of Manitoba v. Forest*, 1979 CanLII 242 (SCC), [1979] 2 S.C.R. 1032 (see *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at pp. 732-33). The Court held that the province's legislative authority to amend the provincial constitution did not extend to giving it the authority to amend the guarantee of language rights in s. 23 of the *Manitoba Act, 1870*.

[45] In *Forest*, the Court held that s. 23 of the *Manitoba Act, 1870* was modelled after s. 133 of the *Constitution Act, 1867*, which provides for (among other things) legislative bilingualism in the Parliament of Canada and the Quebec legislature. This Court also drew upon the similarity between these provisions in *Reference re Manitoba Language Rights*:

> . . . the drafters of the *Constitution Act, 1867* . . . intended s. 133's language guarantees to be just that — guarantees. And the use by Parliament only three years later of nearly identical language in s. 23 of the *Manitoba Act, 1870* is strong evidence of a similar intendment with regard to the language provisions of that Act. [Emphasis deleted; p. 739.]

[...]

[48] In sum, contemporaneous guarantees of language rights were explicit and clear: legislative bilingualism was provided for expressly in the *Constitution Act, 1867* and the *Manitoba Act, 1870*. And, as we shall see, the subject of legislative bilingualism was addressed — explicitly — in the amendments to *The North-West Territories Act* in 1877 and 1891 (*The North-West Territories Act*, 1877, S.C. 1877, c. 7; *An Act to amend the Acts respecting the North-West Territories*, S.C. 1891, c. 22). Never in Canada's constitutional history have the words "legal rights" been understood to confer linguistic rights. These facts considerably undermine the appellants' position.

[…]

(4) Contemporary Evidence Shows That the Parties Thought That Linguistic Rights Were Addressed in the *Manitoba Act, 1870* But Not in the *1870 Order*

[...]

[58] While there can be no debate that there was a political compromise or that constitutional provisions must be interpreted purposively, we cannot accept the appellants' conclusion. The end result of the negotiations regarding legislative bilingualism was the enactment of the *Manitoba Act, 1870*. Conversely, it was never the objective of the *1870 Order* to dictate that French and English must be used by the legislative body governing the newly established North-Western Territory.

[...]

[60] However, there is no doubt the delegates sought to entrench bilingual rights, just as there is no doubt they sought for the territories to enter Canada as a province. That being said, the contrast between the two contemporaneous documents in relation to legislative bilingualism could not be more stark. As discussed above, there is express provision in the *Manitoba Act, 1870* for legislative bilingualism in terms that were very similar to those used in s. 133 of the *Constitution Act, 1867*. However, in the *1870 Order*, there is no express reference — none — to legislative bilingualism. This strongly suggests that while legislative bilingualism was successfully negotiated and established for the new province of Manitoba (per s. 23 of the *Manitoba Act, 1870*), there was no similar agreement or provision for legislative bilingualism in the newly annexed territories. It is noteworthy that the major population centre of the Red River Settlement became part of the province of Manitoba, while the sparsely populated areas of Rupert's Land and the North-Western Territory became a federally administered territory.

[...]

[62] The purpose of the *1870 Order* was simply to effect the transfer of Rupert's Land and the North-Western Territory to Canada. To the extent that an historic compromise was reached to entrench legislative bilingualism as part of the annexation of Rupert's Land and the North-Western Territory, this took the form of s. 23 of the *Manitoba Act, 1870*. As this Court explained in *Mercure*:

> After some tense confrontations, in which demands were made that English and French be used in the legislature and that judges speak both languages, the Canadian government acceded to the demands of the people of the Territories. To that end, Canada enacted the *Manitoba Act, 1870*, S.C. 1870, c. 3, which created the province of Manitoba out of the Red River settlement and surrounding lands, and by s. 23, provided certain guarantees regarding the use of the English and French languages in the Manitoba Legislature and in its courts. [p. 249]

[63] There is ample evidence in the historical record confirming the parties' understanding that the compromise reached was for legislative bilingualism in the province of Manitoba, in the form of the *Manitoba Act, 1870*. It created a new province including the population centre of the Red River Settlement and incorporated parts of the negotiators' demands.

[...]

[70] The fact is that by accepting the creation of the province of Manitoba plus the North-Western Territory, the representatives and negotiators *did* make sacrifices with respect to the outlying regions. Far from being implausible, this reflects the very essence of negotiations: making compromises to reach an agreement. This is especially so in light of the fact that the representatives framed the demand as follows: "That the English and French languages be common in the Legislature . . . ." Like many other demands in the Lists of Rights, this was tied to the very first demand in the third List of Rights — namely, the demand for entry as a province, with the creation of a provincial legislature for the whole annexed territories. It thus follows that the agreement regarding bilingualism was entrenched in the *Manitoba Act, 1870*, and not elsewhere.

(5) The *1867 Address* Does Not Embody the Compromise Reached in 1870

[71] The appellants' assertion that the *1870 Order* embodies a wide-ranging historic compromise with regard to legislative bilingualism is further undermined by a chronological obstacle. The words "legal rights" or "*droits acquis*" / "*droits légaux*" relied upon by the appellants are found in the *1867 Address*, incorporated as a schedule to the 1870 Order. It would be incongruous for an 1867 document to embody a compromise reached only three years later in 1870. Rather, this tends to confirm that the end result of the negotiations was the *Manitoba Act, 1870* — a bill adopted at the *culmination* of the negotiations.

[...]

[73] On the contrary, it is much more plausible that the Imperial government believed that the *Manitoba Act, 1870* was the end result of the compromise. This remains the case today. Ultimately, there is no basis to interpret the *1867 Address* in light of an historic compromise reached in 1870.

[…]

[103] However, these arguments cannot be sustained in the face of the historical record and the underlying principles of constitutional interpretation. Absent some entrenched guarantee, a province has the authority to decide the language or languages to be used in its legislative process. Clearly, a province may choose to enact its laws and regulations in French and English. But we cannot simply infer a guarantee of legislative bilingualism that would override this exclusive provincial jurisdiction absent clear textual and contextual evidence to support an entrenched right. It has never been the case in our constitutional history that a right to legislative bilingualism was constitutionalized by inference through the vehicle of the words “legal rights”. The words in the *1867 Address* cannot support a constitutional guarantee of legislative bilingualism in the province of Alberta. Parliament knew how to entrench language rights and did so in the *Manitoba Act, 1870* but not in the *1867 Address*.

Reference re Manitoba Language Rights, [1992] 1 S.C.R. 212, 1992 CanLII 115 (SCC)

[1] On June 13, 1985, this Court issued a judgment in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, which determined that the requirements of s. 133 of the *Constitution Act, 1867* and of s. 23 of the *Manitoba Act, 1870*, S.C. 1870, c. 3, with respect to the use of both the English and French languages in the Records and Journals and in the Acts of Parliament and of the Legislatures of Manitoba and Quebec are mandatory. Consequently it was held that all statutes and regulations of the province of Manitoba that were not printed and published in both English and French were invalid, but they were deemed to have temporary force and effect for the minimum period of time necessary for their translation, re-enactment, printing and publication.

[...]

[3] The Government of Manitoba then devised a set of criteria for discerning which instruments had to be translated, re-enacted, printed and published in order to comply with this Court's judgment. Essentially, this involved a determination of whether the various instruments were considered to be "of a legislative nature".

[...]

[8] Section 23 of the *Manitoba Act, 1870*, S.C. 1870, c. 3 (reprinted in R.S.C., 1985, App. II, No. 8), provides: [...]

[9] The requirements of s. 133 of the *Constitution Act, 1867* are virtually identical. Section 133 provides: [...]

[14] There can be no doubt, as stated in *Reference re Manitoba Language Rights*, supra, at p. 739, that the purpose of s. 23 is:

> ... to ensure full and equal access to the legislature, the laws and the courts for francophones and anglophones alike.

The Court is bound to ensure that this purpose is not undermined. Consistently with this approach, this Court has acknowledged the necessity of moving beyond an unduly strict interpretation of the phrase "Acts of the Legislature". However, as noted above, the Court has also stressed that the words of the section cannot be stretched beyond what is necessary to meet its purpose. Therefore, while meeting the purpose of this section requires moving beyond the strict meaning of the phrase "Acts of the Legislature", these cannot be extended to instruments which are not of a legislative nature. The Court must, therefore, approach the issues here in a manner that attempts to give a generous meaning to "Acts of the

Legislature", while not applying it to the plethora of other instruments issued by contemporary governments.

[15] In so determining the scope of s. 23, it is important to place the section within the proper historical context. It, like ss. 93 and 133 of the *Constitution Act, 1867*, is an embodiment of a political compromise. It is not a sweeping guarantee designed to achieve complete linguistic equality, but rather a compromise designed to achieve a level of harmony in the demographic reality of Manitoban society. The following statement of Beetz J. in *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, at p. 496, regarding s. 133 is applicable here:

> This incomplete but precise scheme is a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union. The scheme is couched in a language which is capable of containing necessary implications, as was held in *Blaikie No. 1* and *Blaikie No. 2* with respect to certain forms of delegated legislation. It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation, as was held in the *Jones* case. And it is a scheme which can of course be modified by way of constitutional amendment. But it is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise.

See also S*ociété des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, at p. 578, and *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377, at pp. 401-2. To extend the application of s. 23 beyond instruments of a legislative nature would be to improve upon this constitutional compromise under the guise of interpretation.

Criteria Indicative of a Legislative Nature

[16] A determination that the scope of s. 23 is limited to application to instruments of a legislative nature does not, however, end the inquiry. It is necessary to propose some criteria by which legislative instruments can be distinguished from other types of instruments. It is neither possible nor desirable to propose an ironclad test given the proliferation of instruments generated by contemporary governments. But it is both possible and necessary to provide governments with general criteria which will be indicative of whether or not an instrument must comply with the section. These criteria can be roughly divided into the headings of form, content and effect. It should be noted here, however, that these criteria do not operate cumulatively. An instrument may be determined to be legislative in form, though not in content, and under the following criteria it would nonetheless be determined to be of a legislative nature.

[…]

[18] It was argued by the SFM [Société franco-manitobaine] that if orders in council cannot always be considered "Acts of the Legislature", they would nonetheless, in their form, fall within the phrase "Records and Journals" of the House. We do not find that the latter phrase can be so broadly interpreted. Its scope must be limited to those documents which are actually tabled in the Legislative Assembly.

[19] With respect to content and effect, the Attorney General of Manitoba proposed as a starting point the following definition of regulation taken from the MacGuigan Committee in its report on Statutory Instruments (1969), at p. 14:

> [A] regulation is a rule of conduct, enacted by a regulation-making authority pursuant to an Act of Parliament, which has the force of law for an undetermined number of persons;

In its original context the definition relates specifically to regulations, but it provides assistance in developing a general definition of the phrase "of a legislative nature".

[20] The phrases from the above quotation which require elaboration in relation to the content and effect of orders in council are "rule of conduct", "force of law" and "an undetermined number of persons". A "rule of conduct" can be described as a rule which sets norms or standards of conduct, which determine the manner in which rights are exercised and responsibilities are fulfilled. Pairing this with the phrase "force of law", the rule must be unilateral and have binding legal effect. Finally, it must also apply to "an undetermined number of persons", that is, it must be of general application rather than directed at specific individuals or situations.

[21] We emphasize again that the application of these criteria is directed toward meeting a constitutional minimum. Legislatures will often find it appropriate or desirable to translate instruments that go beyond these criteria. Obviously, this is a practice which is to be encouraged.

[22] We further acknowledge that grey areas will arise where the application of the broad criteria outlined here will not provide a clear answer as to whether a particular instrument must be translated. Despite the parameters delineated earlier with respect to the requirements of the type of right under consideration here, it is a constitutional right and retains the force of its constitutional status. It would be wise for legislatures, in cases of doubt, to resolve that doubt in favour of the constitutional right.

[…]

IV. Conclusions and Disposition

Orders in Council

[47] The requirements of s. 23 of the *Manitoba Act, 1870* apply to orders in council which are determined to be of "a legislative nature".

[48] To make this determination, the form, content and effect of the instrument in question must be considered:

(a) With respect to form, sufficient connection between the legislature and the instrument is indicative of a legislative nature. This connection is established where the instrument is, pursuant to legislation, enacted by the Government or made subject to the approval of the Government.

(b) With respect to content and effect, the following are indicative of a legislative nature:

(i) The instrument embodies a rule of conduct;

(ii) The instrument has the force of law; and

(iii) The instrument applies to an undetermined number of persons.

Documents Incorporated by Reference

[49] The requirements of s. 23 also apply to documents incorporated by reference in Acts of the Manitoba Legislature if the following conditions are met:

(a) The primary instrument in which the document is incorporated is a legislative instrument within the meaning articulated above;

(b) The incorporation is a true incorporation in that the document is an integral part of the primary instrument as if reproduced therein; and

(c) The document was generated by the Manitoba Government.

[50] Even where the document is generated by an outside source, for example another government or a non-governmental body, it will still attract s. 23 obligations unless it can be shown that there was a bona fide purpose behind incorporation of it without translation.

Bilodeau v. A.G. (Man.), [1986] 1 S.C.R. 449, 1986 CanLII 64 (SCC)

[10] In the present case, the summons was issued in English only. It is accordingly necessary to determine if a summons must be in both English and French in order for it to be valid. Section 23 of the *Manitoba Act, 1870*, in addition to requiring bilingual enactment, printing and publishing of Acts of the Legislature, also provides that:

> ... either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the Constitution Act, 1867, or in or from all or any of the Courts of the Province.

The question of whether these words require that a summons be printed in both languages was not argued before this Court though there are several references to it in the appellant's factum. The issue was raised before the Manitoba Court of Appeal which was unanimous in finding that the words did not require bilingual printing of the summons.

[11] I am content to follow the majority of this Court in *MacDonald v. City of Montreal*, 1986 CanLII 65 (SCC), [1986] 1 S.C.R. 460, which is being rendered concurrently, in answering the question of whether s. 23 of the *Manitoba Act, 1870* requires bilingual printing of the summons. That case involves an interpretation of s. 133 of the *Constitution Act, 1867* which was enacted only three years prior to the *Manitoba Act, 1870*. The text of s. 133 of the *Constitution Act, 1867* relating to the issuing of court process is virtually the same as that with which we are concerned in the present appeal. In the *MacDonald* case, the majority holds that a unilingual summons and charge does not contravene s. 133. The same conclusion applies in respect of s. 23 of the *Manitoba Act, 1870*.

[...]

[15] To summarize, *The Summary Convictions Act* was enacted, printed and published in the English language only. It contravenes s. 23 of the *Manitoba Act, 1870* and is therefore invalid. Nevertheless, the *de facto* doctrine preserves the rights and obligations arising out of the issuance of a summons by a provincial court under colour of authority of *The Summary Convictions Act* prior to this Court's decision in the *Reference re Manitoba Language Rights*. The summons in the present case is therefore not subject to challenge on the grounds that the Act was passed in English only.

[16] Section 23 of the *Manitoba Act, 1870* does not require a summons for a Manitoba court to be bilingual or printed in the language of choice of its recipient. The summons to the appellant is therefore effective and enforceable in all respects.

[17] *The Highway Traffic Act* was also not enacted or published in French. It too is invalid. The *de facto* doctrine does not preserve a conviction under an invalid statute when the defendant raises the validity of the statute as his defense. However, the principle of rule of law preserves the enforceability of the conviction in accordance with the judgment and order of this Court in the *Reference re Manitoba Language Rights*.

[...]

[21] Although the appellant's conviction will stand, it must be acknowledged that he was successful in challenging the constitutional validity of the unilingual statutes. He was also successful in asserting that the requirements of s. 23 were mandatory. The appellant's conviction only stands because of the application by this Court of the rule of law principle to avoid legal chaos in Manitoba, which would have otherwise resulted from the appellant's successful challenge to the legislation of Manitoba enacted since

1890. In the very special circumstances of this case, it is appropriate that the appellant be awarded his costs in this Court and in the Court of Appeal.

Re Manitoba Language Rights, [1985] 1 S.C.R. 721, 1985 CanLII 33 (SCC)

[4] The provisions of s. 133 of the *Constitution Act, 1867* are virtually identical to those of s. 23 of the *Manitoba Act, 1870*. Section 133 provides: [...]

Manitoba's Language Legislation

[5] Section 23 of the *Manitoba Act, 1870* was the culmination of many years of co-existence and struggle between the English, the French, and the Metis in Red River Colony, the predecessor to the present day Province of Manitoba. Though the region was originally claimed by the English Hudson's Bay Company in 1670 under its Royal Charter, for much of its pre- confederation history, Red River Colony was inhabited by Anglophones and Francophones in roughly equal proportions.

[...]

[7] The final version of the Bill of Rights which was used by the Convention delegates in their negotiations with Ottawa, contained these provisions:

> That the English and French languages be common in the Legislature, and in the courts, and that all public documents, as well as all Acts of the Legislature, be published in both languages.
>
> That the Judge of the Superior Court speak the English and French languages.

These clauses were re-drafted by the Crown lawyers in Ottawa and included in a Bill to be introduced in Parliament. The Bill passed through Parliament with no opposition from either side of the House, resulting in s. 23 of the *Manitoba Act, 1870*. In 1871 this Act was entrenched in the *British North America Act, 1871* (renamed *Constitution Act, 1871* in the *Constitution Act, 1982*, s. 53). The *Manitoba Act, 1870* is now entrenched in the Constitution of Canada by virtue of s. 52(2)(b) of the *Constitution Act, 1982*.

[...]

[25] For present purposes, it seems clear that the bilingual record-keeping and the printing and publication requirements of s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867* are mandatory in the sense that they were meant to be obeyed.

[26] Section 23 of the *Manitoba Act, 1870*, provides that both English and French "shall be used in the ... Records and Journals" of the Manitoba Legislature. It further provides that "[t]he Acts of the Legislature shall be printed and published in both those languages. Section 133 of the *Constitution Act, 1867*, is strikingly similar. It provides that both English and French "shall be used in the respective Records and Journals" of Parliament and the Legislature of Quebec. It also provides that "[t]he Acts of the Parliament of Canada and the Legislature of Quebec shall be printed and published in both those Languages".

[27] As used in its normal grammatical sense, the word "shall" is presumptively imperative. See *Odgers' Construction of Deeds and Statutes* (5th ed. 1967) at p. 377; The *Interpretation Act, 1867* (Can.), 31 Vict., c. 1, s. 6(3); *Interpretation Act*, R.S.C. 1970, c. I-23, s. 28 ("shall is to be construed as imperative"). It is therefore incumbent upon this Court to conclude that Parliament, when it used the word "shall" in s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, intended that those sections be construed as mandatory or imperative, in the sense that they must be obeyed, unless such an interpretation of the word "shall" would be utterly inconsistent with the context in which it has been used and would render the sections irrational or meaningless. See, e.g. *Re Public Finance Corp. and Edwards Garage Ltd.* (1957), 22 W.W.R. 312, p. 317 (Alta. S.C.).

[28] There is nothing in the history or the language of s. 23 of the *Manitoba Act, 1870* or s. 133 of the *Constitution Act, 1867* to indicate that "shall" was not used in its normal imperative sense. On the contrary, the evidence points ineluctably to the conclusion that the word "shall" was deliberately and carefully chosen by Parliament for the express purpose of making the bilingual record-keeping and printing and publication requirements of those sections obligatory. In particular Parliament's use of the presumptively imperative word "shall" twice in s. 23 of the *Manitoba Act, 1870* and twice in s. 133 of the *Constitution Act, 1867* contrasts starkly with its use of the presumptively permissive word "may" twice in the same sections. Section 23 provides that either English or French "may be used" by anyone in the debates of the Manitoba Legislature and that either language "may be used" by anyone in the Manitoba courts. Similarly, s. 133 provides that either English or French "may be used" by anyone in the debates of Parliament and the Legislature of Quebec, and in the courts of Canada and Quebec.

[29] The French versions of both sections leave no doubt that the choice of these contrasting terms was deliberate. In the French version of s. 23, "shall" appears as "sera obligatoire" and "seront", while "may" appears as "sera facultatif" and "pourra être ... à faculté". Similarly, in the French version of s. 133, "shall" is expressed as "sera obligatoire" at one point, and as "devront être" at another, while "may" is expressed as "sera facultatif" in the first clause in which it appears and as "pourra être ... à faculté" in the second.

[…]

[31] If more evidence of Parliament's intent is needed, it is necessary only to have regard to the purpose of both s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, which was to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike. The fundamental guarantees contained in the sections in question are constitutionally entrenched and are beyond the power of the provinces of Quebec or Manitoba to amend unilaterally: *Blaikie No. 1*, supra; *Attorney General of Manitoba v. Forest*, supra. Those guarantees would be meaningless and their entrenchment a futile exercise were they not obligatory.

[…]

[33] The conclusion seems inescapable that the drafters of the *Constitution Act, 1867* deliberately selected the imperative term "shall" in preference to the permissive term "may" because they intended s. 133's language guarantees to be just that -- guarantees. And the use by Parliament only three years later of nearly identical language in s. 23 of the *Manitoba Act, 1870* is strong evidence of a similar intendment with regard to the language provisions of that Act. The requirements of s. 133 of the *Constitution Act, 1867* and of s. 23 of the *Manitoba Act, 1870* respecting the use of both English and French in the Records, Journals and Acts of Parliament and the Legislatures of Quebec and Manitoba are "mandatory" in the normally accepted sense of that term. That is, they are obligatory. They must be observed.

[…]

A) The Meaning of “Acts of the Legislature”

[42] The requirements of s. 23 of the *Manitoba Act, 1870* pertain to "Acts of the Legislature". These words are, in all material respects, identical to those found in s. 133 of the *Constitution Act, 1867*. As we have already indicated, in *Blaikie No. 2*, *supra*, this Court held that s. 133 applied to regulations enacted by the Government of Quebec, a Minister of the Government or a group of Ministers and to regulations of the civil administration and of semi-public agencies which required the approval of that Government, a Minister or group of Ministers for their legal effect. It was emphasized that only those regulations which could properly be called "delegated legislation" fell within the scope of s. 133; rules or directives of internal management did not. It was also held that s. 133 applied to rules of practice enacted by courts and quasi-judicial tribunals, but that it did not apply to the by-laws of municipal bodies or the regulations of school bodies.

[…]

[44] In this judgment, all references to "Acts of the Legislature" are intended to encompass all statutes, regulations and delegated legislation of the Manitoba Legislature, enacted since 1890, that are covered by this Court's judgments in *Blaikie No. 1* and *Blaikie No. 2*.

B) The Consequences of the Manitoba Legislature's Failure to Enact, Print and Publish in Both Languages

[45] Section 23 of the *Manitoba Act, 1870* entrenches a mandatory requirement to enact, print, and publish all Acts of the Legislature in both official languages (see *Blaikie No. 1*, *supra*). It establishes a constitutional duty on the Manitoba Legislature with respect to the manner and form of enactment of its legislation. This duty protects the substantive rights of all Manitobans to equal access to the law in either the French or the English language.

[46] Section 23 of the *Manitoba Act, 1870* is a specific manifestation of the general right of Franco-Manitobans to use their own language. The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

[47] The constitutional entrenchment of a duty on the Manitoba Legislature to enact, print and publish in both French and English in s. 23 of the *Manitoba Act, 1870* confers upon the judiciary the responsibility of protecting the correlative language rights of all Manitobans including the Franco-Manitoban minority. The judiciary is the institution charged with the duty of ensuring that the government complies with the Constitution. We must protect those whose constitutional rights have been violated, whomever they may be, and whatever the reasons for the violation.

[…]

[131] As we have said, s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867* are coterminous. *Blaikie No. 1* is therefore controlling on the question of the effect of s. 23 of the *Manitoba Act, 1870* on the similar legislation in issue here. Applying the criteria as laid down in *Blaikie No. 1* to the present case, it is clear that the *1980 Act* does not meet the requirements of s. 23 of the *Manitoba Act, 1870*.

[132] The heart of the *1980 Act* is s. 4(1), which authorizes the bilingual promulgation of legislation in two stages: (i) the enactment of a statute in one official language only; and (ii) subsequent translation into the other official language. The translation, once certified and deposited with the Clerk of the House, is deemed "valid and of the same effect" as the formally enacted version.

[133] This procedure is insufficient to satisfy s. 23 of the *Manitoba Act, 1870*. Bilingual enactment is required by s. 23 and unilingual enactment, followed by the later deposit of a translation, is not bilingual enactment. Moreover, s. 4(1) does not contemplate simultaneity in the use of English and French in the enactment process, i.e. in the Records and Journals of the legislature, as required by s. 23.

[…]

[141] It does not matter, for constitutional purposes, whether the linguistic preference is expressly given to one language, as in s. 5, or left to be determined by the member who introduces the bill, as in s. 2(a). Any mechanism for attributing superior status to one language version, however fashioned, violates s. 23 of the *Manitoba Act, 1870*.

Order: Manitoba Language Rights, [1985] 2 S.C.R. 347, 1985 CanLII 9 (SCC)

[3] […] The Court

1. GIVES EFFECT to the commitment of the Province of Manitoba that the Continuing Consolidation of the Statutes of Manitoba, and Regulations, and Rules of Court and Administrative Tribunals will appear in bilingual, parallel column format when printed and published.

2. ORDERS THAT the period of temporary validity for the laws of Manitoba will continue as follows:

(a) to December 31, 1988:

(i) the Continuing Consolidation of the Statutes of Manitoba; and

(ii) the Regulations of Manitoba; and

(iii) Rules of Court and Administrative Tribunals;

b) to December 31, 1990 for all other laws of Manitoba.

Attorney General of Manitoba v. Forest, [1979] 2 S.C.R. 1032, 1979 CanLII 242 (SCC)

[p. 1035] Thus the only issue is that which is set out in the constitutional question determined by order of the Chief Justice:

Are the provisions of "*An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba*" enacted by S.M. 1890, c. 14 (now R.S.M. 1970, c. O10) or any of those provisions, ultra vires or inoperative in so far as they abrogate the provisions of s. 23 of the *Manitoba Act, 1870*, 33 Vict., c. 3 (Can.) validated by the *British North America Act*, 1871, 34-35 Vict., c. 28 (U.K.)?

[…]

The *Official Language Act* [*An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba*] adopted in 1890 by the Legislature of Manitoba provides:

1(1) Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the Legislative Assembly of Manitoba, and in any pleadings or process in or issuing from any court in the Province of Manitoba.

(2) The Acts of the Legislature of Manitoba need be printed and published only in the English language.

2 This Act applies only so far as the Legislature has jurisdiction to enact.

Section 23 of *The Manitoba Act, 1870* passed by the Parliament of Canada (33 Vict., c. 3 (Can.)) reads:
[...]

[p. 1039] It is unnecessary to consider in the present case whether this enactment [s. 6 of the *British North America Act, 1871*] implies a restriction of the amending power derived from s. 92(1) by virtue of s. 2 of *The Manitoba Act*. It is enough to note that on any view it certainly cannot result in Manitoba's Legislature having towards s. 23 of *The Manitoba Act* an amending power which Quebec does not have towards s. 133 [of the *Constitution Act, 1867*].

R. v. Dickson (W.A.), 2013 MBCA 58 (CanLII)

[36] The appellant argues that the prohibited act or *actus reus* of the offence requires proof of active maintenance of the trenches, while the Crown argues that keeping them in existence without active maintenance establishes the *actus reus*. Both parties also argue that the English and French versions of the definitions of "maintain" and "entretenir" support their argument. In accordance with s. 23 of the

Manitoba Act, 1870, the English and French versions of all Acts and regulations in Manitoba have equal authority. See also, s. 7 of *The Interpretation Act*, C.C.S.M., c. I80, which reads:

> **Bilingual versions**
>
> 7 The English and French versions of Acts and regulations are equally authoritative, in accordance with section 23 of the Manitoba Act, 1870.

R. v. Simard, [1995] O.J. No. 3989, 27 O.R. (3d) 116 (ON CA) [hyperlink not available]

[6] Section 133 of the *Constitution Act, 1867* reads as follows: […]

Section 23 of the *Manitoba Act, 1870* contains a similar guarantee for the courts of that province.

[…]

[21] *MacDonald v. Montreal (City)*, *supra*, and *Bilodeau v. Manitoba (Attorney General)*, [1986] 1 S.C.R. 449, 25 C.C.C. (3d) 289, raised essentially the question whether processes issuing from courts in Quebec and Manitoba validly expressed in only one of the official languages had to be translated into the other language. The majority of the court in *MacDonald* concluded that a unilingual summons and charge did not contravene s. 133 of the *Constitution Act, 1867*. Section 133 protects some language rights only and is entirely unrelated to the requirements of natural justice, or procedural fairness: *MacDonald*, p. 498. Similarly, in *Bilodeau*, the majority decided that s. 23 of the *Manitoba Act, 1870*, does not require a court summons to be bilingual or in the language of choice of its recipient. I note, however, that in both decisions, Wilson J., dissenting, was of the opinion that summonses should include, as a minimum, an addendum in the other official language "notifying the recipient of the nature and importance of the document and directing him or her to obtain a translation from court officials" (p. 459).

[…]

[28] Canadian language minorities outside Quebec do not enjoy, as the Anglophones of Quebec, a constitutional protection by virtue of s. 133. Moreover, New Brunswick and Manitoba have another constitutional protection with respect to the use of the two official languages found in s. 19(2) of the *Charter* and s. 23 of the *Manitoba Act*, 1870. The language rights pertaining to court proceedings of the Francophones of Manitoba, Saskatchewan and Alberta were scorned by the provincial legislatures until the Supreme Court of Canada intervened in *Forest v. Manitoba (Attorney General),* [1979] 2 S.C.R. 1032, 49 C.C.C. (2d) 353, and *R. v. Mercure*, *supra*. The latter decision recognized the language rights of accused persons to use the French language in proceedings before the Saskatchewan courts pursuant to s. 110 of the former *Northwest Territories Act*, R.S.C. 1886, c. 50 (a quasi-constitutional law). This decision is a Pyrrhic victory for the Francophones, since the protection was legally abolished in 1988 and replaced by the *Language Act*, S.S. 1988-89, c. L-6.1.

Red River Forest Products Inc. v. Ferguson, 1992 CanLII 8557 (MB CA)

[45] In neither the *Constitution Act, 1867* nor the *Manitoba Act, 1870* was it the intention that pre-confederation laws, if not passed in both English and French, would be inapplicable to either the Dominion or Manitoba. Indeed, the opposite was required by necessity. In both Acts (ss. 129 and 2 respectively), it was intended that pre-existing laws, whatever their source, would be continued. Reference in those sections to the existing laws was not intended by the legislators to lead to the necessity of identifying and re-enacting the specific applicable statutes in both French and English by virtue of s. 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act, 1870*. Those former sections were dealing with identification, adoption and continuity of the laws for constitutional purposes.

[...]

[47] The "Acts of the Legislature," as used in s. 23 of the *Manitoba Act*, was intended to apply to all legislative enactments by the Manitoba Legislature following incorporation in accordance with the existing practice and the constitutional language guarantees negotiated in 1870. Those words were not intended to apply to the provision in a valid statute enacted for constitutional purposes to provide continuity and certainty of the laws in accordance with the principle of the rule of law. To find s. 23 of the *Manitoba Act, 1870* applicable to the words, "the laws existing, or established and being in England", as used in s. 1 of the *Q.B. Act* [*Queen's Bench Act, 1874*, 38 Vict., c. 12], would, in the words of Beetz J., be an attempt to improve upon "an historical constitutional compromise". I would suggest that to accept the appellant's submission on the application of s. 23 of the *Manitoba Act, 1870* would stretch the meaning "beyond what is necessary to accomplish this purpose" (*Blaikie No. 1*, *supra*). It is unrealistic to extend the standards enunciated in 1985 and 1992 for the purpose of protecting constitutionally guaranteed language rights to valid enactments drafted in accordance with the principles of the rule of law and necessitated by the incorporation of Manitoba into Canada in 1870.

[48] Neither the *Blaikie* cases, nor the *Reference re: Manitoba Language Rights* cases stand for the proposition that English law received and adopted at the time of incorporation of Manitoba had to be identified and enacted in both French and English in order to be valid under s. 23 of the *Manitoba Act, 1870*. Further, the legislation under review does not come within the criteria described by the Supreme Court as enactments "incorporated by reference". The reasoning adopted in those cases has no relevance to the case at bar.

[...]

[62] The *Gaming Act* was incorporated into the laws of Manitoba by s. 1 of the *Q.B. Act* and is valid legislation in the Province of Manitoba. Section 23 of the *Manitoba Act, 1870* has no application to the reception of the *Gaming Act* in Manitoba in 1874 and does not render its incorporation invalid.

Waite v. Man. (Min. of Highways & Tpt.), 1987 CarswellMan 191, [1987] 4 W.W.R. 540, 2 W.C.B. (2d) 100, 47 Man. R. (2d) 247 (MB CA) [hyperlink not available]

[17] I am of the view that the requirements of s. 23 of *The Manitoba Act, 1870*, that "the Acts of the Legislature shall be printed and published in both those languages", has been met in the re-enactment of *The Highway Traffic Act*; and that there has been equal access to the English and French versions of the Act.

[...]

[19] There is no doubt that there were some deficiencies in the enactment process. Dureault, J. concluded that while the process was not perfect, the record pointed to substantial compliance with the constitutional requirement of s. 23 of *The Manitoba Act, 1870*. That is the only ground of appeal raised by the appellant, namely that there is no rule or doctrine of substantial compliance with constitutional requirements.

[20] Counsel for Waite argues that any breach of those requirements, however slight, is fatal and the procedure must be declared null and void and the Legislative Assembly ordered to start afresh. Should that proposition be accepted, the Court would be enforcing a remedy which is worse than the existing situation. If this Court should declare the law inoperative and of no force and effect, it would automatically be reinstating the previous English only text of *The Highway Traffic Act*. The intent or purpose of s. 23 of The *Manitoba Act, 1870* is clear: all laws are to be enacted, printed and published in both English and French. In allowing this appeal, we would be aiding and abetting non-compliance with that requirement and reverting to the situation which existed from 1890 to 1985. It would place the Court in a ludicrous and impossible situation.

[...]

[23] I am of the view that Dureault, J. reached the proper conclusion. Seven to fifteen days after June 13, 1985, the Legislative Assembly of Manitoba attempted with the means at its disposal to comply with the requirements of the Supreme Court decision. There was compliance, although there were some shortcomings in the process; but the main and essential requirement, namely that laws be enacted and printed in both English and French, was met.

Robin v. College de St-Boniface, 1984 CanLII 42 (MB CA)

[50] The main concern in this appeal is with the right of a litigant in Manitoba to be tried by a judge who understands French. There is no doubt that s. 23 of the *Manitoba Act* gives a constitutional right to speak French in court. Can there be any doubt, it is said, that the right to speak in court necessarily involves the right to be heard? If there is a right to speak French in court, must there not also be a right to be heard in French?

[...]

[64] There is a clear difference between the constitutional position of French and English in Manitoba and the constitutional position of other languages. What is said by a witness in court in another language is not evidence. It is testimony given in English or French through an interpreter that is to be considered by the court. What is said in another language is not considered by the court; it is not transcribed.

[65] When a witness speaks French in court, what he says in French is evidence. What he says in French must be recorded so that on an appeal this court can consider his evidence in French. This may be difficult to do with simultaneous translation; nevertheless the French must be recorded and the evidence given in French must be considered.

[66] In my opinion, it is essential that a judge who hears a case where French is used must be able to understand the French evidence. To give a fair hearing in accordance with the constitutional rights of a Francophone he must put himself into a position of being able to understand what is said in French. But he need not himself speak French and he need not understand French unaided by a translator. If a judge can understand what is said in French with the help of a translator, I see no reason to think he cannot fairly hear witnesses who speak French.

Forest v. Manitoba (Court of Appeal), 1977 CanLII 1635 (MB CA)

[p. 447] The application before us purports to have its roots in a minor offence involving a parking ticket. In reality, however, it arises from a far from minor challenge to the validity, if not the constitutionality, of the *Official Language Act of Manitoba*, enacted in 1890 and now being R.S.M. 1970, c. 010.

[…]

[p. 448] The simple effect of this statute is that in the designated forums English alone became the official language of this Province, rather than English and French as theretofore. For 87 years English has continued so to be the sole official language in those forums.

[…]

[p. 449] The applicant launched an appeal to the County Court of St. Boniface. It is important to note that his appeal documents were in French. An objection having been taken by Crown counsel to the validity of the "appeal", contravening as it did the requirements of the *Official Language Act*, the presiding Judge, Dureault, Co. Ct. J., addressed himself first to this preliminary point of law. Was there a valid appeal before him calling for his adjudication? On this point he reached the conclusion that s. 23 of the *Manitoba Act, 1870*, was the effective and governing provision, that the *Official Language Act* was beyond the jurisdiction of the Legislature of Manitoba to enact, that the appeal as brought in the French language was valid and that it could rightfully be set down for hearing, and that counsel could therefore apply for a hearing date.

[…]

[p. 453-454] But the second reason [why the Queen's Bench is the appropriate forum for the first hearing of this matter] is even stronger. It arises from the consequences that would flow from a decision holding s. 1 of the *1890 Act* to be inoperative. What would those consequences be? They would affect both the Legislature and the Courts of this Province. The first task that would be encountered would be to acquire a corps of competent bilingual translators. That would have to be followed by the installation in the Legislature of equipment for simultaneous translation. In addition, not only the statutes but the legislative debates reproduced in the provincial Hansard would have to be printed in both languages. So too with the Manitoba Gazette, and any other legislative publication of an official character. I am sure I have not exhausted the list. And the Courts? How would the Judges of this Province, of whom only a handful or so are fully bilingual, meet the problem of adjudicating cases presented in French? Does this mean equipment for simultaneous translation here too? And what of the task of Court Reporters, stenographers, Clerks, and other officials? Merely to mention these consequences is to conjure up a chilly prospect of problems and complexities whose solution would involve not only vast sums of money but also a long period of time.

But, it may be argued, the consequences of the Court's decision are entirely irrelevant. The Court must decide the issue according to law and merit, no matter what the consequences might be. Dureault, Co. Ct. J., was certainly of that view, and in support of his position he cited the classical words of Lord Mansfield in *R. v. Wilkes* (1770), 4 Burr. 2527 at p. 2562, 98 E.R. 327: "*fiat justitia, ruat caelum*" (let justice be done even though the heavens fall). Of course justice must be done, and I agree with Lord Mansfield in insisting upon it. But what is justice? In our quest for it in the present case must the Court close its eyes to consequences? My answer is, yes, so far as the judgment itself is concerned; but no, so far as fixing a time when that judgment takes effect. Let me add an explanatory word on that. If the Court should conclude that the *1890 Act* is valid and operative, there will be no problem. But if the Court should reach the opposite conclusion, it would then have to consider the consequences flowing from its judgment and make provision, by way of appropriate timing, to enable those consequences to be met. Courts must be reasonable, and anything less than this would not be justice.

Northwest Child and Family Services Agency v. E.L., 1992 CanLII 8505 (MB QB)

[22] Section 23 [of the *Manitoba Act, 1870*] does not give the right to the applicant to impose on the [Northwest Child and Family Services] agency the obligation to use French in its process. The applicant is only entitled to understand the process. There are two distinct dimensions in these proceedings: the constitutional right of the agency to use either French or English and the common law right of the applicant to have explained to her the nature of the proceedings in *whatever* language the applicant understands. […]

[28] However, the applicant, it is conceded by all the parties before me, has the right to invoke the rules of natural justice and the right to insist on the obligation of the agency to act fairly and equitably, but I do not consider the unilateral act of instituting the proceedings in English as being in violation of those rights.

[...]

[32] There is inherent discrimination in our constitution when s. 23 of the *Manitoba Act, 1870*, and s. 133 of the *Constitution Act, 1867* and s. 23 of the *Charter* confer a special status on English and French.

Bertrand v. Dussault and Lavoie (January 30, 1909), Saint-Boniface, Prud'homme J., reproduced in Re Forest and Court of Appeal of Manitoba 1977 CanLII 1635 (MB CA)

[p.459] A summons has been taken in these two cases to show cause why the plaintiff ' s statement of claim should not be set aside on the ground that they are written in French and that the English language is the only one that can be used in the pleading or process of our Courts.

This brings before me the important question as to whether the abolition of the French language by "*An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba*", R.S.M. 1902, c. 126 is antra or ultra vires of the Legislature of Manitoba.

Up to the year 1890 the use of the French language before the Courts of this Province had never been challenged. The first attempt to do so was made by 1890 (Man.), c. 14 R.S.M. 1902, c. 126, is only a copy of that Act which has been retained in our statutes ever since.

The *Manitoba Act, 1870* (Can.), c. 3, says distinctly that either the English or the French language may be used by any person or in any pleading or process in or issuing from any Court of Canada, established under the *British North America Act, 1867* or in or from all or any of the Courts of the Province.

The Act has become an Imperial Act by 1871 (U.K.), c. 28, also known as the *British North America Act, 1871*.

There cannot be any doubt that the federal Parliament could not alter the provisions of the *Manitoba Act, 1870*. Section 6 of the *British North America Act, 1871* leaves no room for any doubt. The question now is whether the Legislature of Manitoba is vested with such a right?

By s. 2 of the *Manitoba Act, 1870*, the provisions of the *British North America Act, 1867*, in as much as they are not inapplicable by reasonable intendment or varied by the *Manitoba Act, 1870*, are made applicable to Manitoba.

In order to more readily understand the intent and meaning of s 23 and its relations with other parts of the Act, it is only natural to insert it in the *British North America Act, 1867*, at the place occupied by a similar section, if any can be found and see how it is connected with or affected by the other parts of the same.

I find in the *British North America Act, 1867*, s. 133 which is similarly worded as s. 23 of the *Manitoba Act, 1870*. This latter is only a reproduction, *mutatis mutandis* of s. 133. In other words, the standing of the French language in Manitoba is the same as that of the English language in Quebec or to be more correct, the evident intent of those sections is to perpetuate both languages in those Provinces.

[…]

There is no doubt that s. 23 of the *Manitoba Act, 1870* and s. 133 of the *British North America Act, 1867* are similar.

[p.460] Manitoba is substituted to Quebec in s. 23 and that is all the modification made thereto.

Now it is a rule of interpretation of statutes that all statutes in *pari materia* are to be read and construed together as if they formed parts of the same statute and were enacted at the same time (Dwarris, p. 145).

[…]

Section 133 of the British North America Act, 1867 or its equivalent s. 23 of [p.461] the *Manitoba Act, 1870* does not come within that group of classes of clauses governed by the heading "Provincial Constitutions" to which s. 92 refers and consequently the provincial Legislatures are not authorized to make any law conflicting with s. 133.

[…]

Why would the legislators have declared so positively that both languages could be made use of before the Courts of Manitoba if that enactment was not intended to be of a permanent nature but was to be left to the pleasure or the fluctuating opinions of the Legislature. The reason of s. 23 is obvious.

[…]

The reason of s. 23 was evidently the same as of s. 133 of the *British North America Act, 1867*. It was to perpetuate before the Courts of Quebec and Manitoba the uses of both languages and it would be to frustrate the purposes of the legislators, by changing an essential part of that section. Provincial Legislatures whilst Sovereign when acting within their sphere, cannot enlarge it and are powerless to legislate upon subjects beyond their reach.

There is no inherent power in provincial Legislatures, outside of what was given to them by statute — Lambs v. The Bank of Toronto — Ramsays' Appeal Cases, p. 893.

I then hold that R.S.M. 1902, c. 126 is ultra vires of the Legislature of Manitoba and that consequently s. 23 of the Manitoba Act, 1870 cannot be amended and still less repealed by the provincial Legislature. I could not come to a different conclusion without doing violence to both the letter and the spirit of the *British North America Act, 1867*, and the *Manitoba Act, 1870*.

[…]

[p.462] (1) There is no power in the *Manitoba Act, 1870* to change the provisions of s. 23.

[…]

(3) The *British North America Act, 1867* does not purport to give to provincial Legislatures authority to make laws in respect to the dual language guaranteed for all times to come, until altered by Imperial legislation, to the Province of Quebec and s. 23 stands in the same rights as s. 133 the two enactments being similar with the only difference of Manitoba being substituted to Quebec.

(4) The evident intent of the framers of both acts was to perpetuate English and French in these two Provinces and to place them beyond the reach of their respective legislatures.

Pellant v. Hébert (March 9 1892), County Court of Saint-Boniface (Manitoba), Prud'homme J. unreported decision that was published in (1981) 12 R.G.D. 242 [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[p. 244] I am thus of the opinion that c. 14, 53 Vict. is *ultra vires* of the Manitoba legislature and that section 23 of the *Manitoba Act* cannot be changed or repealed by that province's legislature.

[p. 244] Consequently, the petitioner was entitled to choose to prepare his petition in English or in French.

[p. 244] I see no objection to the petition being drawn up in French and the surety bond in English.

[p. 244] Section 23 of the *Manitoba Act* provides that the petitioner has the right to use French or English in any process. I am of the view that a person may choose the language in which he or she will prepare each process, and the person can alternately use one or the other for every process. There must be linguistic unity for and in each separate process. The person may not prepare a process partially in one language and partially in the other, but he or she may prepare one in French and one in English, if that is preferred. This would be awkward and improper, and a person who would act in this way may be imposed fees to translate them into one language. Suffice it to say regarding this petition that the two documents – the petition in French and the surety bond in English – cannot be objected to on the ground that they were drawn up in different languages.