



ARCHIVED - School Governance: The Implementation of Section 23 of the Charter - August 1998

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Acknowledgements

This study was carried out thanks to the important contribution of Richard Goreham, who wrote the text with the assistance of Sarah Dougherty.

The Commissioner would also like to mention the excellent work done under the direction of Richard Tardif by Daniel Mathieu and Diane Côté of the Legal Services Branch. He also wishes to draw attention to the co-operation of Gérard Finn, Jean Fahmy, Jean MacIsaac, Alain Clavet and Charles Barker of the Policy Branch, of Thérèse Boyer as well as of Marc Thérien and the Centre for Legal Translation and Documentation of the University of Ottawa.

The Commissioner also wishes to thank the following persons who have commented on certain parts of the text: Armand Bédard and Jean-Pierre Dubé of the Commission nationale des parents francophones; professors Pierre Foucher and Roger Bilodeau of the School of Law of the Université de Moncton; Robert McConnell, John Dawson, Luc Desjardins, Guy Jourdain, Roger Lepage, Douglas Mitchell, Paul Rouleau and Laurent Roy, legal counsel in private practice; Jeanne Beaudoin, outgoing President of the Commission scolaire francophone du Yukon as well as Claudette Toupin and Richard Goulet of the Court Challenges Program of Canada.

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1.0 Introduction

Few can doubt the importance of minority language schools to the vitality of their communities. Such institutions provide an essential physical and social space within which members can meet and foster their cultural and linguistic heritage. Indeed, without minority language schools, the very conditions necessary for the preservation of Canada's linguistic duality would be markedly diminished.

The significance of schools for the health and vitality of official minority language communities is reflected in Section 23 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Constitutionally entrenched in 1982, this Section defines the rights of all Canadians to have their children educated in their own official language. While access to minority language education (were it English or French) existed in some parts of Canada prior to 1982, the advent of Section 23 of the *Charter* underscored a national commitment to ensuring that such opportunities be available throughout the country. In effect, the constitutional rights guaranteed in Section 23 provided a much needed impetus for reform of publicly funded school systems aimed at improving the access, delivery and quality of minority language education.

Full implementation of Section 23 rights required, of course, a proper understanding of their meaning and scope. About this there was much disagreement in the years immediately following the constitutional entrenchment of Section 23. Litigation arose in various provinces throughout the 1980s, generating a series of decisions that diverged on key questions related to the implementation of minority language educational rights. Reform was accordingly slow in most provinces, a situation which the Supreme Court of Canada helped change in 1990 and 1993 when it rendered its decisions regarding the interpretation of Section 23. The second decision set in motion changes to provincial school systems related to minority language education.

The present study reviews, through April 1998, the nature and scope of current provincial laws, regulations and policies regarding official minority language education, of which the vast majority have been introduced since 1993. It begins (in Chapter 2) by summarizing the principles established by the Supreme Court of Canada in those two landmark decisions interpreting Section 23. These decisions provide an understanding of the underlying purpose of Section 23, indicate the factors relevant to establishing the scope of required educational services, give guidance about the type of educational facility to be made available and the level of financial resources that may be necessary, and confirm the paramount importance of according a meaningful governance role to parents (or their representatives) over the minority language education programs and facilities which their children attend. The rules of interpretation that flow from these two judgements provide a framework for governments with respect to the proper implementation of Section 23.

Chapter 3 reviews the current situation regarding minority language education on a province-by-province basis, endeavouring also to provide a brief historical background to the reforms which have been introduced in each jurisdiction. Statutory provisions and regulations in force in each province, as well as relevant policies, are examined with reference to issues important to the implementation of Section 23 rights. These include the underlying eligibility rules determining access to minority language education, and any numbers-related criteria used to determine if such education will be provided. The notion of what constitutes minority language instruction (i.e. its cultural and linguistic particularities) is also reviewed by reference to relevant law and policy, as well as issues concerning the type of educational facilities (a class in a majority language school, shared facilities or a distinct building) used to deliver a minority language education program.

The role of parents in the governance of minority language education programs and schools is an important issue that is addressed in all provinces. Provincial statutory provisions and regulations that create and govern the operation of minority language school boards (or equivalent authorities) are thus reviewed in detail. Items covered include the scope of authority of such bodies, how their members are selected, the degree of similarity of such bodies with majority language school boards, the powers they may exercise and the role they play in determining the content of minority language education programs. This examination necessarily involves a review of the authority and powers of provincial Ministers of Education and their respective departments. Where the traditional role of local or regional school boards has been placed in question (as in New Brunswick), the structures which have replaced them, and their degree of

compliance with Section 23 rights, are reviewed in detail.

The issue of financial resources accorded minority language education programs and facilities concludes the review of current legislative provisions in each province. The material and human resources at the disposal of those who manage minority language education programs and schools are crucial to ensuring a quality of education equal to that offered in the majority language of any given province, and to comparable results. As the review shows, financial issues are usually addressed in regulations (often adopted on a yearly basis) and in general policy guidelines applicable to school boards and equivalent authorities. Whether this is sufficient to meet the special needs of minority language education remains a contentious issue deserving of close attention.

Chapter 3 also reviews litigation that has arisen in each provincial jurisdiction. Past court decisions issued by provincial superior and appeal courts are examined with a view to chronicling the types of issues that have arisen in each province. This examination includes decisions delivered by provincial courts in the two cases that ultimately found their way to the Supreme Court of Canada. The reasoning in a number of past decisions has been qualified or overruled by the two Supreme Court decisions and a brief review of the former is useful in understanding the historical background relevant to each province.

Court decisions brought down after the Supreme Court judgements are also reviewed. They illustrate the manner in which the underlying principles enunciated by the Supreme Court have been applied, and illustrate the problems or issues that remain outstanding in any given jurisdiction. In this regard, litigation which is anticipated but not yet commenced, as well as cases which have not yet resulted in a court decision, are also discussed.

Chapter 4 provides an overview and summary of the various modalities chosen to implement Section 23, and includes a review of questions and concerns which have arisen in one province or another. It thus constitutes a complement to the more detailed examination found in Chapter 3. By bringing together the experience of all jurisdictions in a more general format, we are better able to focus attention on the relative merits of various modalities, and facilitate discussion of the types of problems for which a complete resolution has not yet been found. While questions continue to be raised on all the main issues relevant to the implementation of Section 23 (in particular regarding the need for linguistically homogeneous minority schools, authority over the content of minority language programs, and resources necessary to ensure equality of educational opportunities and results), significant changes have nonetheless been made over the last eight recent years.

It is hoped that the presentation in one document of the diverse legislative and regulatory regimes applicable to the delivery of minority language education in all provinces and territories of Canada will provide a useful point of reference for addressing unresolved issues. As already stated (and explored in greater detail throughout Chapter 3), the content and quality of minority language education are central to the concerns of citizens with rights under Section 23 of the *Charter*. The constitutional status of minority language education clearly speaks in favour of according the material and human resources necessary to ensure that the quality of such education will be equal to that enjoyed by the majority population of a given province. Indeed, the remedial nature of Section 23 (as interpreted by the Supreme Court) cannot be fully respected without adequate public funding of minority language education.

With respect to the information on statutes, regulations and policy guidelines mentioned in this study, the most current versions available to us have been used. In general, statutes have been updated to at least February 1, 1998, although more recent statutory amendments are included for some provinces. The same is true of regulations and policy guidelines. In a study of this scope, it is perhaps inevitable that small errors of citation or omission may be made. Should the reader become aware of any such error or omission, we would be grateful to have the matter brought to our attention for future reference.



2.0 Guiding principles and rules of interpretation

The Supreme Court of Canada issued decisions in 1990 and 1993 which established an interpretive framework for the implementation of Section 23 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Given the proliferation of litigation in various provinces in the years immediately following the constitutional entrenchment of Section 23 in 1982, such a framework was an important jurisprudential development. Indeed, by 1990 a number of provincial courts of appeal had issued decisions difficult to reconcile and which suggested divergent philosophies regarding the proper

interpretation to be given Section 23.

2.1 Underlying purposes

Recognition of the importance of schools in the preservation of a minority language lies at the very heart of the constitutional rights set out in Section 23. As the Supreme Court declared in the *Mahé* decision in 1990:

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 educational rights to minority language parents throughout Canada.¹

The Chief Justice of the Supreme Court also underscored the important link between language and culture:

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.²

The relationship between language and culture must therefore be kept in mind when determining the scope of educational rights under Section 23, for minority schools "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."³ In other words, any interpretation of Section 23 which failed to give sufficient weight to this fact would run contrary to one of the underlying purposes of the constitutional protection.

The Supreme Court also characterized Section 23 as being remedial in nature, in the sense that it was meant to correct the inadequacies of existing educational systems which impeded the promotion and preservation of an official minority language and culture:

This set of constitutional provisions was not enacted by the framers in a vacuum. When it was adopted, the framers knew, and clearly had in mind the regimes governing the Anglophone and Francophone linguistic minorities in various provinces in Canada so far as the language of instruction was concerned... Rightly or wrongly... the framers of the Constitution manifestly regarded as inadequate some -- and perhaps all -- of the regimes in force at the time the *Charter* was enacted, and their intention was to remedy the perceived defects of these regimes by uniform corrective measures, namely those contained in s. 23 of the *Charter*, which were at the same time given the status of a constitutional guarantee.⁴

The Supreme Court thus endorsed the view that the ultimate goal of such a remedial constitutional provision was to halt the progressive erosion of minority communities and to give effect to a concept of equal partnership of the two official language groups within the context of education.

Full recognition of Canada's linguistic duality in the area of education implied that significant substantive changes would have to be made to law and policies governing access to public schools. This, in turn, suggested that the courts would have to take an active role in enforcing the rights set out in Section 23 where governments failed to initiate appropriate change. While the Supreme Court had, in other circumstances, taken the view that language rights were founded upon political compromise and should be interpreted very cautiously,⁵ its approach to the interpretation of Section 23 proved to be broad and innovative. Not only was such an approach founded upon the remedial nature of Section 23, it also took full cognizance of the special nature of minority language educational rights:

The provision provides for a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with. Both its genesis and its form are evidence of the unusual nature of s. 23. Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such a section is wise: however, this does not mean that courts should not "breathe life" into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.⁶

The views of the Supreme Court of Canada regarding the underlying purposes of Section 23 provide a general

framework within which it can be properly interpreted and implemented. Moreover, the remedial nature of Section 23 supports innovative approaches to the role courts should play in ensuring its full respect.

2.2 Scope of educational services

The range of educational programs (i.e. mandatory and optional courses) made available in the minority language, and the type of physical facility in which they are available, are questions of the utmost importance to parents. The actual wording of Section 23 suggests, depending on the numbers of students involved, a variability in the scope of services offered. Put briefly, the general right of minority language parents to have their children receive primary and secondary education in the minority official language only applies wherever in a province:

- (a) ...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.⁷

The difference between receiving only "minority language instruction" and receiving it "in minority language educational facilities" is unresolved on the face of Section 23, although it seems reasonable to conclude that the allocation of a separate building devoted exclusively to minority language education would not always be required.

In *Mahé*, the Supreme Court of Canada interpreted Paragraphs (a) and (b) of Subsection 23(3) as representing two extremities of a continuum of potential educational services to be offered to minority language students:

...[Section] 23 should be viewed as encompassing a "sliding scale" of requirement, 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.⁸

Besides the issue of separate or shared school buildings, educational services involve such things as the scope of courses offered, the overall type of program, resources to be made available, mandatory second language training and the role of parents in the overall operation and content of minority language education.

The Supreme Court rejected the view that Subsection 23(3) created two separate rights, each with its own threshold level of students required to invoke it. Its view in this regard is central to understanding how Section 23 should be implemented:

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 to 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.

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...

...it is more sensible, and consistent with the purpose of s. 23, to interpret s. 23 as requiring whatever minority language educational protection the number of students in any particular case warrants. Section 23 simply mandates that governments do whatever is practical in the situation to preserve and promote minority language education.⁹



2.3 Sufficient numbers

Since the level of minority language educational services depends upon the numbers of students involved, it is

important to agree upon how demand for such services is calculated. A narrow approach might fix the numbers of students by reference to actual registrations in a given program (e.g. during its current or start-up year). A broad approach would calculate the total number of eligible children present in the area where the services would be offered. The Supreme Court has indicated that the proper approach would lie somewhere between these two extremes. In its view, "the relevant figure for Section 23 purposes is the number of persons who will eventually take advantage of the contemplated programme or facility."¹⁰ While this figure can rarely be known in advance, it can be estimated by considering the known demand (e.g. by reference to actual registration) and the number of persons who could potentially take advantage of the program (e.g. by a survey of eligible parents).

Once the actual number of students is determined, two further considerations have an impact on the level of educational services to be offered. In the words of the Supreme Court:

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 number of students involved; and (2) the cost of the contemplated services.¹¹

Pedagogical concerns refer to the effectiveness of certain programs and facilities being diminished by a shortage of students. This, in turn, can have detrimental effects upon the welfare of the students involved. With respect to costs, the Supreme Court pointed out that Section 23 rights must be subject to some appreciation of costs, 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 are accorded." However, the Court made it clear that pedagogical concerns would most often be the determining factor in determining the type of minority language education services:

...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.¹²

The Supreme Court recognized that its approach to interpreting the "where numbers warrant" requirement of Section 23 provided no explicit standard by which differences of view could be definitively resolved. It foresaw that the standard would have to be "worked out over time by examining the particular facts of each situation which comes before the courts" and by reference to the underlying purpose of Section 23. At the same time, however, the Court pointed out that what is an appropriate level of service may vary as between rural and urban areas, and that the calculation of numbers should not necessarily be restricted to existing school district boundaries.

2.4 Nature of facilities

The Supreme Court of Canada, in *Reference Re Public Schools Act (Man.)*¹³ (the *Manitoba Reference*), had occasion to return to the issue of whether distinct and separate facilities were necessary in order to satisfy the requirements of Section 23. In *Mahé*, as will be explained below, the Court was preoccupied with the issue of whether a right to management and control was vested in eligible parents under Section 23. Such a right (which was in fact found to flow from Section 23) is not itself dependant upon the type of educational facility made available to minority language students. It was for this reason that the Court declared in *Mahé* that the term "facility" should not be interpreted as referring only to physical structures.

In the *Manitoba Reference*, the Supreme Court underscored that the nature of minority language educational facilities necessary to satisfy Section 23 was related to the level of management and control required in any given circumstance:

The statement that it is unnecessary to focus on facilities suggests that any entitlement to facilities is a subsidiary matter, flowing from the level of management and control mandated on a particular set of facts. It was accepted that the delivery of educational services would vary with the circumstances (*Mahé*, at p. 367). The rationale behind the "sliding scale" approach to s. 23 is that it "guarantees whatever type and level of rights and services is appropriate" to the number of students involved (at p. 366).¹⁴

The right to a degree of management and control flowed naturally from the Court's finding in *Mahé* that minority language educational facilities "belonged" to the minority. As the Court said in the *Manitoba Reference*:

Once the threshold of entitlement to minority language education is met, if "minority language educational facilities" are, as determined in *Mahé* 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.¹⁵

Moreover, given the emphasis that had been placed on schools as fulfilling an important cultural role, the Court took the view that it was "...reasonable to infer that some distinctiveness in the physical setting is required to fulfil this role."¹⁶

Whether separate physical facilities would be required depends upon the factual circumstances in any particular case and cannot be determined in the abstract. With respect to Manitoba, the Court pointed out:

There might well be significant differences in what can reasonably be required for the facilities in the urban areas around Winnipeg, the main Francophone regions such as St. Boniface, and remote northern or rural areas to be deemed appropriate, by the standards set out in *Mahé*.¹⁷

At a more general level, the Court endorsed "a right to distinct physical settings as an integral aspect of the provision of educational services" where, in light of the number of students involved and their geographic concentration, pedagogical and financial considerations were not a barrier.¹⁸

2.5 Management and control

Central to the Supreme Court's decision in *Mahé* is whether institutional requirements arising from Section 23 include a role for parents in the management and control of minority language educational services. In reviewing this issue, the Court made reference both to the explicit wording of the Section 23 and to its underlying purpose.

As discussed above, Paragraph 23(3)(b) recognizes the right to receive minority language instruction (where numbers warrant) in "minority language educational facilities". The Supreme Court viewed this right as necessarily including a right to management and control, a right moreover which was not dependent on construing the word "facilities" as referring to a physical building:

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.¹⁹

The second reason for recognizing an implicit right to management and control relates to the underlying purpose of Section 23:

The foregoing textual analysis... 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 and 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.²⁰

While the Supreme Court made it clear that parents of eligible children enjoyed a right to a measure of management and control, the degree of management and control is determined by the level of educational services warranted by the number of students involved.²¹ This means that in some circumstances an independent minority language school board would be required, whereas in others, some form of specific representation on existing majority language boards would suffice. With respect to the former, the Supreme Court remarked:

Such independent boards constitute, for the minority, institutions which it can consider its own with all

this entails in terms of opportunity of working in its own language and of sharing a common culture, interests and understanding and being afforded the fullest measure of representation and control.²²

Even where circumstances do not warrant an independent minority board, the Supreme Court emphasized that representatives of the minority on an existing majority board should be given "exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns." Such control over minority language instruction and facilities would include exclusive authority relating to:

- (a) expenditures of funds provided for such instruction and facilities;
- (b) appointment and direction of those responsible for the administration of such instruction and facilities;
- (c) establishment of programs of instruction;
- (d) recruitment and assignment of teachers and other personnel; and
- (e) making of agreements for education and services for minority language pupils.²³

At the same time as recognizing a broad right to management and control (whether by means of independent minority school boards or guaranteed representation on existing majority boards), the Supreme Court also pointed out that provincial governments retained an important role in the definition and development of educational programs:

...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.²⁴



2.6 Financial resources

In general, the allocation of financial resources for the operation of schools is a matter for provinces to determine. Nevertheless, a constitutional right to minority language education necessarily implies public expenditures sufficient to meet the legitimate needs of eligible children. Insufficient funding can obviously affect the quality of minority language education and dramatically decrease enrolment, thereby detracting from one of the underlying purposes of Section 23, which is to promote and preserve minority language culture.

In approaching this issue, the Supreme Court underscored that "...the quality of education provided to the minority should in principle be on a basis of equality with the majority."²⁵ This does not mean, however, that a strict and formal equality should be rigidly imposed:

...[T]he 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 minority language education itself, make such a requirement impractical and undesirable.²⁶

This applies to matters of funding, as well:

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.²⁷

As an example of special circumstances, the Supreme Court mentioned that per capita funding should, in the case of the early years of minority language education, consider "...the number of students who can realistically be seen as attending the school once operations are well established," as opposed to actual pre-registration or current enrolment. Such a liberal calculation would thus result in a higher allocation of funds to minority language education (for a given period of time) than would occur under a regime of strict and unwavering numerical equality with the majority population.



3.0 Provincial implementation of Section 23

3.1 Newfoundland

3.1.1 Background

Despite the lack of any statutory recognition of French as a language of instruction, a French-language educational program was established in Labrador City in the early 1960s. This was in large part due to mining activity in the region that had invigorated the local economy and brought an influx of workers a considerable number from Quebec. Wishing to attract well qualified employees, Iron Ore of Canada undertook to finance the initial start-up costs of a French-language program and subsequently continued to contribute to its yearly funding. The program was housed in shared facilities and grew to an enrolment of 300 (by the mid-1970s) before changing economic conditions resulted in many Francophone families leaving the region. Within two decades its enrolment had decreased to barely 30 pupils.

Elsewhere in the province the rates of linguistic assimilation were high. When the first educational program for Francophones on the west coast of Newfoundland (Port au Port) was introduced in 1975 (at Cape St. George) it was modelled on French immersion programs. Given the loss of French-language abilities by many children whose parents and grandparents were Francophone, such programs offered the opportunity to recover a half-forgotten linguistic and cultural heritage. The success of this effort ultimately led to requests that the English components of instruction in various non linguistic subjects be gradually reduced in favour of a more homogeneous French-language educational program. This process came to an end in 1989 when the program was officially recognized as a French-first-language program. In the meantime, another French-language program had been initiated in the same region (at Mainland) in 1984, which became known as *École Sainte-Anne (centre scolaire et communautaire)*.

The initiation of French-language educational programs was to a certain extent facilitated by the creation of parent school committees. School boards had the authority to create such committees, part of whose function was to provide liaison between the board and the community. A board could also assign tasks it felt appropriate to a school committee. In some cases this might result in a consultative structure being put in place so as to allow Francophone parents a small voice in the running of a French-language educational program. However, such committees had no real decision-making powers, in particular with respect to the establishment of a new French-language program or the extension of one that already existed. Difficulties associated with the limited authority of committees were evident in the city of St. John's where Francophone parents were unsuccessful (at first) in obtaining access to French-language classes; then experienced problems associated with the physical location of the classes (in the basement of a French immersion school); and finally were denied their request for a homogeneous French-first-language school under the management and control of the Francophone parents themselves.

Amendments to the *Schools Act*²⁸ in 1991 recognized that the children of individuals with rights under Section 23 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) would receive their instruction in French wherever in the province those rights applied. The amendments also gave the Lieutenant-Governor in Council the power to make regulations respecting anything that might be required to give effect to those rights. It would appear that no regulations were made under that authority. To provide it with advice on how rights under Section 23 could be effectively implemented, the government established a ministerial committee to inquire into and make recommendations regarding management models for the governance of French-first-language educational programs. Its report (submitted in September of 1993), as well as consultations with the *Fédération des parents francophones de Terre-Neuve et du Labrador*, provided a basis for the legislative reform which ultimately brought into being a new system of governance (which will be discussed below).

The issue of denominational school rights under constitutional provisions which applied at the time to Newfoundland was an additional concern of the government. As is well known, the constitutional provisions guaranteeing the denominational structure of the school system in Newfoundland was ultimately abolished and replaced with provisions which allowed greater flexibility in the reform and design of a provincial educational system. In light of these constitutional changes, the *Schools Act*, 1996 was introduced and adopted by the Legislature. However, the only new provision regarding Section 23 rights which appeared at that time was a simple statement that "there shall be a commission scolaire provinciale francophone for the province."²⁹ Everything required to give effect to that provision was to be established by way of regulation. To remedy this lack of a statutory basis for a French-language school board for the province, the government subsequently introduced further amendments to the *Schools Act*³⁰

incorporating a new Part V entitled French First Language Schools that include detailed provisions with respect to a new system of governance.

3.1.2 Current legislative provisions

(a) Eligibility

While the current *Schools Act* provides that every student "is entitled to receive instruction in English", it also declares that "where an individual has rights under Section 23 of the *Charter* to have his or her children receive instruction in French, the children of that individual shall receive that instruction in accordance with those rights wherever in the province those rights apply."³¹ "Wherever...those rights apply" would seem to refer to the reasonable numbers requirement found in Section 23. Although the statute uses the mandatory "shall" to establish the language of instruction of Francophones, this should not be interpreted as obliging Francophones to invoke their rights under Section 23. Since the *Schools Act* recognizes that every student is entitled to receive instruction in English, a much broader category than eligible students under Section 23, a francophone student could not be precluded from enrolling in an English-language program.

3.0 Provincial implementation of Section 23: Prince Edward Island

(b) Sufficient numbers

There are no specific threshold numbers set out in the *Schools Act* which determine when instruction in French will be offered. However, as mentioned above regarding eligibility, the Act provides that access to French-language instruction will be available "wherever in the province those rights apply". This would appear to incorporate (or refer to) criteria in Subsection 23(3) of the *Charter* regarding the "sufficient" numbers of children necessary to activate Section 23 rights. Decisions about access to French-language education will also depend upon the management authority accorded to Francophone parents and their representatives, to be discussed below.

(c) Minority language instruction

There is nothing in the Act which addresses directly the meaning of minority language instruction, beyond the fact that it is an educational program in which the language of instruction is French. The authority to establish educational programs will undoubtedly have practical implications for the scope and meaning of what constitutes minority language instruction. This authority is shared by the Ministry of Education and the French-language school board (conseil scolaire) established under the Act. In addition, the Act establishes school committees (conseils d'école) which have a significant role to play in giving advice to the conseil scolaire. These matters will be dealt with below when discussing powers of management.

(d) Minority language education facilities

The *Schools Act* defines a French-first-language school as meaning "a school established, maintained and operated by the conseil scolaire..."³² It also gives the conseil scolaire the exclusive authority to operate French-first-language schools.³³ The term "school" is defined in the Act as "a body of school students that is organized as a unit for the purpose of education and includes the teachers and other staff members associated with the unit and the lands and premises used in connection with the unit."³⁴ This would appear broad enough to allow for shared facilities with respect to the delivery of French-language education. In point of fact, it would appear that the majority of French first language schools are located in shared facilities, due principally to the low numbers of Francophone students. However, prior to the recent amendments to the *Schools Act* (establishing the conseil scolaire) French-language classes were generally under the management authority of majority language boards.

(e) Powers of governance

The *Schools Act* now provides for the election of a conseil scolaire with province-wide jurisdiction.³⁵ The members of the conseil scolaire are elected from among and by the voting members of the various conseils d'école at the school level.³⁶ In other words, determination of who will sit as a member (trustee) of the conseil scolaire (with province-wide jurisdiction) lies essentially with parents of children registered in French-first-language schools, subject to the terms of the Act excluding certain categories of persons (such as employees of the conseil scolaire, persons with contractual links to the conseil, and employees of the Department of Education who do not have the written permission of the

Minister). The Act provides for a maximum of 12 elected trustees, but sets the number at ten for the first election and divides them among four conseils d'école.

With respect to French-first-language schools, the conseil scolaire has the same duties and powers as a school board.³⁷ In addition, the conseil scolaire "may establish, maintain and operate a French first language school where the school provides programs or courses of study that satisfy the minimum requirements as approved by the minister."³⁸ With respect to programs offered within the schools, the Act obliges boards (and the conseil) to "organize and administer primary, elementary and secondary education" and "provide for the instruction of students either by the establishment of a program in its schools or by making an arrangement with another board..."³⁹ This duty of boards (and the conseil) must be placed, however, in the context of the role of the Minister who "may prescribe books, materials, programs and courses of study..." and the Lieutenant-Governor in Council who may issue regulations "respecting the establishment, maintenance, operation, organization, administration and delivery of education programs..."⁴⁰

Like any other board, the conseil scolaire has the authority to appoint and dismiss employees (non-teaching staff), as well as to appoint and assign duties of teachers.⁴¹ The principal of a French-first-language school has the statutory obligation to "promote cultural identity and French language in the school". Teachers employed in French-first-language schools have a similar obligation.⁴²

In addition to the provincial conseil scolaire, the Act provides for the creation of conseils d'école.⁴³ As alluded to above, these bodies operate at the level of French-first-language schools. Each conseil d'école (of which there are four) is given responsibilities regarding specific schools, by order of the minister on the recommendation of the provincial conseil scolaire. Persons eligible to elect members of a conseil d'école are referred to in the Act as voting members of a conseil d'école. To be eligible to vote, a person must be the parent of a student enrolled in, registered to attend, or eligible under the Act to be registered to attend, a French-first-language school. However, candidates are not required to meet these particular criteria, though they must be 18 years of age, a citizen or lawful resident of Canada, a resident of the province, and be nominated by a person eligible to vote in elections for the conseil d'école.⁴⁴

The purpose of a conseil d'école is "to develop, encourage and promote policies, practices and activities to enhance French language and culture, a French ambience, the quality of school programs and the levels of student achievement in a school for which it is responsible."⁴⁵ Amongst the functions of a conseil d'école we find that it is to "represent the cultural, linguistic and educational interests of the school" and to "advise the conseil scolaire on cultural and linguistic issues in the school."⁴⁶ Its duties under the Act include the approval of a plan "for encouraging and promoting the French language and culture and a French ambience" within the school (for recommendation to the conseil scolaire) and the support and promotion of any such plan approved by the provincial conseil scolaire.⁴⁷ A range of other duties are set out in the Act, and the conseil scolaire may, with the consent of a conseil d'école, assign other responsibilities to it. The conseil scolaire is obliged under the Act to "consult with the voting members of a conseil d'école on the operation of a school for which the conseil d'école is responsible, including the assignment of teachers and other staff."⁴⁸

The role of the Minister of Education in the educational system is reflected in the Program Development Division of the Ministry. The Program is responsible for, among other things, curriculum and learning resources development, and student evaluation. Within the Division, the Language Programs sections is responsible for administering the Official Languages in Education Program and programs to develop proficiency in both English and French as first and second languages.

(f) Financial resources

Given the responsibilities of the provincial conseil scolaire, the need for significant financial resources is evident. With respect to existing resources, the Act identifies two French-language schools to be transferred to the conseil scolaire.⁴⁹ Title to all real and personal property used for educational purposes at those schools will thus be transferred to the conseil scolaire. The Act also specifies that the conseil scolaire becomes the successor in law to the school board that previously operated the schools in question with respect to all agreements, contracts, debts and liabilities.⁵⁰ Similar provision is made regarding other French-first-language schools, in the sense that boards which cease to operate such schools are obliged to enter into agreements with the conseil scolaire respecting contracts, debts, liabilities and other obligations. Employment contracts held by a board with respect to the operation of such schools are taken over by the

conseil scolaire as well.⁵¹ The importance of these procedures is underscored by the fact that no board other than the conseil scolaire is allowed to operate a French-first-language school once the amendments to the *Schools Act* come into force.⁵²

The Act also provides for the allotment of funds for capital expenditures and general operational costs related to French-first-language schools. With respect to the former, the Act states that the "minister shall pay out money voted by the Legislature for the construction, extension and equipment of French first language schools in accordance with the recommendations of the conseil scolaire."⁵³ While it is the Legislature that determines the overall amount to be made available for the construction and other costs of such schools, the conseil scolaire plays a role insofar as its recommendations regarding the apportionment of such money are followed by the Minister. (The wording of the section in question would appear to oblige the Minister to follow the recommendations of the conseil scolaire.)

Money for operational costs (including transportation of students, school supplies and equipment) "shall be paid to the conseil scolaire in accordance with scales set out in a policy directive of the minister".⁵⁴

For the 1996-97 school year, there was one policy directive applicable to all school boards in the province. With regard to most operational costs, the directive establishes ratios for funding. For example, repair and maintenance costs are funded based on square feet of space, while costs associated with instruction, excluding salaries and benefits, are funded on a set amount per student plus a block amount for each school based on the number of students per school. (The block amount increases for schools with more students.) Salaries of school and board personnel are dealt with separately. In this regard, Section 92 of the Act provides that they shall be paid "from money voted for that purpose by the legislature...in accordance with scales approved by the Lieutenant-Governor in Council." The policy directive does not provide for any adjustments specific to the conseil scolaire.

3.1.3 Litigation

(a) Recent or anticipated litigation

Although no court decisions have been issued in Newfoundland regarding Section 23 rights, litigation has been contemplated and prepared at various junctures over the past decade. As mentioned in the background section above, Francophones in St. John's initially faced a negative response to their requests that French-first-language classes be established in a homogeneous school setting under their control and management. Legal action was then commenced (in 1988), first against the school board which had rejected the request, then modified to include the Minister. However, this particular case was suspended when agreement was reached to provide French-first-language classes (but without the management authority originally claimed).

The twin issues of a homogeneous school setting and the powers of management to be accorded Francophone parents remained contentious in the following years, not only in St. John's but elsewhere in the province. When no satisfactory resolution of these issues seemed likely, further legal action was commenced in April of 1996. This action brought together as plaintiffs a number of Francophone parents from various regions of the province, and two provincial Francophone organizations.⁵⁵ In their Statement of Claim, the plaintiffs acknowledged that French-first-language programs operated in Cape St. George, Mainland, St. John's, Labrador City and Happy Valley/Goose Bay. However, they claimed that the facilities in which these programs were offered did not satisfy the requirements under Section 23 of the *Charter*. They therefore asked the court to declare, among other things, that they had the right to have their children educated in a homogeneous French-language program housed in a French minority language facility. They also sought a declaration from the court that they enjoyed powers of management and control (under Section 23) over the French-language educational programs in which their children were registered.

Given the changes now made to the *Schools Act*, in particular with respect to the governance of French-first-language schools, further action in this case has been suspended. Nevertheless, the issue of homogeneous school settings for French-language educational programs may arise again. Its resolution is clearly linked to how the new system of school governance operates in practice, and the resources that are made available to ensure its effective implementation.



3.2 Nova Scotia

3.2.1 Background

Legislative changes introduced in 1981 recognized the important role of Acadian schools in preserving and enhancing the French language and culture in the province. Such schools used French as the main language of instruction, although the proportion of instruction given in English increased as a student progressed to higher grade levels. The percentage of French and English as languages of instruction could vary from one Acadian school to another, but all were subject to minimal requirements set down by the Minister of Education regarding the use of French.⁵⁶

The procedure for establishing an Acadian school left considerable authority in the hands of local school boards which were, to a great extent, representative of the English majority. In effect, the *Education Act* at the time required that a request be made by one or two school boards to the Minister of Education regarding the establishment of an Acadian school. The Minister was then empowered to make a recommendation to the Lieutenant-Governor in Council which had the authority to designate a given school as being Acadian, as well as to determine the geographical area it was to serve. Such schools remained subject to the jurisdiction of existing school boards. By 1986 there were 19 designated Acadian schools in five school districts.

The evolution of French-language educational facilities in subsequent years, as reflected in the system of Acadian schools, gave rise to two broadly-based concerns. The first related to the continued presence of bilingual school programs where English was used as a language of instruction, along with French, in the higher grades. Although a bilingual education was viewed by some Francophones as desirable, increasing numbers of Acadians in Nova Scotia recognized that the lack of distinct and homogeneous French-speaking school environments was a major factor in the high rates of linguistic assimilation of their children. Learning English was viewed by all as clearly important, yet many were also beginning to realize that such a goal could not effectively be accomplished while at the same time impoverishing a student's abilities in French.

Desire to assume meaningful management and control of minority language educational facilities and programs was also growing, especially following the Supreme Court judgement in *Mahé* which recognized specific rights in this regard. While a combination of circumstances could have resulted in *de facto* representation of Francophones on existing boards, this was rare.⁵⁷ Boards themselves exercised day to day management powers over schools under their jurisdiction, including the hiring and paying of teachers, expenditure of funds for general administration and other matters such as busing and maintenance of buildings. Government power of regulation was broad, covering such things as the construction, location and control of school buildings, the operation and management of schools, and the prescribing of school programs of education. The Minister of Education exercised powers which included directing the expenditure of funds appropriated for education, approving plans for school houses and school buildings, and prescribing courses of study and authorizing textbooks and related material.⁵⁸

Legislative amendments ultimately allowed for the creation of "conseil d'école", as in the case of a large French-language secondary school in the Halifax area (l'École du Grand-Havre). A "conseil d'école" exercised a number of management and decision-making powers with respect to a designated school.

Public discussions and consultations continued throughout the mid-90s with respect to the issue of school governance, but within the context of wide-reaching reform of the educational system as a whole. Changes proposed by the government were issued in the form of a white paper in 1995, and included proposals for the establishment of a French-language school board with jurisdiction to manage minority language educational facilities across the province.⁵⁹ The white paper formed the basis of the new *Education Act* examined below.

3.2.2 Current legislative provisions

(a) Eligibility

Access to French-language education is provided to the children of "entitled parents". This latter term is defined by words taken from Section 23 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) as meaning a citizen of Canada:

- (i) whose first language learned and still understood is French,
- (ii) who received his or her primary school instruction in Canada in a French-first-language program, or
- (iii) of whom any child has received or is receiving primary or secondary school instruction in Canada in a

French-first-language program.⁶⁰

Point (iii) corresponds to the second paragraph of Section 23 of the *Charter* which guarantees continuity and consistency of language of instruction for members of the same family.

The *Education Act* gives the Governor in Council the authority to make regulations "prescribing the method for determining those who are entitled to receive a French-first-language program in the Province".⁶¹ Presumably this authority was thought necessary in order to resolve potential issues arising out of the application of the three eligibility criteria set out above.

Regulations currently recognize that the Conseil scolaire acadien provincial (a province-wide French-language school board to be discussed below) has the authority to determine eligibility, based on a requisite declaration filed with the Conseil.⁶² The prescribed form of the declaration requests the parent to indicate which of the three eligibility criteria recognized in the *Education Act* he or she satisfies. If relevant to the criteria invoked, a parent must indicate the name of the school attended, as well as the date of such attendance. While the applicant declares all information submitted to be true and exact, the Conseil may request any further information it feels necessary to establish eligibility. Exemption from filing a declaration applies to any parent who already had a child attending a French-first-language program in the province in the 1995-96 school year.

(b) Sufficient numbers

Access to education in French is qualified by the *Education Act* insofar as it will be made available only where there are sufficient numbers of students to justify it. Nevertheless, the Act remains imprecise as to what constitutes sufficient numbers: "The children of an entitled parent are entitled to be provided a French-first-language program... if the numbers warrant the provision of the program out of public funds."⁶³ The Act also gives the Governor in Council the authority to make regulations "establishing procedures for determining the demand for French-first-language programs in the Province."⁶⁴

Regulations currently provide that where the Conseil scolaire is making preliminary plans to start a new class (for children not already enrolled in a French-first-language program) it "shall consider the proximity of its existing classes or facilities, expected numbers of children of entitled parents, and other pertinent factors". Specific reference is made to the possibility that the Conseil scolaire conduct a pre-registration to determine the demand for the proposed program. Determination of demand is not, however, a prerogative of the Conseil. Regulations require the Conseil to obtain the Minister's "agreement with the projected number of children of entitled parents to be served by the class" and his "approval of their reasonable assembly for a class".⁶⁵

The regulations also provide guidance to the Minister when determining if a sufficient number of children can be assembled. Specifically, the regulations state that the Minister "may examine whether the children of entitled parents are sufficiently concentrated both geographically and by grade level, taking into account the following factors:

- (a) the proximity of existing classes and facilities to the area;
- (b) the number of children of entitled parents in the area;
- (c) the potential for future admissions;
- (d) the distances over which the children must be transported; and
- (e) the ages of the children."⁶⁶

(c) Minority language instruction

A French-first-language program is defined in the *Education Act* as a "school program in which the first language of instruction is French and in which the English language is taught, but does not include a French-immersion program". The Act also declares that a public school or any part thereof which provides such a program is known as an "école acadienne". The term "école acadienne", discussed briefly in the background section above, is carried over from previous legislation. The teaching of English as a second language would, presumably, not include the use of that language as a medium of instruction in the general school curriculum. However, it remains unclear whether the reference to a French-language school where "English is taught" is meant to confine English to the material of a single course. In point of fact, Acadian schools continue to operate which offer mixed or bilingual programs.

Transitional plans have been formulated (by the Conseil scolaire acadien provincial) to phase out bilingual or mixed educational programs in favour of fully French-first-language instruction. Bilingual programs are still favoured by part of the Acadian population of the province, a preference which is not shared by others. While the Conseil acadien is on record as being committed to homogeneous French-language programs, this objective has proven difficult to achieve completely in light of differing opinions amongst Acadian parents. The continued existence of bilingual programs housed in the same facilities as homogeneous French-language programs has raised concerns about the proper implementation of Section 23 of the *Charter*, a matter which will be touched upon in the litigation section below.

(d) Minority language education facilities

The *Education Act* does not define threshold levels to determine whether a class (or classes) or an entire school will be made available for the purposes of French-language education. An educational facility is defined under the Act as a "school house, building or classroom, including a mobile classroom."⁶⁷ As mentioned above, the term "école acadienne" is broadly defined to include any part of a public school which provides French-first-language instruction. The Governor in Council is given the authority to "designate educational facilities that are to be used to provide a French-first-language instruction program."⁶⁸ The Governor in Council is also given the authority to make regulations "providing for the method of determining the location of French-first-language program educational facilities."⁶⁹ Still more general authority is found in the power to make regulations "respecting the construction, location and control of public school buildings", and "generally providing for the provision and administration of French-first-language programs in the Province."⁷⁰ Finally, specific regulatory authority is vested in the Governor in Council regarding the conveyance of students, including the conveyance of students to "facilities providing a French-first-language program."⁷¹ The exercise of any or all of these powers could clearly have an effect on the type and location of facilities to be made available to children of eligible parents.

As was mentioned in the previous section, mixed school facilities continue to operate in certain school districts, a situation which is decried by francophone parents who wish their children to benefit from a homogeneous French-language educational environment. While the Conseil acadien has adopted transitional plans aimed at gradually phasing out mixed schools, such plans have fallen short of the expectations of parents who wish to have their rights under Section 23 of the *Charter* fully implemented without further delay.

(e) Powers of governance

The Act gives the Governor in Council the authority to establish what is called a "Conseil scolaire acadien provincial" mandated to provide a French-first-language program to the children of entitled parents.⁷² Once established, the Conseil acadien has the exclusive jurisdiction to deliver and administer all French-first-language programs in the province. As such, it replaces all former administrative or management structures (i.e. the various "conseils d'école" established under Section 26 of the previous *School Boards Act*)⁷³ and is responsible for the "control and management" of all educational facilities known as "écoles acadiennes". Furthermore, where the Governor in Council designates any school currently owned by a district or regional school board as one which dispenses a French-first-language program, "the ownership of the school and its control and management are transferred to the Conseil acadien."⁷⁴ The same is true if the school in question is owned by a municipality. Where only part of a school is to be used to dispense French-first-language instruction, the control and management of the school can nevertheless be vested in the Conseil acadien if the Governor in Council so orders. In the absence of any such order, the Act provides that the costs of running shared facilities (where both English and French instruction are offered) will be apportioned.⁷⁵

Since previous legislation had established a good number of "conseils d'école", the new Act stipulates that all their assets and liabilities are vested in the Conseil acadien which has jurisdiction across the entire province over French-first-language educational facilities. Similarly, all employees of the various "conseils d'école" become employees of the Conseil acadien.⁷⁶ Like any other school board under the Act, the Conseil has the authority to discharge (subject to provisions in the Act) teachers in its employ.⁷⁷

While the language of instruction in the écoles acadiennes is clearly French, the new Act also specifies that the general working language of the Conseil acadien and all schools under its jurisdiction is French. However, "when the circumstances warrant the use of English" the same section requires the Conseil to use it in the given context.⁷⁸

The responsibilities and powers of the Conseil acadien are the same as those of other school boards in the province. These are set out in Sections 64 to 93 of the new Act. While the general authority of the Conseil acadien (and even ownership of designated schools) is clear, the Act recognizes the paramount authority of the Minister regarding school property in the province. Any decision "to acquire property or to construct, purchase, alter, add to, improve, furnish or equip buildings or other works for public school purposes" is subject to approval by the Minister, who must be satisfied after reviewing a full report (submitted pursuant to regulations) that such a decision is necessary.⁷⁹

The overall scope of a school board's management powers and responsibilities is broad (as set out in Section 64). It includes the authority to hire and pay school principals, teachers and other staff. While the school board has authority to develop regional policies regarding educational services and programs, it is subject to policies established by the Minister and any regulations. The Act also makes it clear that a school board must "ensure that its schools adhere to the provincial program of studies" which are presumably developed by the Department of Education.⁸⁰

Members of school boards are elected from districts established pursuant to the Act and to decisions of various government agencies.⁸¹ With respect to the Conseil acadien, its members are elected by entitled persons (i.e. anyone whose children are eligible for French-first-language instruction, or anyone whose children would be so eligible should they have any). Candidacies for election to the Conseil acadien are restricted to those persons who fall within the definition of entitled persons.⁸²

While the election of members of school boards ensures community input (at a regional level) in the management of educational resources, the Act also envisages the establishment of school advisory councils. A school board (including the Conseil scolaire acadien provincial) is required to establish a school advisory council when so requested by "(a) eight or more parents of students attending the public school; (b) a home and school association, parent-teacher association or similar organization for the public school; or (c) the principal of the public school". Rules regarding membership in a council are provided in the Act to ensure that it is composed of a cross-section of interests (including parents, teachers, support staff, the principal of the school and community representatives).⁸³

The responsibilities of a school advisory council are set out in an agreement entered into by the council, the school board to which the school is attached, and the Minister. In addition, the Act itself establishes a list of responsibilities of a school advisory council which includes the development and recommendation to the school board of a school improvement plan, the provision of advice to the principal and staff of the school on curriculum and programs, and participation in the selection of the principal of the school. The Governor in Council also has the authority to transfer duties and powers of a school board to a school advisory council, but in accordance with the terms of a three-party agreement between the council, the school board and the Minister.⁸⁴

The Act provides for the appointment of a chief administrative and management officer for each school board (the latter term includes the Conseil scolaire acadien provincial), known as a superintendent. It is the school board itself which has the authority to hire the superintendent, although the board is required to "invite the Department of Education and Culture to name a representative to participate in the process of hiring the superintendent" and to participate in the annual evaluation of the person so hired.⁸⁵ The superintendent, who has broad day to day responsibilities regarding the operation of the schools, is answerable to the school board which hires him. However, the superintendent is also linked to the Minister in that he has the duty to oversee the carrying out of ministerial policies and the duty to co-operate with the Minister and other departments and agencies of the Government to ensure the effective and efficient carrying out of the *Education Act* and its regulations.⁸⁶

The authority of the Minister to make regulations is extensive and includes "prescribing courses of study and authorizing learning materials for use in the public schools" and "prescribing the public school program of education to be provided and administered by school boards."⁸⁷ Within the Ministry, a special division called Acadian and French Language Services ("Division des services acadiens et de langue française") is responsible for overseeing French first- and second-language instruction. Besides being involved in the development of curricula, it also develops policies on student evaluation and offers support in the area of student services and with regard to governance of the Conseil acadien.

(f) Financial resources

The Act provides that the Minister shall notify school boards each fiscal year of the amounts of financial assistance

which will be accorded (pursuant to rules set out in Section 73 of the Act and in regulations adopted by the Governor in Council). Upon receipt of such notice a school board is required to prepare a statement of estimated revenues and expenditures and submit it to the Minister. There is nothing in the Act itself which establishes particular procedures for determining the amount of financial assistance to be made available to the Conseil acadien, although regulations do include the Conseil acadien among three boards which receive an equity grant in recognition of their special circumstances (as explained below).

Funding for school boards comes from two sources: grants paid under the authority of the Minister and education property taxes. In 1996-97, 82% of funding came from grants and 18% from taxes.

Grants are paid by the Minister pursuant to Section 72 of the Act and to the rules established in regulations.⁸⁸ An advisory committee, the Education Funding Review Workgroup, conducts an annual review of the funding formulas and makes recommendations to the Minister. The committee is composed of representatives from various Ministries, associations of municipalities, the school boards association, majority language boards, the Director of Finance for the Conseil acadien and the Director of Acadian and French language programs in the Ministry.

The Regulations provide for three types of grants: global grants, specific purpose grants and a capital bus replacement grant. Global grants are divided into general formula grants, a student transportation operating grant and an equity grant for certain specified school boards. Specific purpose grants are divided into special education grants and a provincial contribution grant in respect of the teacher early retirement plan.

The general formula grant consists of a set amount multiplied by the number of students enrolled less an amount that would be raised by taxes levied at a stipulated rate. Other weighting factors such as average teachers' salaries, size of schools, remoteness, population distribution and socio-economic characteristics used to form part of the calculating formula for this grant but have been eliminated.

The equity grant is currently given to three boards, including the Conseil acadien, in recognition of their particular circumstances. The grant is equal to the amount stipulated in the Regulations, multiplied by a factor relating to actual enrollment.

Capital costs school property, other than those costs that boards are permitted to fund with the grants referred to, are funded on a project by project basis by the province with the approval of the Minister and the Governor in Council.⁸⁹

As regards education property taxes, Section 73 of the Act provides that the rate is set by the Governor in Council. These taxes are then collected by municipalities and subsequently paid to school boards. The power of boards to borrow for current and capital spending is subject to the approval of the Minister and, in some cases, the restrictions imposed by other statutes.⁹⁰

Reflecting the Minister's general authority over public schools, the Act provides that he may "withhold the payment of all or any part of financial assistance that would otherwise be payable to a school board... if the school board... fails to provide and administer any part of the public school program that is required to be provided" under the *Education Act* and regulations.⁹¹ The expenditure of funds on a wide range of matters concerning the operation of public schools, in particular in relation to real and personal property, is also subject to conditions established by the Minister.⁹²

3.2.3 Litigation

(a) Early cases

Early litigation⁹³ in Nova Scotia, predating the Supreme Court decision in *Mahé*, drew attention to deficiencies in provincial legislation which the current *Education Act* seeks to remedy. Among other things, the early litigation raised issues concerning the manner in which sufficient numbers should be determined, the circumstances which would justify the provision of separate physical facilities for the delivery of French-language education, and the involvement of parents of eligible children in the management of French-language education and of school facilities.

The fact that school boards at the time enjoyed wide statutory discretion in disposing of requests from Francophone parents that instruction in French, as well as necessary school facilities, be made available, constituted a considerable barrier to improving access to education in the minority language. Focussing on the concerns of the majority population, school boards often lacked sensitivity to the needs and aspirations of members of the Francophone minority. This fact

alone could not help but influence decisions about the numbers of children necessary to justify a given level of educational services in French, the manner in which numbers were calculated, and the weight to be given to financial considerations in dealing with requests for the provision of French-language instruction.⁹⁴

Decisions rendered as a result of this early litigation, both at trial and on appeal, failed to provide a completely satisfactory response to the concerns of Francophones in the province (and ultimately fell short of the principles enunciated by the Supreme Court of Canada). Nevertheless, observations made by the Nova Scotia Court of Appeal provided useful guidance regarding the interpretation to be given various components of Section 23. On the issue of the nature of French-language instruction, for example, the Court of Appeal determined that where numbers warrant the province:

...must provide suitable accommodation 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 provide in a suitably structured environment.⁹⁵

Numbers necessary to warrant the provision of instruction in French were, of course, considered less than those necessary to warrant the provision of a "separate and free-standing educational facility". Moreover, the Court of Appeal took the view that any possibility of a role in management for parents of eligible children was dependent on the numbers being sufficient to justify a separate educational facility. This threshold level was never determined, but appeared to be set considerably higher than that applicable to the provision of French-language instruction. On the crucial issue of the overall adequacy of provincial legislation at the time, the Court of Appeal found no inconsistency with Section 23 of the *Charter*. As already mentioned, subsequent decisions of the Supreme Court of Canada would place in question various parts of the interpretive framework arising from this early litigation.

(b) Recent or anticipated litigation

The issue of bilingual or mixed schools, mentioned in the background section above, continues to be a source of concern to many Francophones in the province. It appears that some schools subject to the jurisdiction of the Conseil scolaire acadien provincial still provide programs where the language of instruction is both English and French. The ratio of English- to French-language instruction may of course vary from school to school, but the net effect is the continuation of bilingual educational environments. Moreover, students attending some of these bilingual schools are drawn from both the English- and French-speaking communities. While this situation reflects the wishes of some Acadians in the province, it does not respond to the legitimate expectations of others that access to distinct educational facilities be made available where the language of instruction is exclusively French.

In maintaining bilingual schools and programs, the Conseil scolaire acadien provincial believes it is fulfilling its responsibilities to deliver French-first-language programs, as provided for under the *Education Act*. Nevertheless, the right to distinct minority language educational facilities is a constitutional right which cannot be ignored. Where numbers warrant, parents of eligible children who desire homogeneous French-language programs and schools must be accommodated. While people cannot be obliged to exercise their rights under Section 23 of the *Charter*, they cannot by virtue of their own choices detract from the constitutional guarantees of others.

The division within the minority language community over the appropriateness of bilingual schools serves to underscore the difficulties which a minority language school board may encounter in exercising its administrative and managerial powers over schools subject to its jurisdiction. When those powers are exercised in a way which fails to respond to the legitimate expectations of parents who enjoy rights under Section 23 of the *Charter*, there is every likelihood that legal action will be commenced to enforce those rights. This would appear to be the case in Nova Scotia at the present moment. A broadly based group known as La Fédération des parents acadiens de la Nouvelle-Écosse has served notice of its intention to seek legal redress if steps are not taken to ensure the integrity and establishment of homogeneous French-first-language programs in five districts of the province (Clare, Argyle, Chéticamp, Île Madame and Greenwood).⁹⁶ Within the districts in question, instruction in French is given in mixed or bilingual school environments. Eligible parents under Section 23 of the *Charter* have for some time requested that students enrolled in bilingual programs not be housed or accommodated in the same facilities as those enrolled in programs offering instruction exclusively in French. They claim, given the number of pupils involved, that they have a right to have their children educated in programs and schools where French is the exclusive language of instruction. They take the position that

such programs and schools are vital to the preservation and enhancement of the French language in their communities, one of the underlying purposes of Section 23 of the *Charter*.



3.3 New Brunswick

3.3.1 Background

Changes to the New Brunswick school system in 1981 sought to resolve serious problems associated with the operation of what were then known as "bilingual schools". At the time, various school boards in the province provided schools where both English- and French-speaking students were enrolled, the curriculum being taught in both official languages. Extensive studies of the impact and results of an education provided partly in English and partly in French showed alarming rates of assimilation of the linguistic minority and a general impoverishment of the language abilities of students.⁹⁷

Given the unsatisfactory results of such schooling, amendments were made to the *Schools Act* which officially organized school districts on the basis of language and provided for two separate and distinct systems of schools.⁹⁸ The manifest aim of these amendments was to abolish bilingual schools in favour of homogeneous English-speaking and French-speaking schools and teaching environments. Given demographic realities, the amendments envisaged the creation of minority language school boards (English or French) which would manage minority language schools located within districts organized on the basis of the majority language. In addition, except for second-language training, school boards were generally prohibited from offering programs in the other official language.⁹⁹ This was clearly motivated by concerns about the high rates of assimilation of French-speaking children who had received their education in bilingual schools.

These 1981 statutory amendments complemented two other legislative provisions of importance to official languages in New Brunswick. First, Section 12 of the *Official Languages of New Brunswick Act* guaranteed, as early as 1977, that public education would be provided to pupils in their own official language.¹⁰⁰ Several years later, the Legislature of New Brunswick adopted an Act which recognized the equality of the province's two official language communities.¹⁰¹ This latter Act committed the government of the province to ensuring the "protection of the equality of status and the equal rights and privileges of the official linguistic communities and in particular their right to distinct institutions within which cultural, educational and social activities may be carried on."¹⁰²

For many decades, the educational system in New Brunswick recognized the role of school boards in the delivery of education, although considerable authority was centralized in the Department of Education. As described in a previous study published in 1991:

The Minister of Education delegates few of the provincial powers traditionally exercised by the Minister of Education; the Minister always has the final word. For example, all property belongs legally to the province and the school boards are required to provide detailed inventories. The Minister may transfer material from one school district to another. Budgets are approved by the Minister, who allocates all funds; the school boards may collect taxes only in exceptional cases. The province decides on the site, location and construction of schools. The remuneration of teaching and administrative staff is negotiated provincially with the Ministry, which also pays the salaries. Other Ministry powers include:

- preparing the district budget for each school board;
- establishing a teacher training system; and
- prescribing or approving school organization, programs of study, services and courses.¹⁰³

While this description was based on policy and legislative realities which prevailed in 1990, it would seem to reflect the situation in succeeding years as well. For example, a new *Schools Act* (proclaimed in 1992)¹⁰⁴ confirmed the paramount role of the Department of Education over a wide range of issues. Section 4 of that Act empowered the Minister to "prescribe or approve" programs, services and courses for all schools and evaluation procedures related thereto, as well as "prescribe or approve" instructional and other materials for use in the schools. Subsection 6(2) of the same Act

also established that the Minister had the "general administration, management and control of all school property". Consultation with schools boards was certainly mandated by the Act in various areas of concern, but the Minister retained broad and ultimate authority. This was clear under the Act with regard to determining the construction and the sites of school buildings, and the establishment of budgets for the operation of all schools.¹⁰⁵

The *Schools Act* of 1992 confirmed the division of the province into school districts organized as a function of the official language of the majority population of a given district.¹⁰⁶ An elected school board had jurisdiction within each district. While a previous study found (based on the situation prevailing in 1990) that the province had already been divided into 15 French-language majority school boards and 24 English-language majority school boards, regulations under the 1992 *Education Act* reduced the number of districts to six French and 12 English.¹⁰⁷ The administrative powers and responsibilities of all school boards remained the same. These included the day to day management of the schools, the implementation of programs and pedagogical standards, the expenditure of funds in accordance with budgets established by the Minister (in consultation with school boards), and the hiring of personnel who met ministerial standards and requirements.¹⁰⁸

Provision was also made in the 1992 *Schools Act*¹⁰⁹ for the creation of minority school boards within any given district where so requested by the parents of at least thirty school age minority language children. Such minority boards exercised the same authority with respect to specific minority language schools as did the majority board with respect to all other schools in the district. This attests to the possible geographic isolation of minority language speakers even when every attempt is made to provide for language based school districts. What is more, the 1992 Act provided¹¹⁰ for the designation of community schools (operating in an official language other than of the district) over which a community board would have general administration, management and supervision.¹¹¹ However, a community board was subject to the general policies, direction and authority of the school board for the district as a whole.

The linguistic division of school districts and school boards was also reflected within the Department of Education, where two parallel divisions, one Anglophone and one Francophone, evolved over time. Ultimately each division became responsible for a number of services, including pedagogical development (program of study and student services), evaluation and development (teacher evaluation and pedagogical development), and financial and administrative matters (such as transportation, equipment, textbooks and buildings).

New Brunswick has recently introduced legislative changes which radically alter the institutional framework within which public education is delivered and managed. They have crystallized a number of important issues which relate to the very nature and scope of rights protected under Section 23 of the *Canadian Charter of Rights and Freedoms* (the *Charter*), as interpreted by our courts. As will be explained below, the network of school boards which traditionally administered and managed public education in the province has been reduced to two entities, English and French, by the new legislation. Clearly, this raises serious questions regarding the constitutional right of parents to exercise effective management and control over education programs and schools.

3.3.2 Current legislative provisions

(a) Eligibility

The new *Education Act*¹¹² guarantees access to schooling in the official language of a student. Language proficiency plays an important role in determining whether a student will be placed in either English- or French-language education. A unilingual student ("sufficient linguistic proficiency in only one of the official languages") is entitled to receive instruction in a "school district, school and class organized in that official language." Bilingual students ("sufficient linguistic proficiency in both of the official languages") are entitled to receive instruction in either official language, as are students who speak neither of the official languages. The rules therefore provide for a principle of freedom of choice where students are already sufficiently bilingual (as well as immigrants who speak neither official language with sufficient proficiency), and guarantee that unilingual students will be educated in their own official language.¹¹³ Where there is doubt about the linguistic proficiency of a student, Subsection 5(2) of the Act provides for the administration of tests designed to determine the level of proficiency. In addition to these basic rules, Section 5 of the *Education Act* also declares that where a student's parent has rights under Section 23 of the *Charter*, he or she is entitled to receive instruction "in a school district, school and class organized in the French language."

(b) Sufficient numbers

There are no specific provisions in the new Act dealing with the numbers of students necessary to warrant the provision of minority language education. In effect, the Act recognizes an absolute right to education in the official language of a student, be it English or French. Two parallel systems of education continue to operate in New Brunswick¹¹⁴ as described in Section 4 of the new Act. School districts are classed as either English- or French-speaking, and schools operating in a given district are required to give instruction in the official language of the district.¹¹⁵ The Act¹¹⁶ also provides that the Lieutenant-Governor in Council may by regulation group schools for the purpose of establishing districts, although this must be done without infringing the principle set out in Subsection 4(1) of the Act to the effect that school districts shall be organized throughout the province in either English or French.

(c) Minority language instruction

The legislative provisions discussed in the previous section regarding reasonable numbers make it clear that instruction is given exclusively in either English or French depending on the school district within which a school or class is located or to which it is attached. Second-language training is permitted in either educational sector, as a subject matter of study or by way of immersion.

Authority to determine programs will be discussed more fully in the Management section below, although it is useful to mention at this point that regulations have been adopted which establish two curriculum advisory committees to the Minister of Education.¹¹⁷ These committees (one Anglophone and the other Francophone) play a consultative role and thus make recommendations to the Minister with respect to "instruction, curricula, or pilot, experimental or supplementary courses." These advisory committees work in conjunction with curriculum development committees and task forces. Membership in all these structures are a prerogative of the Minister.¹¹⁸ This network of administrative advisory bodies will thus have a role in determining the content of educational programs, although it is the Minister who retains ultimate authority in this regard (as is clearly set out in Section 6 of the Act).

(d) Minority language education facilities

The new Act has little to say about what constitutes a minority language educational facility. The term "school" is defined in the Act as "a structured learning environment through which public education is provided to a pupil". The term "school building" is defined as including "any building approved by the Minister as necessary for the operation of a school district."¹¹⁹

Other provisions in the Act already reviewed (regarding the organization of school districts as either English or French and the obligation to provide instruction exclusively in the language of a district) have the effect of ensuring that instruction given in the minority official language of the province (i.e. French) will be in homogeneous school settings or classrooms. In this regard, it will be remembered that geographic isolation of minority language speakers (be they English or French) led, under the legislative framework and policies predating the current Act, to the creation of minority language school boards with jurisdiction over schools in a given district operating in the minority language, or potentially to the designation of community schools and the creation of community boards to administer them. This would suggest that every effort was made to ensure that homogeneous educational facilities are made available to minority official language students.

Because of the manner in which the educational system is organized in New Brunswick, there are perhaps fewer reasons to make a statutory distinction between "instruction in the minority official language" and "instruction in minority language educational facilities". Nevertheless, whether the geographic isolation of some French-speaking communities results in less than separate school facilities being made available to them is a question of fact difficult to answer in the abstract. Within the framework of the new Act, however, it is the Minister who has ultimate authority to make decisions regarding the type of educational facilities made available to minority language children.¹²⁰ A *School Districts Regulation* has now been adopted which recognizes a total of 18 school districts, six of which are French-speaking. Schedules to the regulation identify the specific schools attached to each district.¹²¹

(e) Powers of governance

Questions concerning powers of governance over public schools in New Brunswick, both English and French, go to the heart of changes made under the new *Education Act*. The new Act abolishes all existing school boards, replacing them with two separate but related hierarchical structures.

On the one hand, the new Act decrees the establishment of three levels of parental involvement in the operation of public schools. At the level closest to the community, i.e. within each school in the province, the Act provides for the creation of parent advisory committees. The majority of members of a parent advisory committee are elected by parents of children enrolled in a given school (at a public meeting), with one member being elected from among the teachers of the school.¹²² Details regarding the mode of election and membership in the committees are to be determined by regulation. The second level of involvement of parents is found in the district parent advisory councils.¹²³ As the name suggests, the Act provides that one council per school district will be established, its members to be elected or appointed by, and from among, parents (or their representatives) sitting on the various school advisory committees. The final level of involvement of parents is found in two provincial boards of education, representing the English and French sectors of the school system.¹²⁴ Members are elected by and from among members of district parent advisory councils attached to the same official language community. As with school committees, other details regarding mode of elections, etc. to the district councils and to the two provincial boards of education are left to be set out in regulations.

Regulations have now been adopted which set out details regarding eligibility for membership, modes of election, and formal rules of operation of the school parent advisory committees, district parent advisory councils and two boards of education.¹²⁵ However, these regulations do not clarify the substantive powers or concrete authority these bodies may exercise. These are matters which have to be determined by reference to the provisions of the *Education Act* itself.

The Act establishes a further hierarchical administrative structure emanating from the Department of Education and subject to ministerial authority. First, at the level of each school district, the Act provides for the appointment of a director of education. Given various responsibilities, each director of education is in turn accountable to a superintendent charged with overseeing the operation of public schools within a given set of districts. Expressed generally, a director of education "is accountable to the superintendent... for the quality and effectiveness of the educational programs and educational services in the school district in respect of which the director of education is appointed."¹²⁶ As for the superintendent, he is "accountable to the Minister for the management of programs and resources, for the quality of learning and for the implementation of the provincial education plan and provincial expenditure plan in the school district or school districts in respect of which the superintendent is appointed or reappointed."¹²⁷

As previously mentioned, the Act establishes a relationship between these two hierarchical structures. The components of each structure are given mandates, assigned various duties and responsibilities, and accorded certain powers. None of the components operate in isolation from the others. An examination of that interrelationship provides a view of the anticipated distribution of management powers within the public school system as a whole. In terms of real decision-making power, that distribution is overwhelmingly in favour of the Minister of Education, his Department and its various officials.

With respect to a school parent advisory committee, the Act provides that it "shall advise the principal of the school respecting the establishment, implementation and monitoring of the school improvement plan..."¹²⁸ The Act recognizes that such plans may include "strategies for ensuring the language and culture of the school preserve and that they shall promote the language and culture of the official linguistic community for which the school is organized", as well as "strategies for establishing school policies related to education, language and culture." The committee also "participates in the selection of the principal of the school."¹²⁹ This wording clearly accords no decision-making authority to the school parent advisory committee.

A district parent advisory council advises the superintendent and director of education of the school district "respecting the establishment, implementation and monitoring of the district education plan". This advice includes "strategies to ensure that curriculum and program delivery preserve and promote the language and culture of the official linguistic community for which the school district is organized."¹³⁰ The Act provides for the participation of advisory councils in various management functions, such as providing "input into the annual performance review of the superintendent and director of education of the school district" and participating (through its designate) in the "selection of the director of education for the school district."¹³¹ Advisory councils are also empowered to reject the appointment of teachers or principals, but only where required qualifications (as established by the Minister in conjunction with a Board of Education) are not met, or some ministerial policy or procedure has been violated.¹³²

The giving of advice does not of course confer authority to make decisions regarding educational policy, nor with respect to managing educational facilities or programs. One might have thought that the district advisory council would exercise meaningful authority over the expenditure of funds, the use of school buildings and other resources, the hiring and supervision of teachers and other personnel, and any other matter having an impact on a minority language or culture. However, this is not the case.

Since statutory terminology is frequently used which establishes only a consultative role for school parent advisory committees and district parent advisory councils, it is useful to consider the functions of the director of education for a district and those of the superintendent to determine if greater authority is vested there. As regards the director of education, the Act provides that his or her duties include "coordinating the implementation and evaluation of the educational programs and educational services in the schools..."¹³³ He or she is also designated as having "primary responsibility for the preparation and implementation of the district education plan for the school district, in consultation with the superintendent of the school district and the district parent advisory council."¹³⁴ The director of education also participates, "with the superintendent of the school district, in the hiring, assignment and supervision of teachers for the school district."¹³⁵ While other duties are set out in the Act, these examples demonstrate that director of education exercises more extensive authority, albeit limited, than the parent committees and advisory councils. Indeed, his or her role in hiring and assigning teachers is a management function which should, according to the Supreme Court of Canada, fall within the authority of parents. At the same time, however, a district director of education is accountable to the superintendent and participates with this higher authority in performing various tasks.

As to the superintendent, the Act stipulates that his or her duties include "coordinating and administering the educational programs and educational services prescribed by the Minister", as well as "overseeing the preparation and implementation of the district education plan". The superintendent also ensures the establishment and operation of the district parent advisory council and provides for the "effective and efficient management of available financial resources."¹³⁶ As previously stated, the superintendent is accountable to the Minister.

While the superintendent seems to exercise increased authority regarding the substantive aspects of education plans (implied by the duty to oversee their preparation), the Act more often suggests that the superintendent coordinates and administers, rather than establishes, education programs and education services. However, it should also be remembered that the Act provides that for each of the two education sectors "there shall be a dedicated division within the Department of Education to develop and oversee the implementation and evaluation of educational programs and educational services."¹³⁷ This certainly reinforces administrative control over the development of educational programs. This should be kept in mind when reviewing the authority over educational programs vested in the highest levels of the two hierarchies established by the Act: the Minister and the Boards of Education.

As previously stated, two Boards of Education are created to represent the official language linguistic communities. Accordingly, there is one province-wide Board of Education to represent the English-speaking majority of New Brunswick and one which represents the French-speaking minority. With respect to the authority of either Board of Education, Paragraph 38(2)(a) of the new Act provides that they shall "require that the plans, policies, programs and services related to education, language and culture preserve and promote the language and culture of that official linguistic community" for which they are established. Such terminology obviously implies that the actual preparation of education plans, etc. do not lie within the purview of a Board's exclusive authority. This is borne out in Paragraph 38(2)(b) of the new Act which provides that a Board of Education shall, in conjunction with the Minister:

- (i) decide on and adopt, on an annual basis, a provincial education plan,
- (ii) decide on and adopt, on an annual basis, a provincial expenditure plan,
- (iii) review, advise on and approve recommendations made by the provincial curriculum advisory committee and the provincial testing and evaluation advisory committee,
- (iv) cooperate with persons and organizations for the promotion of educational standards and programs,
- (v) establish required qualifications for school personnel, and
- (vi) select, for appointment under the *Civil Service Act*, superintendents and directors of education for school districts organized in the same official language for which the provincial board of education is established...

Since these duties are performed "in conjunction with the Minister", a Board of Education cannot be said to exercise ultimate authority regarding these matters. As already explained, the other parent-related bodies at the level of each school and district are merely consultative as well. In the result, none of the three levels of parental involvement envisaged under the Act encompasses any exclusive authority for parents or their representatives over key aspects of education, as mandated for official language minority parents by the Supreme Court judgement in *Mahé*.

With respect to the appointment of superintendents and directors of education (Subparagraph (vi) above), Paragraph 38(3) of the new Act recognizes explicitly the paramount authority of the Minister where:

- (a) a superintendent is transferred to a superintendent position for another school district organized in the same official language, or
- (b) a director of education is transferred to a director of education position for another school district organized in the same official language.

In other words, a Board of Education has no power to alter these types of lateral transfers, even though the Minister is obliged to consult the Board regarding appointments under consideration.

The new Act is vague as to how the "shared" powers of the Minister and the two School Boards are to be exercised. On the face of it, a Board of Education has quite extensive responsibilities regarding the preparation of provincial education plans, as well as the duty to establish and maintain liaison with district parent advisory councils. In light of this, Subsection 38(4) of the Act provides that the "Minister shall, in accordance with the regulations, provide, for each provincial board of education, a dedicated support staff to assist the provincial board of education in organizing and carrying out its responsibilities under this Act." However, the regulation entitled the *Governance Structure Regulation* makes no provision for financial resources or a "dedicated support staff" for the two Boards of Education, nor any financial resources for the school parent advisory committees or district parent advisory councils.¹³⁸ Nevertheless, it would appear that a budget was decided upon by the Department of Education for committees, councils and boards applicable to the 1997-98 school year.

The Minister's ultimate authority over the non-departmental components which play a role in the education system is clearly set out in Subsection 41(1) of the Act. Here we find that the Minister is empowered (with the approval of the Lieutenant-Governor in Council) to dissolve a school parent advisory committee, a district parent advisory council or a provincial Board of Education where it fails to comply (after proper notice) with any provision in the Act or with any regulation passed under the authority of the Act. The Minister also has the authority to dismiss for cause a member of any of these three bodies. Powers of regulation (found in Section 57 of the Act) are extremely broad, and a complete understanding of how the education system is managed would have to take account of the more than 60 items with respect to which regulations may be adopted. In principle, however, regulations could affect significantly the manner in which parent-related bodies perform their functions.

The Minister's administrative powers under the Act include the authority to establish advisory boards and committees. A regulation has now been adopted which contains a number of provisions relevant to the creation of provincial curriculum advisory committees.¹³⁹ In effect, the regulation provides that two such committees "shall be established", one Anglophone and one Francophone. Their purpose is to provide "communication and consultation...relating to the development and implementation of curriculum and instruction in the public schools in the Province." Members of each committee are to be named by the Minister, although the regulation includes the principle that "provision shall be made for representation of appropriate organizations involved in public education in the Province." The authority of the Minister and his department over these two committees is evident from various sections in the regulation. For example, prior approval of the Minister must be sought before presentations are made to a committee by representatives of organizations with "special interests in public school curriculum and instruction", and it is the Minister who establishes the "plan of organization of each of the provincial curriculum advisory committees". Furthermore, the executive secretary to each committee is the Director of Curriculum Development in the Department of Education or his Francophone equivalent (the latter identified in the regulation as the "directeur des services pédagogiques").

The two advisory committees are empowered to recommend policy with respect to "instruction, curricula, or pilot, experimental or supplementary courses". To assist them in this regard the regulation provides for the establishment of curriculum development committees and task forces, although the members of such bodies must be appointed by the

Minister. Recommendations of development committees or task forces are submitted to the Minister via the relevant advisory committee. The Minister is given the authority to approve and implement recommendations, although the regulation makes it clear that this is subject to the "shared" authority of the Minister and the provincial Boards of Education to "review, advise on and approve recommendations made by the provincial curriculum advisory committee..."¹⁴⁰ As already mentioned, the manner in which this "shared" authority is to be exercised is unclear on the face of the Act and the regulation.

Finally, specific powers of regulation under Section 57 of the Act are reinforced by provisions in the Act regarding the Minister's powers in general. In addition to the general administration of the Act, the Minister is declared to have "the general administration, management and control of all school property", and the authority to determine the "sites of school buildings", make decisions regarding the construction and furnishing of school buildings, and authorize the use of any school property by any person or organization.¹⁴¹ Moreover, both superintendents and directors of education are ultimately subject to the Minister's administrative control.

(f) Financial resources

Total financial resources for the operation of schools in the province are voted by the Legislative Assembly. Once the governmental budget has been approved by the Assembly, the Minister of Education is required by the Act to divide resources earmarked for education "on an equitable basis between the two distinct education sectors."¹⁴² French-language education is thus statutorily entitled to an equitable share of the monies available for the operation of schools in the province. How this translates into actual formulas for the division of funds is obviously a matter which will be determined by regulation, directives or other standards and procedures established by the Minister.

It is unclear on the face of the Act whether this principle of equitable share applies as well to the resources needed to run the two Boards of Education, as well as the operations of the district parent advisory councils and school parent advisory committees. Moreover, the actual amounts which will ultimately be made available to these parent-related bodies is a matter for the Minister to determine under the general administration of the Act and by means of directives or regulations. Presumably, any regulations ultimately adopted will also determine how such monies may be spent.

3.3.3 Litigation

(a) Early cases

A case decided in the early 1980s dealt extensively with changes to the school system aimed at officially establishing two parallel and distinct educational systems based on language. As already mentioned, the phasing out of bilingual schools was considered essential at the time to the preservation and enhancement of the French language. Despite legislative changes designed to accomplish this objective, some English-language school boards continued to offer programs to Francophone children in which the language of instruction was a mixture of English and French. Believing this practice to be contrary to statutory amendments introduced in 1981 which prohibited school boards operating in one official language from offering programs in the other official language, two organizations representing francophone interests in the province commenced legal action.¹⁴³

The intention of the Legislature to require that one or the other official language be the primary language of instruction (apart from second-language training) in a dual system of education was central to the decision of the New Brunswick Court of Queen's Bench.¹⁴⁴ The court found that this intention was sufficiently clear to support the proposition that any form of bilingual educational programs (which had in the past been promoted and operated by some school boards) could no longer be offered,¹⁴⁵ nor could a school board operating in one official language offer a full program in the other official language without breaching the integrity of the two parallel and distinct educational sectors. This being said, however, the court was faced with the further issue of what criteria to use in determining the eligibility of children to attend one or the other system of schools.

On this issue the court differed with the position taken by the plaintiffs, who had argued that the *Schools Act* required parents to have their children educated in their mother tongue. Mr. Justice Richard found that the amendments to the *Schools Act* gave no indication that the "[trans.] legislator intended to exclude all Francophones from an English school and all Anglophones from a French school", and concluded that "[trans.] such an intent would require clear and unequivocal language..."¹⁴⁶ While there was no explicit provision in the legislation which dealt with the use of linguistic tests to determine when a child should be admitted to the one or the other school system, Mr. Justice Richard found

nevertheless that the legislation implicitly placed "[trans.] a limit upon eligibility according to whether or not there is sufficient knowledge of the chosen language." Provided that sufficient knowledge was demonstrated in a given language, a child could legally be admitted to a school where that language was used as the medium of instruction.¹⁴⁷

The criterion of sufficient knowledge also led the court to conclude that, generally speaking, admission to immersion second-language programs should not be open to children who already spoke that language. To decide otherwise, reasoned the court, would amount to opening the back door to bilingual schools. In effect, admission to a French language program in cases where children were not able to function adequately in the chief language of instruction of a given school would breach the statutory requirement that homogenous educational environments be maintained. As the court reviewed at some length, it is only within such environments that second-language training can occur without jeopardizing the development of a child's mother tongue.

The answers that the court gave to the issues raised in this case helped establish the framework for the dual system of education which is a distinctive feature of the Province of New Brunswick. No other decisions appear to have been issued by New Brunswick courts. However, recent government decisions to close schools in small communities and the extensive statutory changes contained in the new *Education Act*, 1997 may give rise to litigation.

(b) Recent or anticipated litigation

Recent government decisions naturally raise potential issues related to rights under Section 23 of the *Charter*. This was the case recently where dissatisfied parents filed suit contesting the constitutionality of ministerial decisions to close schools in rural areas of the province.¹⁴⁸ However, given the delays normally experienced in conducting constitutional cases in the courts, the plaintiffs sought a preliminary decision on an application for an interim injunction. Although it does not involve the merits of the underlying claim of the plaintiffs, the court's decision regarding the interim injunction sets out three conditions which a party must satisfy before such an injunction will issue.

First, the underlying cause of action must involve a serious legal issue. On this point, the court had no difficulty in concluding that the management powers of minority language parents under Section 23 of the *Charter* could have been adversely affected by the contested ministerial decisions. This being the case, the legal issues involved were serious enough to satisfy the first criterion in applications for an interim injunction.

Second, the applicant for an interim injunction must show that irreparable harm or prejudice would be suffered in the absence of such an injunction (assuming he or she were later successful at the trial of the merits of his case). In the context of Section 23, the court concluded that decisions which would have the effect of moving children from one school to another, then back again part way through an academic year (in the event that the plaintiffs were successful at trial), would inflict serious harm upon them. As a result, the court determined that the second condition had been satisfied.

Third, it must be shown that the applicant for an interim injunction would suffer greater harm or prejudice (depending on the outcome of the application for the interim injunction) than that which would be suffered by the adverse party. When comparing the potential harm to the children involved against that potentially caused to the government, the court concluded that the latter might suffer an inconvenience by the delay in the implementation of its decision (should it win the case on its merits), whereas the nature of the prejudice suffered by the children (should the plaintiff win on the merits) would be considerably more serious. Given that all three conditions had been satisfied, the court issued an interim injunction against the government, restraining it from applying its order of closure to the three schools involved in the plaintiff's cause of action.

The dramatic changes to the educational system, summarized in the previous section, have raised the likelihood of legal action being initiated to contest the constitutional validity of various elements in the new *Education Act*. There is widespread concern amongst Francophones in the province that minimal constitutional requirements established by the Supreme Court of Canada, in particular those related to the right of parents to exercise meaningful management and control, are not respected by the legislative amendments now being implemented in New Brunswick.

As discussed in Chapter 2 of this study, the Supreme Court has identified a number of specific powers of management which belong exclusively to parents of eligible children under Section 23 of the *Charter*. These relate to the expenditure of funds provided for minority language education, the appointment and direction of those responsible for the administration of minority language instruction and facilities, the establishment of programs of instruction, the

recruitment and assignment of teachers and other personnel, and the making of agreements for education and services for minority language pupils. It is precisely in regard to these specific management powers that the new *Education Act* appears deficient.

Under the Act, school principals and teachers are appointed by the Minister, although required qualifications are established jointly by the Minister and a provincial Board of Education. As already mentioned, however, the manner in which this joint authority is to be exercised is unclear. While a district parent advisory council has the power to reject an appointment if the required qualifications have not been met, this would appear to be some distance from an exclusive authority to recruit and assign teachers. Indeed, management authority over teachers and other personnel is virtually completely within the hands of the Department of Education. With respect to the positions of superintendent and district director of education, the Act merely provides that they are selected jointly by the Minister and a provincial Board of Education. No mechanism is foreseen in the Act for resolving possible differences of opinion a Board of Education may have with the Minister.

The development of educational programs is centred, to a great extent, in the Anglophone and Francophone divisions of the Department of Education. Consultation is foreseen with the district parent advisory councils with respect to the district education plan (advice in this regard is given to the superintendent and district director of education), but no decision-making power is accorded. The Act also provides that an annual provincial education plan will be adopted each year jointly by the Minister and a Board of Education, and that both will "review, advise on and approve recommendations"¹⁴⁹ made by provincial curriculum advisory committees. Again, there is nothing in the Act which relates to the resolution of possible differences of view between the Minister and a Board of Education. This would appear to reduce the role of a Board of Education to one which is primarily consultative. The one exclusive power which a Board of Education would appear to have under the Act is to "require that the plans, policies, programs and services related to education, language and culture preserve and promote the language and culture of that official linguistic community"¹⁵⁰ which the Board represents. Nevertheless, the absence of any meaningful parental authority at the level of the school and school district, notably regarding minority language education programs places in doubt the constitutional sufficiency of these sections of the *Education Act*.

Francophones in the province are also concerned that the general management and control of financial resources related to minority language education lies with the superintendent of schools. The latter official has the duty under the Act of "ensuring the allocation, management and development of all human resources in the school district" and "providing for the effective and efficient management of available financial resources."¹⁵¹ He or she is "accountable to the Minister... for the implementation of the... provincial expenditure plan."¹⁵² Involvement of parents at the school and district levels is not provided for in the Act, although a provincial Board of Education is empowered, in conjunction with the Minister, to "decide on and adopt, on an annual basis, a provincial expenditure plan."¹⁵³ Again, whether this is the type of meaningful role for parents in the expenditure of funds earmarked for minority language education, as envisaged by the Supreme Court, is open to doubt.

Issues of the sort touched upon here call for careful consideration of the constitutional principles and requirements enunciated by the Supreme Court of Canada. Accordingly, a provincial association known as Le comité des parents, which has worked for many years in the area of minority language education, has requested that the government of New Brunswick initiate a constitutional reference to the provincial Court of Appeal. It is felt that judicial review of the contentious elements of the new *Education Act* is needed in order to ensure that fundamental minority rights are respected. In the event that no reference is submitted to the Court of Appeal (the preferred procedure given its cost-effectiveness and less time-consuming nature), legal action may be initiated.

Education Minister Bernard Richard announced on February 5, 1998 that a special committee was established to review the parental governance structure of the New Brunswick public education system.

The terms of reference for the review committee are:

- to review the effectiveness of the current parental governance structure of the New Brunswick public education system relative to the objectives of the renewed education system, as presented in the document titled "A Renewed Education System for New Brunswick" tabled in the Legislature in February 1996;
- to make recommendations to the Minister of Education as to how the current parental governance

structure could be improved, including an assessment of the implications of any changes on:

- a) parental involvement in education;
- b) system accountability;
- c) the system's decision-making;
- d) the cost effectiveness of the system.

The committee will prepare a report for submission to the Minister of Education by September 1, 1998.

3.0 Provincial implementation of Section 23



3.4 Prince Edward Island

3.4.1 Background

The presence of small local schools and authorities across Prince Edward Island in the first half of the century helped to sustain a network of community-based Acadian schools where French was the language of instruction for part of a pupil's education. However, because of problems associated with bilingual readers, a periodic lack of qualified Francophone teachers and an increasingly mixed school population, such schools were only partially successful in preserving the French language and culture.

The transition from small schools and authorities to larger regional schools (begun in the late 1950s), and the creation of school boards to govern them, inevitably reduced the overall number of Acadian schools. By the early 1970s, that number had fallen from 43 to 23, and the vast majority offered their programs in mixed or bilingual environments. This school consolidation resulted in the creation (in 1971) of five regional school boards for the province. At that time there was only one designated school where French was the language of instruction (the *École Évangéline*), located in Unit 5. The school board for Unit 5 thus became identified as offering a French-language program and administering the *École Évangéline* (in Abrams Village). A second French-language school was opened in the city of Charlottetown in 1980 (its establishment being the result of the transfer to Charlottetown of the headquarters of the federal department of Veterans Affairs).

The territory of Unit 5 did not, of course, cover the entire province. Beyond that unit, Francophone parents were obliged to request majority language boards to establish minority language programs, a procedure which proved unsatisfactory and which ultimately led to the preparation of legal action in the early 1980s. The possibility of that legal action (arising from rejected requests from Francophone parents in the Summerside area that the school board for Unit 2 open a French-language grade one class) resulted in a number of constitutional issues being referred to the Prince Edward Island Supreme Court, Appeal Division, in 1985. The judgment of the court in that matter is discussed below.

The boundaries of the French-language school board for Unit 5 were extended to cover the entire province in 1990. However, any decision to open minority language classes or schools was subject to the approval of the Minister of Education. The manner in which power to approve was exercised, with respect to further requests from Francophone parents in Summerside that a minority language program be offered within their community, is the subject of legal action now before the Prince Edward Island Court of Appeal. Thus, even though current legislation and regulations recognize a French-language school board with province-wide jurisdiction, problems still persist regarding the establishment of minority language programs and schools in local communities, as opposed to busing children to more distant localities where such programs may currently be offered. The case before the Court of Appeal will be discussed more fully below when dealing with litigation.

3.4.2 Current legislative provisions

(a) Eligibility

Section 112 of the *School Act*,¹⁵⁴ recognizes the right of parents resident in the province to have their children receive "French first language instruction" where the parent's first language learned and still understood is French, where the parent received primary schooling in Canada in French, or where one of the parent's children has or is already receiving

French-first-language instruction (primary or secondary) in Canada. The wording of the statute essentially reproduces that which is found in Section 23 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) itself. This basic right is, however, subject to the qualification of "where numbers warrant" (as in Section 23), and to proof of eligibility as prescribed by the regulations.

Regulations have been adopted which stipulate that a parent who falls within one of the above-mentioned situations must file with the French school board (to be discussed below) a declaration in such form as the Minister of Education may approve in order to register a child.¹⁵⁵ The current version of this declaration requires parents, depending on the situation giving rise to their right, to indicate the date and place of their own primary instruction, or the date and place of their children's current or past instruction. Where a parent's right is based upon his or her mother tongue (i.e. first language learned and still understood), only a simple declaration to this effect is required. The current form also requires the parent to authorize the French school board to undertake any investigation it judges necessary.

On the basis of a parent's claimed right and the declaration filed, the French school board determines the eligibility of a child to be registered for French-first-language instruction. This determination is subject, however, to the Minister's authority under the regulations to review declarations filed and make a final decision with respect to eligibility.¹⁵⁶ An exemption from the obligation of filing a declaration is granted to parents who had a child attending a French school in the province in the 1989-90 school year. The regulations also provide that no one who is eligible loses that eligibility merely because one or more of that person's children has been registered for or received instruction in a school system where English is the language of education.¹⁵⁷

The regulations recognize a discretion in the French school board to register students in the French school system who are not eligible under Section 23 of the *Charter*. However, this authority must be exercised with due "regard for the integrity of the system and the intent to provide a French language program."¹⁵⁸ This authority is also subject to the condition that the child so admitted "has been released by the English school board that has jurisdiction in the area in which the child is resident."¹⁵⁹

(b) Sufficient numbers

The regulations under the Act provide a very specific definition of what constitutes sufficient numbers for the purposes of French-language instruction. The phrase "where numbers warrant" (which appears in the statute) is defined as meaning "at least fifteen section 23 children over two consecutive grade levels, who can reasonably be assembled for the purposes of providing French language instruction."¹⁶⁰ No similar definition is given as regards reasonable numbers for the provision of facilities.

While the definition of the phrase "where numbers warrant" is very explicit, other sections of the regulations introduce important qualifications as to how the definition applies in practice. With respect to the locality where French-language instruction will be offered, the regulations provide that:

[trad.]

The French school board shall, where numbers warrant, provide French language instruction in a particular area by offering classes or by offering transportation to an area that has a class.¹⁶¹

Furthermore, the regulations require the French school board, when making preliminary plans to start a new class in any area, to "take into consideration the proximity of existing classes or facilities, projected numbers of Section 23 children, and other relevant factors."¹⁶² Despite the board's powers in this regard, it must, before making a conditional offer of instruction, obtain the Minister's approval regarding the projected numbers and whether they can be reasonably assembled for a class.¹⁶³

The regulations suggest a number of factors the Minister should consider when addressing the issue of whether a sufficient number of children can be reasonably assembled:

- (a) the proximity of existing classes and facilities to the area;
- (b) the number of Section 23 children in the area;
- (c) the potential for future admissions;

(d) the distances over which children must be transported,

(e) the ages of the children.¹⁶⁴

(c) Minority language instruction

The *School Act* defines "French first language instruction" as being a "school program in which the language of instruction is French, but does not include the French immersion program."¹⁶⁵ The phrase "French school system" is defined as meaning "the administrative system in which French is used as the language of instruction and in which English is taught as a second language".¹⁶⁶ Part IV of the *School Act Regulations* (which deals with French-language instruction) repeats key definitions with the exception that the term "French language instruction" is used instead of "French first language instruction". (Given that the definitions are the same, this discrepancy is most likely a drafting oversight.)

(d) Minority language education facilities

As mentioned earlier, the *School Act Regulations* set out criteria to be used when considering the provision of French-first-language instruction, either through an offer of classes in a given area or by arranging transportation to an existing facility. How decision-making authority is divided in this regard is also specified.

With respect to educational facilities, the regulations provide that the Minister "may designate a school as a French school." When exercising this authority the Minister is required by the regulations to take into consideration the following factors:

(a) the number of students;

(b) the number of grade levels; and

(c) the reasonable assembly of the students in one location.¹⁶⁷

These criteria therefore constitute a type of "where numbers warrant" standard, but the determination is left to the discretion of the Minister.

While a French school may constitute a separate building devoted exclusively to instruction in French, this is not always the case. This is evident by reference to the definition of French school found in the regulations: "...a building or part of a building", designated by the Minister, and "used, during school hours, to provide French language instruction to classes over several grade levels."¹⁶⁸

(e) Powers of governance

The *School Act* recognizes that residents of the province who meet the qualifications for French-first-language education, whether or not they do in fact have children, "have the right to participate in the administration and management of French first language instruction."¹⁶⁹ To determine how this right is translated into an institutional reality one must consult both the *School Act Regulations* and the *School Boards Regulation*.

By virtue of the regulations, a French school board has been created whose territorial jurisdiction covers the entire province.¹⁷⁰ The regulations recognize that it "shall have jurisdiction over and administer French language instruction in the province in accordance with the Act and the regulations." In this regard, it also is responsible for the "promotion of, and distribution of information with respect to, French language instruction in the province."¹⁷¹

The *School Boards Regulation* sets up five zones for the purposes of the election of a total of nine trustees of the French board. To be eligible to vote, citizens must meet not only the general criteria of age, citizenship and residency but also one of the criteria in Section 29 of the Act being the parent of a child receiving or eligible to receive French-first-language instruction, or being someone whose child would be so eligible if the person had a child.

To be eligible for election to the French school board a candidate must not only meet general criteria concerning age, citizenship, residency and not being disqualified for other reasons (i.e. being a school board employee), but also must meet one of the criteria in Section 29 referred to above. The Act and regulations therefore provide mechanisms designed to ensure that control over the French-language board remains with the representatives of the minority language community.

As far as the powers of management of the French board are concerned, they do not differ from those of the English-language boards. While it may appear from the enumeration of these powers at Sections 49 and 50 of the Act that they are extensive, a closer reading reveals that they are in fact significantly curtailed by the powers of the Minister, by standards and procedures set out not only in the regulations but also in Ministerial directives and by collective agreements centrally negotiated by the Education Negotiations Agency. The boards' latitude with regard to everything from the hiring, transferring and dismissal of teaching and non-teaching personnel and their salaries and working conditions, setting curriculum and choosing teaching materials, setting a yearly budget and capital spending, and rental, construction and sale of buildings is therefore subject to extensive regulation.

Although other management structures are not referred to in the Act or regulations, the provincial Department of Education has a division entitled "French Programs and Services". It has a permanent staff and develops and implements not only French-first-language but also French immersion and Core French programs. (The latter consists of basic French as a second language instruction as of Grade 4 and is not compulsory after Grade 9.) The "comité directeur" of this division, composed of the director of the division, the principals of the two French schools, the superintendent of the French board, as well as teacher and special education representatives, have input into the curriculum and teaching materials used in French-first-language instruction.

(f) Financial resources

As is the case with the English boards, the French board is provided with a yearly budgetary allotment established in accordance with very specific guidelines. For 1997-98, these are found in Ministerial Directive 97-04 entitled "School Board Staffing and Funding for the 1997-1998 School Board Fiscal Year". This directive contains detailed ratios for funding based on, for example, the number of square feet as regards maintenance costs, the number of students as regards renovations, repairs, equipment and program materials, the number of kilometres as regards transportation, and the number of employees as regards professional development. In many cases, however, the Minister retains the right to determine the number of staff members a board is entitled to or to adjust funding levels. While there are no provisions in Directive 97-04 specifically to adjust the ratios for the purposes of French-first-language instruction, the directive does give the Minister latitude to do this.

Section 146 of the Act allows boards¹⁷² to levy a property tax to raise supplemental funds over and above their budgetary allotment. Before seeking such supplementary funding, the board must obtain approval from the Minister for the program or service for which the funds will be used, publish a notice about the proposed program or service and, if five percent or more of the eligible voters protest, conduct a plebiscite on the proposal. The class of eligible voters for the purposes of such a plebiscite is the same as for an election of trustees.

3.4.3 Litigation

(a) Early cases

As was the case in Nova Scotia, early litigation on Prince Edward Island underscored a number of deficiencies in provincial law relevant to the implementation of Section 23. While provisions in the current *Education Act* are meant to remedy these defects, it is useful to recall briefly some of the issues which the early litigation raised.¹⁷³ This litigation was related, of course, to legislation in place at the time, which set out a mechanism for requests to be made (by a group of French-language parents) to an existing school board (controlled by the majority English-speaking population of a given district) for the provision of French-language education. Regulations prescribed a minimum number of children (25 within any three consecutive grade levels) as a prerequisite for the submission of a request, and gave the school board to which the request was submitted the authority to determine if the prescribed number of children could be reasonably assembled for the purpose of French-language education.

Among other things, the litigation (which eventually took the form of a reference submitted to the Court of Appeal of Prince Edward Island) questioned the validity of school board discretion regarding the reasonable assembly of eligible children, as well as the validity of statutory criteria which established eligibility, and placed in doubt the constitutionality of an *Education Act* which made no provision for the participation of parents of eligible children in program development and delivery. With respect to the first issue, i.e. school board discretion, the Court of Appeal made it clear that it was not constitutionally permissible that a school board in the province be given the authority to determine what might constitute a reasonable demand for French-language education, let alone be given unfettered discretion to determine if a statutorily imposed number of students could be reasonably assembled.¹⁷⁴ These matters rightfully had to be

determined by the legislature, or by the Lieutenant-Governor in Council (by way of statutory delegation). The Court of Appeal declined to rule, however, that the statutory minimum of 25 eligible students was, in and of itself, contrary to Section 23 of the *Charter*.

The question of eligibility arose due to the fact that legislation at the time determined access to French-language education by, in part, reference to the mother tongue of a child and his or her current ability to understand it. This was clearly in conflict with Section 23 of the *Charter*, in that the latter determines eligibility, in part, by reference to the mother tongue of a parent and the parent's continued ability to understand it.

As to the issue of management, the Court of Appeal determined that eligible parents enjoyed the implicit right under Section 23 to "participate" in program development and delivery. Although its notion of what might constitute participation now appears narrower than the right to management and control set out in two decisions of the Supreme Court of Canada, the Court of Appeal's underlying reasoning remains pertinent to the issue:

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 program 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 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.¹⁷⁵

Legislative and regulatory reform subsequently undertaken by Prince Edward Island has been reviewed above, reform which resulted in the creation of a French-language school board with province-wide jurisdiction. Nevertheless, a major case has emerged from the Supreme Court of Prince Edward Island which illustrates the type of difficulties which can still be encountered when applying statutory provisions and constitutional principles to specific situations.

(b) Recent or anticipated litigation

The lawsuit, brought before the Prince Edward Island Supreme Court, involves a long-standing request by parents of eligible children for French-language instruction at the primary level in the town of Summerside.¹⁷⁶ Various issues are raised in the case, including the manner in which the number of pupils should be calculated, the negative effects of busing on potential enrolment in minority language education, the deterioration of local minority language communities and the remedial role of Section 23, and the role of the French School Board in determining the educational needs of a given minority language community.

Prior to the start of litigation, the plaintiffs had engaged in extensive consultations and discussions with the French School Board. To assist in assessing the demand for French-language classes at the primary level, the Board had conducted a pre-registration which indicated that a total of 34 children would have enrolled in six elementary grades if such instruction had been offered. Fifteen students would have registered for the first two grades. While a fully operational French-language school exists 28 kilometres from Summerside (the *École Évangéline*), the majority of the parents concerned did not consider it suitable to bus young children to another locality. Indeed, they believed busing was so strong a deterrent that many Francophone parents in their community were choosing to enrol their children in English-language schools located closer to home. In light of this and the number of children involved, the French School Board felt it would be justified in offering elementary instruction in French in a designated school in Summerside. It therefore sought the approval of the Minister to do so, as required under the regulations.

In rejecting the request of the Board, the Minister emphasized the difficulty the provincial government "would have with the establishment of a school for a small number of students who were already being offered transportation to an existing, well established program at *Évangéline* School." He also felt that "this arrangement (meets) the requirements of Article 23 of the *Charter*, as well as regulations established under the *School Act*." In addition, he identified budget restrictions which allegedly had forced other boards to consider school closures even where enrolments were far larger than that projected for a French school in Summerside. He therefore only gave approval to the French School Board to arrange for busing of the pupils in question to the *École Évangéline*.¹⁷⁷

In an effort to meet budgetary concerns, a further proposal was made to offer French instruction in Summerside but under the authority of the *École Évangéline*. The supplementary costs to the latter school were estimated to be

\$40,000. This proposal also was rejected by the Minister, and legal action was commenced seeking a court order both recognizing the rights of the Summerside parents to a French school in their community and requiring the province to provide sufficient public funds to support its establishment and operation. In addition, the court action sought to have parts of the regulations governing French-language education (concerning the discretion of the Minister to determine if a sufficient number of children could reasonably be assembled) declared to be inconsistent with Section 23 of the *Charter* and therefore inoperative.

In rendering judgement, Mr. Justice DesRoches of the Prince Edward Island Supreme Court set out the underlying purpose which must be considered when interpreting and applying Section 23 of the *Charter*. In this regard, he quoted directly from decisions of the Supreme Court of Canada which have established that the purpose of Section 23 "...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."¹⁷⁸ As Mr. Justice DesRoches pointed out, the linkage of language to culture was not incidental in the eyes of the Supreme Court: "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."¹⁷⁹

Mr. Justice DesRoches also reviewed the ruling of the Supreme Court of Canada that Section 23 of the *Charter* entails a sliding scale of minority language education services depending on the numbers of eligible students. Actual numbers will determine when classes as opposed to separate educational facilities are appropriate, as well as determine the degree of management and control to be accorded to parents of eligible students.

He also emphasizes that Section 23, as interpreted by the Supreme Court of Canada, must be reviewed as remedial in nature and meant to correct historical injustices which persist today:

...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.¹⁸⁰

In light of these considerations, Mr. Justice DesRoches examined in great detail the evidence presented in court, ranging from testimony of individual plaintiffs regarding their particular circumstances, to evidence about the history of French-speaking communities on Prince Edward Island, to expert testimony on rates of assimilation and the loss of institutional settings necessary for the preservation of French, to the role of schools in preserving language and culture, to factors considered by the Minister of Education in rendering his decision, to the potential numbers of children eligible for French-language education. His lengthy review provides a complete historical analysis of Acadian communities on the island as well as an assessment of their present condition and their prospects for the future.

The evidence led Mr. Justice DesRoches to conclude that sufficient eligible students were present in Summerside to warrant the provision out of public funds of French-language instruction, a conclusion which even the evidence of the provincial government allegedly supported. However, the further issue remained, that is to say whether the proposal for busing students to the École Évangéline was adequate to meet the constitutional obligations of the province. It was the latter's position that the obligation to provide French-language instruction did not necessarily include the obligation to provide it in Summerside.

The resolution of this issue required not only an assessment of how the Minister had exercised his discretionary powers under the school regulations, but also a consideration of the underlying purpose of Section 23 of the *Charter*. Regarding the constitutionality of the Minister's alleged discretion under the regulations to refuse a proposal of the French School Board and to substitute his own solution, the Court declined to issue a definitive ruling. It preferred instead to concentrate on the failure of the Minister to consider a wide variety of factors which he should have weighed under the very terms of the school regulations, and his failure to consider fully the impact of Section 23 when dealing with the specific proposal of the French School Board and the Francophone parents of Summerside. In this regard, Mr. Justice DesRoches concluded that:

...the evidence establishes the Minister directed his mind to only one factor, the existence of l'école Évangéline. He did not consider the number of pre-registrations as in any way significant to his decision. He did not consider the total number of s. 23 children in the Summerside area. He did not consider the

potential for future admissions. He did not consider the distance over which the children must be transported, although he did consider the travelling time as being acceptable. In particular, the Minister did not address his mind to the purpose of s. 23 of the *Charter*, nor to its remedial aspect and the role it plays in the preservation and flourishing of minority language and culture.¹⁸¹

Mr. Justice DesRoches also pointed out that, in absolute numbers, the Summerside area contains the second largest number of Francophones on Prince Edward Island. Ample evidence was also presented to convince the judge that there was "an urgency for taking action now to preserve the Summerside area French language community, to preserve the French language and culture in that area. The provision of transportation for s. 23 children from the Summerside area to l'école Évangéline does nothing to address the situation."¹⁸²

Lengthy bus trips for elementary school children were also viewed as inherently detrimental; they should be minimized where possible:

In my opinion, if the numbers warrant the establishment of a facility pursuant to ss. 23(3)(b) to provide for instruction in the language of the French minority in the Summerside area (in my view that is the case here), then surely the facility should be located so as to be reasonably accessible and eliminate, insofar as possible, extremely lengthy bus rides for elementary school children. In this respect I agree with Hallett J. at the trial level of *Lavoie* ((1988), 50 D.L.R. (4th) 405 (N.S.S.C.T.D.)) who held that sending elementary school children on bus trips of 30 to 45 minutes each way is unreasonable if appropriate priorities are kept in mind (Hallett J. was not overturned on this point). Sending very young children on bus trips of up to 50 minutes each way is unreasonable if the priority of ensuring to citizens of Canada the right guaranteed by s. 23 is properly applied. A facility for elementary school children cannot be considered reasonably accessible if it is located some 30 kilometres away from the main geographic area where the majority of the students who would be attending the facility reside.¹⁸³

Mr. Justice DesRoches also emphasized that what might be considered reasonable access should be assessed by reference to the situation that majority language parents must confront:

It is implicit in the s. 23 right that a facility for minority language instruction be at least as accessible as those of the majority language group. The French School Board proposed, and still wishes, to provide French language classes in Summerside organized and presented by l'école Évangéline under its mandate. That, in my view, would more likely guarantee s. 23 parents in the Summerside area their minority language right as opposed to the transportation offer made by the Minister which, in effect, denies the plaintiffs their minority language right.¹⁸⁴

Although the number of pre-registered children was smaller than the actual number of eligible children in the Summerside area, Mr. Justice DesRoches took note of the high probability of increased demand. Indeed, the evidence presented suggested that as many as 300 children would ultimately be eligible to register in a French-language program. For the time being, however, Mr. Justice DesRoches ruled that the number of children pre-registered (34) was sufficient to justify the provision of French-language classes in Summerside, leaving the question of establishing a separate facility to a later date: "It may be that future enrolment will necessitate a much more comprehensive approach up to and including a separate facility. Only time will dictate the appropriate s. 23 sliding scale response to the demand for minority language educational facilities in the Summerside area."¹⁸⁵

In conclusion, Mr. Justice DesRoches remarked (regarding the establishment of French-language classes): "I am convinced such a program will most effectively encourage the flourishings and preservation of the French language and culture in the Summerside area, and in the Province in general, and will remedy past defects in the provision of French language educational services. In my view, there can be no other reasonable conclusion from the evidence presented."¹⁸⁶

Following the judgement of Mr. Justice DesRoches, the Minister of Education decided to appeal to the Court of Appeal of Prince Edward Island. In addition, the Minister has taken the position that the judgment appealed from is merely declaratory and does not require the French Board of Education to implement French-language instruction in Summerside in September of 1997. Meanwhile the French School Board has taken various steps to establish a French-language instruction facility in an existing facility in the Summerside area for the upcoming school year, that is 1997-1998. The budget it presented to the Government included a sum of \$247,000, the total cost of establishing and

operating such a facility for that year. Approval of the budget was refused by the Minister.

In light of these developments, further application was therefore made to Mr. Justice DesRoches for an order enforcing his judgement in the first instance.¹⁸⁷ Mr. DesRoches declined to issue such an order for a number of reasons. Among other things, the judge did not believe he had jurisdiction over the case any longer, given the appeal which had been lodged. Even if he were to issue a mandatory order, he emphasized that the government would simply seek a stay of execution pending the outcome of the appeal, something which was provided for under the Rules of Court. In conclusion he expressed the following view :

I would urge the Government, however, in the strongest possible terms to proceed... to cooperate with and assist the French School Board in the planning, design and approval process necessary to ensure that should the appeal be unsuccessful, the educational facilities required by the judgment could be in operation without delay.... In my view, it would be a grave injustice in these circumstances to force the applicants to wait until the beginning of the 1998-99 school year before their constitutional rights can be exercised.¹⁸⁸

Proceedings before the Court of Appeal¹⁸⁹ focus, to a great extent, upon the "where numbers warrant" test arising out of Section 23 of the *Charter* and issues which are closely connected to it.¹⁹⁰ While the Supreme Court of Canada has indicated that the level of educational services offered in the minority language will vary with the number of pupils involved, no precise number or series of numbers can be established in the abstract. Each situation must be assessed in light of its own facts, and in line with the underlying purposes of Section 23.

The government of Prince Edward Island (the appellant) has taken a restricted view of the actual numbers of pupils involved in the present case, being reluctant to consider the potential demand (over and above actual pre-registration) which might emerge should a French-language program be established in Summerside. While the appellant accepts that the number of children pre-registered warrants the provision of instruction in French, the appellant considers that the numbers are not high enough to justify that such instruction be offered in Summerside. Estimates suggested by the parents (the respondent) take note of the large number of parents of eligible children who actually reside in and around Summerside. As the Supreme Court of Canada has pointed out, actual demand for a minority language educational service will follow, to a certain extent, the active offer of such a service. It is thus reasonable to conclude that the numbers of pupils who would eventually take advantage of instruction in the minority language would fall somewhere between the actual pre-registration and the total number of eligible children residing in a given area.

The remedial nature of Section 23 lends weight to the manner in which the respondents propose that eventual demand for minority language instruction (or distinct facilities) should be calculated. The erosion of the French-speaking community of Summerside can be halted, it is argued, only by the establishment of a community-based minority language school. The parents point out that the numbers they advance are considerably higher than those put forward by the provincial government and hence present a strong case for French-language instruction in their community. The parents also believe (supported by the French School Board acting in its capacity as an intervenor before the court¹⁹¹) that the actual number of children pre-registered leads to the same conclusion.

(Shortly before going to press, we learned that the Court of Appeal had overturned the decision of the lower court, and that the parents were asking the Supreme Court of Canada to hear the case.)



3.5 Quebec

3.5.1 Background

English-language schools in Quebec evolved over a long period of time within a framework of constitutional provisions meant to protect the denominational rights of Protestants and Catholics to an education based on their respective confessions or denominations.¹⁹² At the time of Confederation it was religion, rather than language, that carried the seeds of potential conflict and called for an appropriate protective mechanism for religious minorities (whether Protestant or Catholic) in the constitutional arrangements of 1867. Nevertheless, denominational schools in Quebec at the time of Confederation falling under the rubric "Protestant" were essentially English; while those falling under the rubric "Catholic" were primarily French. Even though denominational rights protected under Section 93 of the

Constitution Act, 1867 were ultimately interpreted in such a manner as to exclude linguistic guarantees, English remained the predominant language of instruction in Protestant schools in Quebec.

Provincial legislation with respect to education did not directly regulate the language of instruction almost until the 1970s. By then the linguistic division between Catholic and Protestant was not as complete as it had been a hundred years before, and the ever-increasing number of immigrants whose mother tongue was neither English nor French had begun to raise contentious issues surrounding rules of access to English-language education. Indeed, the very absence of rules had favoured a principle of parental freedom in the choice of language of instruction. While this latter principle was legislatively recognized in 1969, it quickly gave way to other statutory rules which effectively narrowed access to English-language schools.¹⁹³ This was accomplished by requiring that pupils demonstrate sufficient knowledge of the language of instruction (either English or French) to enable them to receive instruction in that language. Where pupils did not have sufficient knowledge of either English or French they were required to register in a French-language school.¹⁹⁴

Difficulties in applying the criterion of sufficient knowledge quickly emerged, though such difficulties were overtaken by the enactment of the *Charter of the French Language* (Bill 101) in 1977. At that point, the main criterion governing access to English-language schools became the language in which a child's parent had received his or her own primary education in Quebec.¹⁹⁵ Where a parent's elementary instruction had been received in English (in Quebec), his or her children had the right to attend English-language schools. This effectively excluded immigrants into Canada from access to publicly funded English-language schools in Quebec (unless access was granted through the exercise of discretionary powers), as well as English-speaking Canadians moving to Quebec after the entry into force of the new statutory provisions.

The contentious debate in Quebec over rules which should apply to the right of access to English-language schools spilled over into federal-provincial discussions regarding proposals for patriating and amending the *Canadian Constitution*. The rules of access to English-language schools established by Bill 101 (known as the Quebec clause) were considered by many to constitute an unjustified restriction on English-speaking Canadians who might choose to reside in Quebec. When constitutional amendments were introduced in 1982 (which included the *Canadian Charter of Rights and Freedoms* hereinafter, for greater clarity in this section, the *Canadian Charter*), they contained a definition of minority official language education rights which based eligibility (in the case of English-language education in Quebec) on a parent having received his or her primary education in English anywhere in Canada (known as the Canada clause).¹⁹⁶ The pan-Canadian approach of Section 23 of the *Canadian Charter* thus came into direct conflict with the more restrictive eligibility rules contained in Bill 101.

In addition to the eligibility rule based on the official language in which a parent received his or her elementary education (in Canada), Section 23 of the *Canadian Charter* also guarantees access to official minority language education to children of parents whose first language learned and still understood is that of the minority in any given province.¹⁹⁷ However, the mother tongue rule of eligibility for minority official language education under Paragraph 23(1)(a) of the *Canadian Charter* (i.e. the first language learned and still understood of a parent) does not currently apply in Quebec. In this regard, the constitutional amendments of 1982 stipulate that any proclamation bringing into force Paragraph 23(1)(a) in the province of Quebec will only be made when so authorized by the legislative assembly or government of Quebec.¹⁹⁸ As a result, the scope of Section 23 of the *Canadian Charter* is at the moment narrower in Quebec than in the other provinces insofar as the constitutional rules of eligibility for minority official language education are concerned.

In view of the conflict between the pan-Canadian approach of Section 23 and the provisions in Bill 101 essentially limiting the right of access to English-language schools to the children of Quebecers educated in English, a court challenge was initiated in 1982. This case eventually reached the Supreme Court of Canada and resulted in the first Supreme Court decision interpreting Section 23 of the *Canadian Charter*. While this case will be discussed below in the section on litigation, it is useful to mention now that it had the effect of rendering unenforceable provisions in Bill 101 restricting access to English-language schools to the children of parents who had themselves received their primary instruction in English in Quebec.¹⁹⁹ In short, the constitutional rights entrenched in Section 23, guaranteeing such access to the children of all citizens of Canada who had received their elementary instruction in English anywhere in Canada, were found to take precedence over the statutory rules of eligibility (in Bill 101) with which they conflicted.

English-language education in Quebec has thus been marked more by the debate over the rules of eligibility than by

consideration of those elements of Section 23 of the *Canadian Charter* which pertain to the adequacy of minority language school facilities and the powers of management over them. The system of denominational school boards provided an effective framework for the development and growth of minority language education in the province, although the past two decades have witnessed a steady decline in the number of students enrolled in English-language schools. The decline is in part related to rules of access which limit enrolment to the children of Canadian citizens who were themselves educated in English (at the primary level) somewhere in Canada. Residents of Quebec educated outside of Canada (i.e. immigrants who have become Canadian citizens) are required (as is the majority French-speaking population of the province) to enrol their children in French-language schools, at least with respect to publicly-funded education.

Proposals to transform the system of denominational school boards to a school board system based on language (English and French) were debated in Quebec over a long period of time, beginning in the 1970s. However, such a transformation was rendered problematic because of confessional rights guaranteed under Section 93 of the original *Constitutional Act, 1867*. The latter not only applied to dissentient minorities across the province, but was also the source of a broader set of constitutional rights applicable to the Protestant and Catholic school boards of Montreal and Quebec City.²⁰⁰ Initial legislative amendments that attempted to restrict the territorial jurisdiction of the latter school boards (at the same time as introducing linguistic boards in general) were declared by the courts²⁰¹ to be incompatible with Section 93. Further attempts at statutory amendment met with more success, but the Supreme Court of Canada also reaffirmed the constitutionally entrenched rights of denominational school boards in Montreal and Quebec City.²⁰² In the end, the complexities that Section 93 rights would have imposed on a system of linguistic school boards led the Quebec government to propose a constitutional amendment designed to repeal the constitutionally entrenched status of denominational (and dissentient) school boards in the province.

Resolutions were adopted both by the National Assembly of Quebec (April of 1997) and the Parliament of Canada (December of 1997) to the effect that paragraphs one to four of Section 93 no longer apply to Quebec. Thus, by constitutional amendment, Section 93 rights which had encumbered the ability of the Quebec government to implement a system of linguistic school boards have been effectively repealed. In so doing, the federal and provincial governments have relied on the special bilateral amending formula set out in Section 43 of the *Constitution Act, 1982* that allows for an amendment to be made relating to any constitutional provision applicable to one or more provinces (but not all), by the province(s) concerned and the Parliament of Canada. However, several court challenges have been commenced in Quebec placing in question the validity of the process by which the constitutional amendment was made. It will be argued that an amendment to Section 93 requires the consent of more than just Parliament and the National Assembly of Quebec, given that Section 93 applies formally to five other provinces and gives rise in particular to significant substantive rights in the province of Ontario. While the amendment affects only the applicability of Section 93 to the province of Quebec, it will nevertheless be argued that the consent of the other provinces affected by Section 93 is necessary, failing which the constitutional amendment is null and void.

At the same time as adopting the resolution to amend Section 93, the government of Quebec introduced major changes to the *Education Act* (Bill 109) designed to replace denominational (and dissentient) school boards with boards classified as either English or French.²⁰³ A transitional period is provided for that will have been completed on July 1, 1998, at which time the system of boards based on religion will have been replaced with a new network of linguistic (English and French) school boards. Within the framework of the *Education Act* (as amended), English- and French-language school boards will exercise the same powers and fulfil the same responsibilities and roles. The review of current legislative provisions in this regard reflects the situation as it will be after the transitional period is completed and the new linguistic school boards are fully functional.

3.5.2 Current legislative provisions

(a) Eligibility

The basic rules regulating access to English-language education in Quebec are found in Chapter VIII of the *Charter of the French Language*. They constitute exceptions to the statutory requirement that "instruction in the kindergarten classes and in the elementary and secondary schools shall be in French".²⁰⁴ Two of the main eligibility criteria are now modelled on Section 23 of the *Canadian Charter*:

The following children, at the request of one of their parents, may receive instruction in English:

(1) a child whose father or mother is a Canadian citizen and received elementary instruction in English in Canada, provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada;

(2) a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers and sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada.²⁰⁵

While these two eligibility rules find their source in Section 23 of the *Canadian Charter*,²⁰⁶ they also introduce a qualifying phrase unique to the Quebec statute, namely the requirement that the "major part" of the instruction must have taken place in English. Whether this qualification is compatible with the wording of Section 23 of the *Canadian Charter* has not been definitely settled, although it could potentially be a source of disagreement between parents and those designated to apply the provisions of Quebec law.

In addition to transitional provisions ensuring continuity of the language of instruction of children at the time the *Charter of the French Language* was adopted (August 1977), and the rights of persons resident in Quebec at the same date, provision is also made for children of non-Canadian citizens who received their instruction in Quebec in English. Provided that such instruction constituted the major part of their elementary education, such persons (regardless of citizenship) are allowed to enrol their children in English-language schools.²⁰⁷ Similar access is also allowed in cases of children whose parents received the "greater part" of his or her elementary instruction in English in a Canadian province which, in the opinion of the Quebec government, offers instruction in French equivalent to that offered in English in Quebec (provided that the parent was domiciled in such a province immediately prior to moving to Quebec).²⁰⁸ The only province currently deemed to offer the same level of educational services in the minority language is New Brunswick. Further exceptions are allowed with respect to children who are staying in Quebec temporarily and for children with serious learning disabilities.²⁰⁹

In order to establish eligibility for English-language instruction, parents must present extensive written proof of facts which may bring them within any of the various provisions of Quebec law. For example, parents claiming access on the basis of their own past language of instruction (received in Canada, but outside Quebec) must produce a written attestation issued by the school they attended indicating the period of time during which they were students, the proportion of the instruction that was given in English, and the place where the instruction was received.²¹⁰ Proof of citizenship is also required. Similar requirements of written proof apply with respect to the other criteria of access, with variations made to reflect the nature of the criterion invoked.

A request for permission to register a child in an English-language school (along with all supporting documents) must first be made to the school board having jurisdiction. The school board is then required to transmit the request within a reasonable time to the person designated by the Minister of Education, who reviews the claim and all supporting documents before making a final determination.²¹¹ Where the claim is accepted, the designated person is required to issue a certificate of eligibility. Where the claim is denied, provision is made to appeal decisions made by the designated person, such appeals being heard by a committee of three members appointed by the government after consultation with organisations deemed most representative of parents, teachers, school boards, school administrators and socio-economic groups.²¹² The appeals committee "may make such orders as it sees fit to safeguard the rights of the parties and rule on any question of fact or of law."²¹³ Where the committee cannot allow an appeal but deems that there is evidence of serious family or humanitarian grounds on which to grant eligibility, it is required to submit a report to the Minister, who may declare the children involved to be eligible for English-language education.²¹⁴

(b) Sufficient numbers

Neither the *Education Act* nor the regulations establish what constitutes a reasonable number for the purposes of providing instruction in English or English-language school facilities. As discussed above, the central issue in Quebec has concerned eligibility rules which effectively restrict access to English-language education. The availability of educational facilities, in and of itself, does not seem to have raised serious controversy. However, falling enrolment has an impact on the ability of English-language school boards to maintain existing facilities.

(c) Minority language instruction

The *Education Act* does not define what constitutes English-language education, beyond the fact that English is the language of instruction. Requirements with respect to curriculum and teaching materials, as well as the goals that instruction and support services to students must meet, are established in regulations. This will be discussed below when dealing with powers of management.

(d) Minority language education facilities

The *Education Act* declares that "a school is an educational institution whose object is to provide to the persons entitled thereto under Section 1 the educational services provided for by this Act and prescribed by the basic school regulation established by the Government... and to contribute to the social and cultural development of the community."²¹⁵ This declaration applies whether the school is operated by a English- or French-language school board. The Act also provides that "schools shall be established by the school board,"²¹⁶ although the ability to do this is a function of the financial resources at the disposal of a board.

(e) Powers of governance

As previously mentioned, the historic system of denominational and dissentient school boards will have been replaced on July 1, 1998 with school boards organized as a function of language (English or French). The government has established nine English and 60 French-language school boards throughout the province.²¹⁷ The territory over which each school board has jurisdiction is divided into divisions as a function of the number of students enrolled in its schools (each member of the board being elected from a division).²¹⁸

The *Education Act* provides that a school board "shall be administered by a council of commissioners,"²¹⁹ the majority of whom are elected pursuant to *An Act respecting school elections* (the *School Elections Act*). Persons eligible to vote in such elections can be divided into two categories. First, persons who have children enrolled in the schools of a board with jurisdiction over the territory where they are domiciled may vote in the election of commissioners to that board.²²⁰ It will be remembered, however, that access to English-language schools is subject to specific criteria set out in the *Charter of the French Language* and regulations adopted under it. In addition, the *Education Act* stipulates that "only those persons who, according to law, are entitled to receive instruction in the English language and who elect to come under the jurisdiction of an English language school board come under the jurisdiction of that school board."²²¹ The Act further stipulates that such an election is made by virtue of applying for admission to educational services of the school board in question (and presumably being found eligible).

Persons without children enrolled in a school may become electors of the English-language school board with jurisdiction over the territory where they live if they make specific application.²²² This is done by sending a notice in writing to the returning officer of the English-language school board. The exercise of this option applies for every subsequent election unless the elector revokes it or unless one of the elector's children is admitted to a school of a board in the territory of domicile of the elector. The returning officer responsible for preparing the public notice of school board elections must inform electors in the notice that they may exercise this option. There is therefore no requirement that those without children who wish to vote in the elections of an English-language board demonstrate that they would have been eligible under Section 23 of the *Canadian Charter* to enrol their children in English-language education.

In addition to elected members of the council of commissioners (of the school board), the *Education Act* provides for the selection of two commissioners representing parents' committees at the elementary and secondary levels. In this regard, a school board is required to establish a parent's committee composed of one representative from each school (elected by parents pursuant to provisions in the *Education Act*), and one representative of an advisory committee on services for handicapped students and students with social maladjustments or learning disabilities.²²³ The parents' committee then meets and elects, by majority vote of those present, one commissioner to represent the elementary level and one commissioner to represent the secondary level. The two commissioners so elected to the council have the same rights, powers and obligations as the other commissioners elected pursuant to the *School Elections Act*, although their right to vote at meetings is restricted and they are not entitled to occupy the position of chairman or vice-chairman of the school board.²²⁴

To be a candidate for general election to the council of commissioners (of a school board), a person must be entitled to be an elector of that board and must have been domiciled in the territory of that board for at least six months and be nominated by ten electors. In addition, a person must not otherwise be disqualified under the terms of the *School*

The *Education Act* provides that a school board "shall see to the proper operation of its schools" and "to that end, it may make by-laws for the management of its schools".²²⁶ However, the operation of schools involves pedagogical considerations, as well as control over human and material resources. As to the content of education, the Act stipulates that the Minister "shall establish the programs of developmental and cognitive learning activities for preschool education, the programs of compulsory subjects for elementary and secondary schools as well as the elective subjects..."²²⁷ The Minister "may draw up a list of textbooks and instructional material or classes of instructional material approved by him."²²⁸

In providing educational services, a board must follow what is known as the "basic school regulation" (in French, the "régime pédagogique"), which sets out obligatory and elective courses and basic educational goals.²²⁹ There is one regulation for preschool and elementary education and one for secondary education. Other than adjustments for first- and second-language instruction, the regulations make no changes for English-language education. The Act does allow a school board (subject to conditions in the basic school regulation, and the authorization of the Minister if a departure from the established list of subjects is proposed) to depart from the regulation in order to implement a special school project.²³⁰ A board may also, with authorization and subject to conditions determined by the Minister, adopt a "local program of studies" designed for a student or category of students who are "unable to benefit from the programs of studies established by the Minister."²³¹ As regards teaching materials, the Act stipulates that a school board "shall ensure that only the textbooks and instructional material or class of instructional material approved by the Minister... are used for the teaching of any program of studies established by the Minister."²³²

With respect to material resources, a school board is authorized to acquire or lease movable and immovable property, to build or repair its moveable or immovable property, and to determine the use of its property and administer it.²³³ However, the sale, exchange or other disposition of an immovable shall be done in accordance with pertinent regulations,²³⁴ and no school board may hypothecate (mortgage) or demolish its immovables without the permission of the Minister. The advice of the Minister is also required with respect to any renovations involving the preparation of plans and specifications.

Teachers and other personnel of a school board are considered to be employees of the board.²³⁵ They are under the general authority of the principal of the school where they teach, the principal being appointed by the school board.²³⁶ Hiring is subject to applicable collective agreements (as well as provincial labour relations legislation) and to the requirement that a teacher hold a teaching licence issued by the Minister of Education.²³⁷

General authority of school boards over its schools is subject to the very extensive powers of regulation of the government under the *Education Act*. These are too numerous to reproduce here, but the exercise of these powers has a wide-ranging impact on the operation of schools in Quebec.²³⁸ The role of the Ministry of Education is also reflected in its internal operations where we find a departmental branch responsible for the English preschool, elementary and secondary sectors, overseen by an Assistant Deputy Minister. The branch is responsible for ensuring that the policies of the Minister are adapted to meet the needs of the English sector.

To assist the Minister from a more general point of view, the *Education Act* establishes several advisory bodies involved in the development of policy. These are the "Commission des programmes d'études" (no official English version exists in the statute, but it could be translated as Council on Study Programs), the teaching resource evaluation committee, the teacher training program accreditation committee and the teacher training policy committee.²³⁹ The Act provides that all these bodies must have a minimum number of representatives from the English-language education sector.

Recent amendments to the *Education Act* also create a new school-based body, known as a governing board, which exercises certain powers and fulfils a consultative role vis-à-vis the school board and the principal of the school. Members of the governing board include parents (elected by and from among the parents of students attending the school), teachers and other staff, students, and representatives from the community.²⁴⁰ The governing board has the authority to approve various school policies developed by the school principal, advises the school board on a number of matters related to school operations (including the selection of the school principal), and approves various strategies and policies relevant to the implementation of the program of studies in the school. The governing board is also authorized to organize social, cultural and sports services, and may develop educational services other than those

prescribed by the basic school regulation. This new body is meant to involve parents and others affected by the operation of schools in the establishment of policies appropriate and acceptable to the local community. In this regard, the Act also provides for the creation of parent participation organizations (if so desired by the parents of students enrolled in a school) whose function is to advise parents' representatives on the governing board.²⁴¹

(f) Financial resources

Revenue necessary for the operation of schools is provided by way of school taxes levied on immovables and by way of grants from the provincial government. With respect to school taxes, however, the *Education Act* makes a distinction between school boards situated in whole or in part on the Island of Montreal and those in the rest of the province. Only the latter are allowed to levy a school tax directly.²⁴² In the case of school boards on the Island of Montreal, a special regime applies which involves a body known as the Island School Council ("Conseil scolaire de l'île de Montréal").

The determination of which school board may levy a tax with respect to a given immovable (leaving aside for the moment the special regime applicable to the Island of Montreal) is made by reference to several factors. First, where an owner of taxable property has children enrolled in a school operated by a board exercising jurisdiction in the area where the property is located, the property is taxed exclusively by the board in question. Where the children are admitted to the educational services of different school boards having jurisdiction over the area, the tax is divided between the boards in proportion to the ratio of children enrolled with each board.²⁴³

In the case of natural persons who do not have children enrolled in school, their immovables are taxed by the school board as a function of the list of electors. As mentioned above, a natural person can exercise an option to become an elector of an English-language school board by following a specific procedure. Where that option is not exercised, such persons are entered on the list of electors of the French-language board having jurisdiction in the territory where they live; and their immovables situated in the territory are taxed by that board. If the option is exercised, the immovables of the persons in question are taxed by the English-language school board for which they have become electors.²⁴⁴

Where natural persons are not on a list of electors (and have no children enrolled), they may elect to have their immovables taxed by a specific board having jurisdiction over the territory where the immovables are situated. The *Education Act* provides that "an election as to the levy of school taxes shall be made by way of notice transmitted before 1 April to the school board in whose favour the election is made."²⁴⁵ That board is required to inform without delay any other board having jurisdiction in the same territory. The election remains in effect until it is revoked, or until the person applies to have one of his or her children enrolled in a school of a board having jurisdiction in the area, or until the person's name is entered on the list of electors of another board.

Where none of the above-mentioned three situations apply, an immovable of a person (this term not being qualified in the statute by the adjective "natural") "is taxable by each school board having jurisdiction over the territory in which the immovable is situated on a portion of the standardized assessment of the immovable established in proportion to the number of students enrolled on 30 September of the preceding year in the schools that are under the jurisdiction of the school boards concerned and residing in their common territory."²⁴⁶ Since the term "person" may include a corporation, this provision for taxation by several boards would appear to include levies on commercial property (if it is an immovable). In any event, it would appear rare that a natural person would not fall within one of the other three situations governing the imposition of school taxes.

The council of commissioners of a school board sets the tax rate, which must be the same for all taxable property.²⁴⁷ However, the *Education Act* and regulations establish the maximum total yield that a school board may collect for one school year. This yield is determined according to a formula based in part on the number of students. In addition, if a school board proposes to levy a tax the rate of which exceeds a certain amount (set out in the *Education Act*), it must conduct a referendum to obtain the approval of its electors.²⁴⁸

As mentioned above, a special regime for levying school taxes applies to the Island of Montreal. Here the *Education Act* establishes the School Council for the Island of Montreal (the "Conseil scolaire de l'île de Montréal") whose purpose is to assist economically disadvantaged areas on the Island, to economize in some areas by pooling resources and to coordinate services amongst Island school boards.²⁴⁹ The Council levies taxes on behalf of all school boards on the Island of Montreal. It may also levy an extra tax to finance its own operations and to provide assistance to

economically disadvantaged areas. While the Council may set the tax rate, neither the rate nor the total yield may exceed amounts set out in the *Education Act*.²⁵⁰

The *Education Act* provides the formula for determining the apportionment of the tax collected amongst the various school boards on the Island.²⁵¹ Essentially, the portion each board receives is at least equal to what it would have collected had it levied the tax itself as an "off-Island" board (according to the rules reviewed above). Any remainder left after this distribution is apportioned among school boards located in economically disadvantaged areas. Where a school board on the Island wishes to collect an amount over and above its apportionment, it must obtain the approval of its electors in accordance with referendum procedures set out in the Act.

The *Education Act* also provides for two different regimes concerning the borrowing powers of boards on and off the Island. The latter may borrow only with the authorization of the Minister and subject to such conditions as he or she prescribes. The Minister may also grant an off-Island board a general authorization to borrow for a period not exceeding one year and up to a specified amount.²⁵² With respect to school boards on the Island, only the Island School Council may, with the authorization of the Minister and on the conditions he or she determines, borrow money for its purposes and for the purposes of the Island boards.²⁵³

In addition to revenue received from school taxes, boards receive grants from the provincial government. Money made available for operating expenses, capital expenditures and debt service expenses is calculated by reference to "budgetary rules" that are determined annually by the Minister (after consultation with school boards).²⁵⁴ The *Education Act* stipulates that the allocation for operating expenses shall be proportionate to the number of students enrolled in schools operated by a school board. Grants for capital expenditures and for the debt service on them may be made on the basis of "general or specific" standards (i.e. be the same for all boards or be tailored to meet specific circumstances), may be made to one or more boards specifically, or to the Montreal Island School Council, and are subject to the authorization of the Minister. The Act also provides that the budgetary rules for grants may take into account special situations or be made for certain projects or activities.²⁵⁵ The Montreal Island School Council is authorized, with respect to school boards under its jurisdiction, to adopt resolutions concerning the administration of grants made to boards pursuant to the budgetary rules.

As regards grants for basic educational services to students, the current budgetary rules (those applicable to the 1997-98 school year) provide for a basic amount related to the number of students enrolled. This amount can then be adjusted according to numerous factors related to the particular characteristics of a school board and its clientele. The factors that can be adjusted for include the number of small schools, remoteness and sparseness of population, economically disadvantaged areas, students at risk of dropping out, students who need personalized attention beyond regular school hours, nutritional supplements for students in poorer areas, special education, students with handicaps or learning difficulties, and boards that wish to develop new or experimental curricula. It is interesting to note that the rules also provide that an adjustment can be made for the additional costs for studying pedagogical needs, the preparation of curriculum guidelines and exams, and the implementation of educational projects concerning minority language and second-language instruction.

A different formula is used for costs related to administration and student transportation, but the basic principle of a standard amount adjusted for the particular characteristics of a board still applies.

Costs for maintenance and operation of the physical plant of school boards is based, generally speaking, on physical area, with adjustments given for special recurring and non-recurring costs.

The rules provide that boards with insufficient tax resources receive an equalization grant for the operating expenses referred to in the preceding paragraphs. The authority to provide such a grant flows from Section 475 of the Act.

Grants for the cost of acquiring furniture, supplies, and equipment (excluding teaching materials, which are covered by the operating grant for basic educational services) and for improvements and renovations are subject to a separate formula, the basis for which is the number of students enrolled. Again, adjustments can be made for particular factors, such as making buildings accessible for students with physical handicaps. Although the costs of constructing new schools and expanding existing schools are also dealt with under this type of grant, the rules in fact provide for a project by project approval process, as was mentioned previously in the section concerning management powers.

The budgetary rules also establish restrictions on the power of boards to transfer monies between different

allocations, on what can be done with the proceeds of the sale of property (regulations also apply in this regard) and on the modalities of debt servicing.

3.5.3 Litigation

(a) Early cases

As mentioned in the background section above, an early court challenge was initiated in Quebec regarding the validity of eligibility criteria set out in the original *Charter of the French Language* (Bill 101).²⁵⁶ Although provision was made in this statute for continuity of language of instruction and rights of siblings (all time-related),²⁵⁷ the primary criterion of access (at issue in the courts) stipulated that access to English-language education was accorded to "a child whose father or mother received his or her elementary instruction in English, in Québec."²⁵⁸ This criterion of access was in conflict with Paragraph 23(1)(b) of the *Canadian Charter* which guaranteed access to the children of Canadian citizens who had themselves received primary school instruction in English anywhere in Canada.

The government of Quebec at the time argued that the narrower eligibility criteria were justified as "reasonable limits" in a free and democratic society.²⁵⁹ In rejecting this argument, the Supreme Court of Canada (as well as the courts in Quebec) emphasized that the narrower eligibility criteria in Bill 101 were not so much reasonable limits on Section 23 rights as they were exceptions to the very rights constitutionally protected. To decide that the criteria in Bill 101 were valid would have amounted to changing the actual categories of persons whose rights were guaranteed under the constitutional provisions of Section 23. As the Court said:

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.²⁶⁰

Although the Supreme Court recognized that English-language education in Quebec had historically been better protected than the "fate reserved to the French language in the other provinces", it was nonetheless true that by the 1980s Quebec seemed "to have been the only province where there was then this tendency to limit the benefits conferred on the language of the minority."²⁶¹ In other words, past inequities regarding the use of French as a language of instruction in other parts of Canada were beginning to be addressed and rectified. The Court also emphasized that the framers of Section 23 had been clearly aware of inadequacies regarding the use of the minority official language (both past and present) in various educational systems and had therefore designed corrective measures:

This set of constitutional provisions was not enacted by the framers in a vacuum. When it was adopted, the framers knew, and clearly had in mind the regimes governing Anglophone and Francophone linguistic minorities in various provinces in Canada so far as the language of instruction was concerned. They also had in mind the history of these regimes, both earlier ones such as Regulation 17, which for a time limited instruction in French in the separate schools of Ontario... as well as more recent ones such as *Bill 101* and the legislation which preceded it in Quebec. Rightly or wrongly, -- and it is not for the courts to decide, -- the framers of the Constitution manifestly regarded as inadequate some -- and perhaps all -- of the regimes in force at the time the *Charter* was enacted, and their intention was to remedy the perceived defects of these regimes by uniform corrective measures, namely those contained in s. 23 of the *Charter*, which were at the same time given the status of a constitutional guarantee.²⁶²

As already stated, the categories of persons who enjoy rights under Section 23 cannot be altered by statutory provisions. Only constitutional amendment could effect such a change. Consequently, the eligibility criteria contained in Bill 101 were found to be of no force or effect to the extent of any inconsistency with provisions set out in Section 23. While it would take a number of years before statutory amendments were enacted to reflect the findings in the Supreme Court decision, the rules of access to English schools in Quebec were henceforth determined by reference to Section 23 of the *Canadian Charter* (with the exception of the mother tongue rule, which does not currently apply in Quebec).

The scope and content of confessional rights protected under Section 93 of the *Constitution Act, 1867* also generated a

number of cases in Quebec. As mentioned in the background section above, the variable impact of Section 93 in the six provinces to which it formally applies involves complex historical and legal issues beyond the scope of the present study.²⁶³ It is well to remember, however, that linguistic realities were never far beneath the surface in various court challenges to legislative initiatives in Quebec designed to replace denominational and dissentient school boards with a system of school boards based on language (French or English). Opinion was divided, however, as to whether Section 93 could indirectly help protect access to English-language schools and the right of Anglophones to effective management and control over them.

A case did arise which invoked both Section 93 of the *Constitution Act, 1867* and Section 23 of the *Canadian Charter*.²⁶⁴ It involved inter-board agreements for the transfer of students (for linguistic reasons) from the schools of one school board to those of another. The plaintiff was an English-speaking Catholic who claimed that his right to have his children educated in English under Section 23 was broad enough to include access to a Catholic denominational school over which he had effective management and control. The court was unreceptive to this argument, pointing out that the right under Section 23 was one to "receive instruction in minority language facilities, not in minority denominational facilities."²⁶⁵ In any event, the facts of the case showed that the children of the plaintiff were not then being educated in Protestant schools; rather they were all enrolled in English-language educational programs offered in Catholic denominational schools. In the end, the plaintiff (who had raised a number of other arguments) was unsuccessful.

Another case in Quebec raised the issue of separate school facilities and the power of management over them, but within the context of French-language education being dispensed in an area of high Anglophone concentration. The issue of Section 23 of the *Canadian Charter* was raised, although the presiding judge merely pointed out that Section 23 does not accord rights to parents who belong to the majority official language community of a province.²⁶⁶

As explained in the background section above, the constitutional guarantees under Section 93 regarding denominational and dissentient school boards in Quebec have been repealed by virtue of a constitutional amendment. The bilateral amending formula used to affect this change has generated several new court challenges in Quebec. The courts will thus be called upon to review the validity of the process which resulted in the repeal of Section 93 rights in Quebec, a repeal which facilitated the introduction of French- and English-speaking school boards throughout the province.



3.6 Ontario

3.6.1 Background

The use of French as a language of instruction in some Ontario schools predated the legal requirements to do so, particularly in areas where Francophones were sufficiently numerous to have effective control over local school boards. However, the decrease over time of the number of school districts in favour of larger, more efficient administrative units led to a corresponding loss of community control.

By 1974, Ontario had enacted legislation obliging existing school boards to establish French Language Instructional Units where numbers so warranted. Such units were composed of a class, a group of classes or an entire school where French was the primary language of instruction. Legislation also obliged school boards to set up advisory committees for such units, to give advice to a school board on the French-language programs it offered. Since these committees had a purely consultative role, there was a need to provide some type of mechanism for resolving differences between an advisory committee and the school board to which it was attached. As a result, a Languages of Instruction Commission of Ontario was established in 1977 to mediate disputes and issue recommendations.

In 1986, statutory amendments to the *Education Act*²⁶⁷ further reformed the educational system and provided for the creation of minority language sections within existing school boards. Members of a French-language section of a board were elected by persons who had rights under Section 23 of the *Canadian Charter of Rights and Freedoms*²⁶⁸ (the *Charter*). The *Education Act* also guaranteed a minimum of three members for a French-language section of a board (giving the Minister a power of appointment in the event that the electoral system in place was unable to provide for the minimum number).²⁶⁹ Significant powers of management were also accorded to members of a French-language section. They had the exclusive authority to:

- (a) plan and establish French language instructional units;
- (b) administer such units and determine when they should be closed;
- (c) plan and establish programs and courses;
- (d) recruit and assign teachers and administrative staff;
- (e) enter into agreements with other school boards.²⁷⁰

However, a number of administrative and management issues were subject to the joint authority of a French-language section and the school board of which it was a part.²⁷¹ These included some budgetary matters, the maintenance and operation of school buildings, various school supplies and other services available at the head office of the board. The existence of joint authority was, of course, a source of tension and potential problems in the operations of minority language programs and schools.

Where French-language sections of existing boards were not required to be created under the terms of the *Education Act*, provision was made for the establishment of French-language advisory committees.²⁷² Such committees recommended proposals to the school board to which they were attached regarding the educational and cultural needs of French-speaking Ontarians and their children. While the school board was obliged to seek the advice of its French-language committee regarding French-language instruction, and required to give reasons if any of its recommendations were rejected, the board had general authority over all schools and programs under its jurisdiction. In the event of a disagreement over its recommendations regarding French-language instruction, the committee could refer the matter to the Languages of Instruction Commission of Ontario,²⁷³ whose first duty was to try to mediate the dispute. Where any recommendations of the Commission were rejected by the school board, the Commission could make a recommendation to the Minister of Education who then had ultimate authority to decide the matter.²⁷⁴

In addition to these decision-making and advisory bodies, the Ontario educational system recognized four autonomous, French-language school boards in the following regions: Toronto (a public board), Ottawa-Carleton (both a public and a separate board) and Prescott-Russell (a separate board). Each of these boards emerged (during the period 1989-1991) from its own particular historical and legislative circumstances.²⁷⁵ The authority and powers of these bodies were essentially the same as those exercised by majority language school boards in the province.

Sweeping changes have been made to the educational system in the past two years which affect minority language schools, in particular with respect to the issue of governance. While there has been a reduction in the overall number of school boards in the province, the number of French-language autonomous boards has been substantially increased.

3.0 Provincial implementation of Section 23: Ontario

3.6.2 Current legislative provisions

(a) Eligibility

Access to French-language instruction is guaranteed to "French-speaking persons", the latter term being defined as meaning "a child of a person who has a right under Subsection 23(1) or (2), without regard to Subsection 23(3), of the *Canadian Charter of Rights and Freedoms* to have his or her children receive their primary and secondary school instruction in the French-language in Ontario".²⁷⁶ However, where that instruction is made available is a function of various further factors, such as residence in a given jurisdiction, whether the parent is a supporter of the school board or authority having jurisdiction over a given school,²⁷⁷ and whether an inter-board or inter-authority agreement exists regarding the transfer of a French-speaking pupil. More detail will be given below with respect to the different types of district school boards and other school authorities.

Access to education in French is clearly defined for a parent that is a supporter of a French-language district school board (either Catholic or public). Provisions in the *Education Act* stipulate that such school boards "shall only operate classes, groups of classes and schools that are French-language instructional units".²⁷⁸ Other types of school authorities (generally exercising jurisdiction over much smaller areas) are obliged, at the request of a French-speaking person, either to operate one or more French-language instructional units, or to enter into an agreement with another board to enable an entitled person to receive instruction in a French-language instructional unit.²⁷⁹

Rules about residency are subject to exceptions for students who wish to attend schools that are more geographically accessible provided that these schools are of the same type.²⁸⁰ Other eligibility rules (which establish if a person is qualified to be a resident pupil of a given school board or authority) are also subject to important exceptions which allow French-speaking persons to cross over linguistic and public/separate lines to attend a school under the jurisdiction of a different type of board.²⁸¹

Finally, a French-language district school board or a school authority that operates a French-language instructional unit may admit a student who is not a "French-speaking person". This discretionary power is exercised by an admissions' committee appointed by the board or school authority. In the case of a board, the committee is composed of the principal of the school, a teacher of the board, and a supervisory officer employed by the board. In the case of a school authority, the committee is composed of the principal, a teacher who uses the French language in instruction in the school, and a French-speaking supervisory officer employed by the school authority.²⁸²

(b) Sufficient numbers

Neither the statutes nor the regulations establish minimum numbers necessary for instruction or separate facilities. As mentioned above, every "French-speaking person" is entitled to French-language instruction. This is offered either in the classes and schools of a French-language district school board, where such boards exist, or in a French-language instructional unit operated by a school authority. If a school authority does not operate such a unit, it is obliged to make one available by agreement with another authority or board.

(c) Minority language instruction

The term "French-language instructional unit" is defined under the *Education Act* as "a class, group of classes or school in which the French language or Quebec sign language is the language of instruction..."²⁸³ The Act specifically excludes from this definition French instruction for English-speaking pupils.

English as subject of instruction is permitted at any elementary or secondary school level within French-language instructional units. However, the *Education Act* requires that English²⁸⁴ be a subject of instruction in grades 5, 6, 7, and 8.

(d) Minority language education facilities

The definition of a French-language instructional unit suggests that French-language instruction may in some circumstances be given in some type of shared facility. While one might presume that classes or schools under the jurisdiction of a French-language district school board (to be discussed below) are offered in homogeneous settings, it is unclear whether the same can be said with respect to French-language instructional units offered by other kinds of school authorities.

The term "school" under the *Education Act* is defined as meaning either:

- (a) the body of elementary school pupils or secondary school pupils that is organized as a unit for educational purposes under the jurisdiction of the appropriate board, or
- (b) the body of pupils enrolled in any of the elementary or secondary school courses of study in an educational institution operated by the Government of Ontario.²⁸⁵

The term also includes "the teachers and other staff members associated with the unit or institution and the lands and premises used in connection with the unit or institution".²⁸⁶ The use of the word "unit" as key to the definition of what constitutes a school suggests that, in some circumstances, something short of a free-standing, distinct building may be made available for instruction in French. In any event, the distinction between a class and a school found in the definition of a French-language instructional unit leads to a similar conclusion.

The type of physical facilities made available for minority language education will no doubt vary as a function of the kind of board or school authority which exercises management powers in any given set of circumstances. It is therefore important to examine the extensive changes made in this area under recent statutory amendments.

(e) Powers of governance

The restructuring of the school board system in Ontario has led to a greatly expanded network of district boards

controlled by representatives of the French-speaking minority.²⁸⁷ This has been accomplished through recent statutory amendments to the *Education Act* allowing the government to establish, by way of regulation, four different types of district school boards:

- (a) English-language public district school boards;
- (b) English-language separate district school boards;
- (c) French-language public district school boards; and
- (d) French-language separate district school boards.²⁸⁸

While the total number of district school boards has been reduced by the amalgamation of previous boards and school authorities, those responsible for French-language education have been increased substantially. In effect, recent regulations recognize four public and eight separate French-language district boards.²⁸⁹ The territory over which these boards have jurisdiction covers virtually all of Ontario, thus encompassing the majority of Franco-Ontarians. In the words of the statutory amendments, the district boards "govern the provision of elementary and secondary French-language instruction" in their respective schools.²⁹⁰

The responsibilities and management powers of district school boards, applicable to both the English and French components, are found in provisions throughout the *Education Act* and regulations.²⁹¹ The scope of these provisions is broad, covering everything from appointing teachers, to taking care of the physical plant, to determining the numbers and kinds of schools to be established. However, the powers of district boards are subject to broad powers of the Minister, set out in Part I of the *Education Act*, and in regulations adopted pursuant to it, to regulate everything from courses of study, textbooks used, the assessment of academic performance, teacher training, student transportation, the roles and responsibilities of principals, the functioning of school councils to the sale, lease or other disposition of properties used for schools.

The Minister of Education is also supported by a French-language sector in the Department, managed by an assistant deputy minister. Here we find the Elementary/Secondary Operations and French-language Education Division ("Division de l'administration de l'éducation élémentaire et secondaire, et de l'éducation en langue française") whose mandate is to provide leadership across all divisions in the Ministry in the development of policies and programs to address the needs of the French-speaking community at the elementary, secondary and post-secondary levels. Within this Division, the French Language Education and Programs Branch ("Direction des politiques et programmes d'éducation en langue française") develops curricula for French elementary and secondary education, administers French-language funding programs, coordinates research in the area of content and teaching process, coordinates activities with other ministries as regards French-language education and advises on issues pertaining to liaison with the Francophone community.

The Minister also has extensive powers regarding the finances of boards and authorities, which are discussed in section (f) below.

Given that French-language district school boards are defined in terms of territory and language (not to mention religion), it is not surprising that eligibility to vote in board elections is also a function (in part) of these two criteria. In effect, one must be a resident of a district and be a supporter of the French-language district school board which has jurisdiction over it. To become a supporter of such a board (where it is public) one must, in addition to residency, be a French-language rights holder. A French-language rights holder is defined as anyone who has rights under Section 23(1) and(2) of the *Charter*. In addition, there are a number of procedural requirements necessary to getting one's name on the appropriate voting list. If the district board in question also happens to be Catholic, a person must be a Roman Catholic and elect to support that board.²⁹² In order to run for election to a French-language separate or public district school board, a candidate must meet the same criteria as an elector.

Since French-language district school boards (separate and public) do not quite geographically cover the entire province, one must also consider the role of school authorities which may be offering (as they are required to do under the *Education Act*) French-language instruction to children so entitled. Under the *Education Act*, six types of school management bodies fall under the definition of "school authority".²⁹³ For all six authorities, there are no guarantees regarding representation of the French-speaking minority, nor any linguistic restrictions on who may be an elector. Nevertheless, some school authorities which are also classified as separate (Catholic) may very well be controlled by

the French-speaking minority because of demographic realities which prevail in a given region. Where this is not the case, however, access to French-language education could be compromised without an appropriate mechanism for dealing with requests from Francophone parents.

In this regard, a special process is established by the Act to allow a group of at least ten "French-language rights holders" to make proposals to a school authority "designed to meet the educational and cultural needs of the French-speaking persons who are resident pupils of the school authority and of the French-speaking community served by the school authority."²⁹⁴ A rights holder is defined for these purposes to mean someone who is entitled to vote at the election of members of the school authority and whose children are eligible under Subsections 23(1) and (2) of the *Charter*.²⁹⁵

The matters that may be the subject of a proposal are extensive, including the establishment and operation of French-language instructional units, the establishment of a course of study and the use of textbooks, the establishment or alteration of the area of jurisdiction of a French-language district school board, agreements with other boards concerning French-language instruction, the recruitment of personnel, and the use of any facility and means to meet the educational and cultural needs of the French-speaking community.²⁹⁶

A school authority that receives a proposal must consider it. If the authority refuses to adopt the proposal, the French-language rights holders may refer the matter to the Languages of Instruction Commission of Ontario, referred to in the Background section above. Recent statutory amendments have confirmed the Commission's continued existence.²⁹⁷

Under current law, the Commission is composed of five members appointed by the Lieutenant-Governor in Council, two of whom must be French-speaking and two of whom must be English-speaking. In addition to the right of a group of ten French-language rights holders to submit matters related to its proposals, the Minister may also refer any matter to the Commission relating to instruction in the French language (as well as any matter related to English-language instruction where the pupils concerned are in a minority position within the relevant school authority).²⁹⁸ When a group of rights holders refers a matter, the Commission considers whether any further action would be "conducive to meeting the educational and cultural needs of the French-speaking or the English-speaking community". If it determines that the furtherance of the matter would not be so conducive, the Commission takes no further action, although it is required to send notice in writing of its decision, with written reasons, to the parties and to the Minister. If further action is warranted (in the opinion of the Commission), a mediator is appointed to inquire into the matter and to endeavor to bring about an agreement between the parties.²⁹⁹ It should also be noted that the Commission is obliged to appoint one or more mediators in the case of a referral made by the Minister.³⁰⁰

If the mediation fails to bring about an agreement, the Commission must recommend a course of action and so notify the parties involved (which includes the Minister). Should a school authority, after full consideration of the Commission's recommendations, resolve not to take the course of action proposed, it must give its reasons in writing to the parties. The Commission then reconsiders the matter and makes a written report with recommendations to the Minister, who must in turn make an order to resolve the matter.³⁰¹ While advice given by the Commission must be considered, the Minister has the authority to make any order he or she considers appropriate in the circumstances. An order made by the Minister is enforceable in the same way as a court judgement.

The Act and regulations also make provision for the creation of School Board Advisory Committees and School Councils.³⁰² Although not obliged to do so, district boards may establish Committees to be composed of board members, an education officer, teachers and four persons appointed by the board who are neither teachers nor board members. In the case of Committees established by French-language district boards, provision is made for the appointment of either one or two members selected by the *Fédération des associations de parents francophones de l'Ontario*, where the latter organization is present in the area over which the board has jurisdiction. Committees are authorized to make reports and recommendations to the board regarding all school matters except salaries of employees, personnel problems and policies regarding personnel. While a board is obliged to consider a Committee's reports or recommendations, it is not obliged to adopt them. (In contrast to the permissive wording regarding the creation of Committees, school boards and authorities must establish a school council for each school, although the Act leaves further details regarding their function and operations to be worked out in regulations. At the moment there appear to be no regulations in force.)

To oversee the implementation of the changes to the educational system in Ontario, the government has created the

Education Improvement Commission.³⁰³ Although the functions and powers of the Commission are too extensive to review here, it should be mentioned that the Commission, in carrying out its mandate, is obliged to "identify issues related to the establishment of French-language district school boards that should, in the opinion of the Commission, be addressed and consider and make recommendations to the Minister on those issues." However, no specific legislative provision is made regarding the appointment of a representative of the French-speaking minority to the Commission. Enabling legislation simply gives a power of appointment to the Lieutenant-Governor in Council (the Commission to be composed of no fewer than five and not more than seven members).³⁰⁴

(f) Financial resources

Two primary sources of funding for the operation of schools (both public and separate) are grants made from monies appropriated by the Legislature, and taxes levied on residential and commercial property. With respect to the former, the *Education Act* authorizes the Lieutenant-Governor in Council to make regulations regarding grants of money for educational purposes.³⁰⁵ Rules governing the allocation of grants are determined annually under the *General Legislative Grants Regulation*. The Act imposes two statutory standards which must be used in making regulations. First, the legislation and regulations governing education must operate in "a fair and non-discriminatory manner" as between English-language public and Roman Catholic boards, and as between French-language public and separate district boards.³⁰⁶ Second, the legislation and regulations governing education funding must operate so as to respect the rights given by Section 23 of the *Charter*.³⁰⁷

The Ontario government recently announced changes (March 25, 1998) to the method of funding for schools, in particular as it relates to the allocation of grants. While legislative grants and property taxes will still be the two primary sources of funding, the number and types of grants will be changing in the autumn of 1998. Pursuant to the announced changes, about half of the current residential education property taxes will be replaced by increased legislative grants. As has been the case in the past, the exact calculation of grants will be contained in the *General Legislative Grants Regulation*, which is published each year. It is expected that the version applicable to the 1998-99 school year will appear in the summer of 1998. In the meantime, the Ontario government has issued public statements regarding the new grants system. The description that follows is based on those public statements.

Grants will be divided into three types: a foundation grant; special purpose grants; and a pupil accommodation grant. The foundation grant will cover the basic costs of education (teachers, textbooks, supplies, library and guidance services, non-teaching professionals, school administration, etc.) for each student for one school year. It will be allocated to district school boards on a per student basis and will be the same regardless of where the board is located in Ontario. In order to compensate for the higher cost of secondary education, the grant will be different for elementary as opposed to secondary students.

Special purposes grants will be given over and above the foundation grant and are meant to recognize the different circumstances of students and boards. There will be eight types of special purpose grants: special education; language; early learning; learning opportunities; geographic and school authorities; adult and continuing education; transportation; and school board administration and governance. Two of these are of particular importance to French-language boards. The geographic and school authorities grant will help pay for, among other things, the higher costs of operating small schools, which could be a factor for boards providing educational programs in areas where the numbers of Francophone students are relatively low. The language grant will provide additional funding for, among other things, boards providing French-as-a-first-language instruction. Boards will receive a specified amount per student, based on the student grade level. The language grant will also provide additional funding for what is referred to as French proficiency for Francophones (*Actualisation linguistique en français/Perfectionnement du français*), which are programs designed to help students who have a right to attend or are admitted to French-language schools but who need to upgrade their French-language skills.

The third category of grant -- the pupil accommodation grant -- will cover the costs of operation, maintenance, repair, renovation and construction of schools and debt servicing for prior capital projects. Generally speaking, boards will receive an amount based on the numbers of elementary and secondary students. The former system of government approval for specific projects will disappear.

While the role of grants in meeting the financial costs of operating schools is increasing, property taxes still represent an important funding source. With respect to residential and commercial property taxes (under Division B of Part IX of

the *Education Act*), the Minister determines both the classes of property subject to taxation and the rates to be imposed (which may vary between municipalities).³⁰⁸ Taxes thus calculated are levied either by a municipality (in areas where one exists) or by a board.

Within each area of jurisdiction the amount collected from a levy on business property is distributed to school boards operating therein, in proportion to enrolment and according to ratios established by the Minister.³⁰⁹ Where only one board operates, the amount collected is remitted to it.

With respect to taxes on residential property, they are distributed as a function of the assessment rolls.³¹⁰ In other words, the list of taxpayers who appear on a given assessment roll is central to calculating the amount of tax revenue from levies on residential property (under Division B) which is destined for French-language public or separate boards. In this regard, an individual who is a French-language rights holder and an owner or tenant of residential property in the area of jurisdiction of a French-language public district board may have his or her name included on the assessment roll as a supporter of that board. A Roman Catholic, in the same circumstances, may be entered on the assessment roll of the French-language separate board where his or her property is located. This requires an application to be made under the *Assessment Act*³¹¹ to the assessment commissioner for the area where the property is located.³¹²

Provision is also made for the allocation of part or all of the property taxes collected from residential property held by partnerships or corporations (who are not designated ratepayers³¹³) to a French-language public or separate district school board. This is done through proper notice being given to the assessment commissioner on a form authorized by the Minister of Finance under the *Assessment Act*.³¹⁴ At the same time, however, the *Education Act* establishes limits on the amount that can be allocated to one school board or another. In the case of a French-language district school board (separate or public), for example, the amount cannot exceed the proportion of the assessment attributable to the interest (in the partnership) of those partners who are supporters of the board in question. For corporations, the amount is limited to that portion of the assessment attributable to the proportion of a corporation's shares held by supporters of the French-language district school board (separate or public).³¹⁵

Further Divisions within Part IX of the *Education Act* deal with a number of other fund-raising issues relevant to school boards. Division C relates to taxes that may be levied directly by boards and authorities at rates set by them. This was a right that historically belonged to these bodies. However, by virtue of Division F of Part IX, Division C is currently inoperative. Division F also provides that a committee appointed by the provincial cabinet shall, not before June 30, 2003, commence work on a review of whether the current legislation governing education funding respects the standards of fairness and non-discrimination as between the public and separate school sectors. The mandate therefore does not include an assessment of whether funding is equitably distributed between the French and English sectors. The committee must submit its report before December 31, 2003 which must then be tabled in the Legislative Assembly.

Division E of Part IX of the Act allows boards to pass by-laws to impose "educational development charges" against land in its jurisdiction undergoing residential or non-residential development.³¹⁶ Charges may only be imposed for certain costs such as acquiring land or preparing a site so that a building can be built on it. Charges cannot be imposed for the costs of a school building. A board must follow a detailed process in adopting such a by-law and a decision of the Board may be appealed to the Ontario Municipal Board.

Division D of Part IX deals with the powers of the Minister to investigate the financial affairs of a board or authority and to give directions or issue an order vesting the administration of the board or authority in the Minister. The Act stipulates that in exercising powers under Division D, the Minister may not interfere with or control the linguistic or cultural aspects of a French-language district school board. Furthermore, the Minister's powers must be "exercised in a manner that is consistent with the linguistic or cultural aspects of a French-language district school board."³¹⁷

Other sections of Part IX deal with the borrowing powers of boards and authorities. Borrowing and issuing debt instruments for current expenditures and "permanent improvements" (which includes acquiring land, building buildings, altering, adding to or improving buildings and acquiring furnishings and instructional equipment)³¹⁸ is subject to controls established by the Act and regulations that are too detailed to set out in full here.

3.6.3 Litigation

(a) Early cases

Early litigation in Ontario provided the basis for some of the interpretive principles established by the Supreme Court of Canada in 1990 and 1993. Similarly to what happened in Prince Edward Island, the first case to be considered took the form of a reference to the Ontario Court of Appeal regarding the constitutionality of a number of statutory provisions then governing access to French-language education in the province.³¹⁹ Questions canvassed included statutory criteria determining eligibility for French-language education, the discretion of existing boards to determine requests for the provision of French-language education, the manner of determining if the "numbers warrant" such education, and the right of parents of eligible children to meaningful participation in the management and control of French-language instruction and educational facilities.

As already explained, Section 23 of the *Charter* determines access to minority language education for a child as a function, in part, of a parent's mother tongue and ability to currently understand it. Statutory provisions which condition access to minority language education by reference to the language already spoken by a child, such as existed in Ontario at the time of this reference, are thus incompatible with Section 23. (A similar conclusion was reached by the Court of Appeal of Prince Edward Island.)

The issue of numbers necessary to warrant the provision of French-language education in Ontario raised questions regarding both the specific threshold numbers applicable anywhere in the province and the persons who were empowered to make decisions to provide such education. Legislation at the time of the reference accorded wide discretion to existing school boards to provide French-language instruction or facilities where the boards determined that groups of 20 or 25 students could be assembled for that purpose. While the details of that discretion varied depending upon whether instruction in classes or separate facilities was contemplated,³²⁰ the fact remained that the provision of education in French was subject to the will of school boards controlled by the majority population. In light of the constitutional nature of Section 23 of the *Charter*, the Court of Appeal emphasized that "...any limitation placed on minority language education rights cannot be left to the unfettered discretion of existing school boards no matter how competent and well-meaning those boards may be..."³²¹ It was incumbent upon the legislature "...to set reasonably clear and specific standards in circumstances where the grant of an unfettered discretion leads to arbitrary, discriminatory or otherwise unconstitutional restrictions upon guaranteed rights or imposes unnecessary inhibition upon the exercise of constitutional rights."³²²

While the legislation at the time used groups of 20 and 25 students as a reference point for considering the provision of minority language education or facilities, the Court of Appeal considered such rigid figures, which applied to any given school district in the province, to be arbitrary and difficult to justify. In finding them in conflict with the provisions of Section 23, the Court of Appeal remarked:

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.³²³

Related to the numbers issue was the fact that any decision of existing school boards about the feasibility or practicality of offering French-language education was made within the context of already established school board boundaries. This introduced further arbitrariness into decisions about providing French-language education, for the geographic distribution of Francophones did not necessarily correspond to existing school board boundaries. The Court of Appeal found that such geographic limitations upon existing school boards impeded the proper implementation of Section 23 of the *Charter*.³²⁴

In dealing with the issue of the management and control of French-language instruction and facilities, the Court of Appeal took note of various instances where school boards controlled by the majority population refused to implement, or caused unwarranted delays in carrying out, decisions to provide proper facilities for minority language instruction. It determined that this was precisely the type of mischief that Section 23 was designed to remedy. Furthermore, "lack of meaningful participation in management and control of local school boards by the francophone minority made these events possible."³²⁵ Participation of Francophones at that time was generally limited to membership in French-language advisory committees, which, as their name implied, developed proposals and made recommendations to the

school board to which each was attached regarding the educational and cultural needs of the French-speaking community and its pupils. Lack of any important decision-making powers for such committees, however, hampered the development and evolution of French-language education.

The Court of Appeal thus found that provincial legislation in force at the time was deficient in this regard and did not respect the implicit right of parents of children eligible under Section 23 to a meaningful degree of management and control of minority language education. It further suggested the following guidelines for the proper implementation of Section 23:

- the representation of the linguistic minority on local boards or other public authorities which administer minority language instruction or facilities should be guaranteed;
- those representatives should be given exclusive authority to make decisions pertaining to the provision of minority language instruction and facilities within their jurisdiction, including the expenditure of the funds provided for such instruction and facilities, and the appointment and direction of those responsible for the administration of such instruction and facilities.³²⁶

Not long after the decision of the Court of Appeal on the reference, the High Court of Justice of Ontario issued a judgment³²⁷ related to long-standing difficulties of Francophones in the Penetanguishene area to gain access to a suitable French-language educational facility equipped to provide an educational program equivalent to that offered in English-language secondary schools in the same region. The school board with jurisdiction in the area had consistently refused to accede to the requests of local Francophones, or to implement the recommendations of the French-Language Advisory Committee (even recommendations of the Minister of Education at the time appeared to fall on deaf ears).

The case from Penetanguishene underscored the difficulties encountered when majority language school boards retain jurisdiction over minority language education. While the issue of management and control was not at the centre of questions raised in the litigation, the High Court of Justice took note of the Court of Appeal decision in this regard on the reference. Resolution of that issue, however, would await further legislative amendment. For the time being, the court addressed the issue of the quality of education made available to Francophones in the Penetanguishene area. On this point the court was unequivocal: "...the plaintiff is entitled to be provided out of public funds for an *education* in French to his children. That means the *same education* as is given the majority but in the other official language. *This is to be a full and complete education not a limited, partial or truncated one, which necessarily would be an inferior education, a second class one.*"³²⁸ Appropriate orders and declarations³²⁸ were thus issued against the defendant school board and the provincial government (the latter having already supported the efforts of the French-Language Advisory Committee), related to the provision of French-language instruction and facilities and adequate funding for the purpose of ensuring equivalency.

(b) Recent or anticipated litigation

The constitutional obligation to allot sufficient public funds for the support of minority official language education remains a current issue. It was central to a recent case brought before the Ontario Court of Justice by the Roman Catholic Separate School Board of Dufferin and Peel.³²⁹ The School Board operates the only French-language separate school between Toronto and Hamilton, which has been housed in temporary quarters since 1989. After long delays funds were finally allocated for the construction of new permanent facilities, but no contract had formally been signed when the government of Ontario announced an across-the-board freeze on all capital expenditures affecting public and separate schools in the province. Believing that the effect of this spending moratorium would be devastating for the planned construction of its French-language school, the school board applied to the court seeking a declaration that constitutional rights under Section 23 of the *Charter* were being violated by the government's refusal to release funds necessary for the school's construction.

Mr. Justice Hawkins recognized the difficulties faced by the government in controlling public expenditures. He further took notice of a government's legitimate right to review all public services so as to establish its priorities with respect to funding cuts. The moratorium on spending announced in March of 1996 was clearly related to the government's overall fiscal planning, and based upon the principles found in its fiscal and economic statement of the previous November. Nevertheless, Mr. Justice Hawkins emphasized that the determination of public policy in general must not ignore specific rights set out in the Constitution:

A democratically elected government may in most cases and quite properly determine what in its view are "the services we value most". If it is wrong in that determination it answers at the ballot box. In a climate of job loss, welfare cuts and general reduction of government services it is not difficult to imagine that a capital expenditure of over \$10 million for an improved French language secondary school might not qualify as a service that "we value most", supposing that the "we" referred to therein is the non-Francophone majority. It is to avoid such a result that we have constitutionally protected rights.³³⁰

Considering that the school in question (Sainte-Famille Secondary School) had been housed in inadequate temporary facilities since 1989, as well as the admitted fact that the quality of minority language education was not equal to that offered in the more than fifty English-language secondary schools in the same region, Mr. Justice Hawkins concluded that Section 23 of the *Charter* would be violated by a further, open-ended delay in funding the construction of the Sainte-Famille Secondary School. He therefore declared that the school project in question was exempted from the spending moratorium imposed by the Minister of Education, and ordered that the Department of Education issue, in accordance with its Capital Grant Process, final approval for the capital costs to be incurred in carrying out the construction of the school.

Pending an application to seek leave to appeal from the decision of Mr. Justice Hawkins, the Minister of Education sought an order of the Court of Appeal to stay execution of this decision.³³¹ In reviewing the order of the lower court, the Court of Appeal took note of the admitted facts that there were sufficient numbers of students to warrant the establishment of a French-language secondary school out of public funds, and that the current facilities were not reasonably equivalent to those provided to the English-language secondary schools of the same region. While the Minister recognized the need to construct the school in question, he argued that a delay of one more year would not do irreparable harm. Moreover, he stated that the Sainte-Famille school project would be considered for funding on a priority basis at the end of the moratorium. In responding to these arguments, Mr. Justice Labrosse of the Ontario Court of Appeal declared:

[Transl.]

The Minister maintains that the imposition of the moratorium constitutes no more than a delay for the Sainte-Famille school. In my opinion, it is much more than that. It is clear that imposition of the moratorium does not have the same impact on the majority as it has on the minority. The majority has many schools, while the minority has part of one school that it is at risk of losing. The moratorium threatens to have a catastrophic impact on the future of Sainte-Famille school and on the future of the linguistic minority in Dufferin and Peel. According to facts which are not in dispute, there is a risk of irreparable loss.³³²

In light of these conclusions, the application for a stay regarding the judgement of Mr. Justice Hawkins was dismissed.

The constitutional obligation to provide public funding to minority official language schools raises complex issues of fact and law which in turn are linked to the powers of governance vested in minority language speakers. Governing bodies which exercise management and control over minority language education must obviously have access to the resources necessary to ensure that such education is of equal quality to that offered in majority language schools. Mechanisms in place which determine the division of resources between various school authorities may accordingly raise issues of equity which public officials cannot ignore.

As reviewed above under the heading Current legislative provisions, the funding mechanisms for school boards and authorities have recently undergone significant modification. Prior to these changes, the case of *Séguin et al. v. Ontario et al.* was filed before the Ontario Court of Justice, challenging the validity of various legislative provisions whose combined effect allegedly deprived separate schools and French-language education of a fair and equitable share of financial resources.³³³ The court action also sought a declaration to the effect that rights to management and control under Section 23 (as well as under Subsection 93(1) of the *Constitution Act, 1867*) required the government to create an autonomous French-language separate school board in the school district of Stormont, Dundas and Glengarry. (The Commissioner of Official Languages applied for and was granted intervenor status in order to present arguments regarding the interpretation of Section 23 of the *Charter* and the manner in which it should be implemented.)

Since the issues in this case were identified and developed by reference to statutory provisions and administrative practices which have been modified or no longer exist, it may not proceed in its present form. Legislative reform has

already created a French-language district school board in the area from which this case emerged.³³⁴ Many of the issues regarding board financing are also part of recent legislative reform. For example, the structural inequities which had burdened the operations of separate school boards (all the more so when they had French-language sections) flowed from provisions which favoured boards able to raise supplementary revenue through a large tax base. Moreover, the rate of tax established by the provincial government on residential property was uniform across the province, thus favouring school boards located in areas of greater real estate value. Procedures were in place which aimed at reducing the disparities caused by unequal tax bases, notably by way of grants to school boards up to a maximum level established by the province. However, it was alleged by the plaintiffs in the *Séguin* case that the mechanisms in place resulted in substantial under-funding for French-language and separate school education.

As we have already seen, new legislative provisions aim at equalizing the distribution of financial resources through new rules regarding taxes on business property (to be shared according to enrollment and ratios established by the government), and further elaboration of rules regarding levies on residential properties and their apportionment. However, the full scope and details respecting the new funding model to be applied to the reformed system of school boards and authorities is not yet known. Much of this will be accomplished through regulation, but the new legislation makes it clear that this must be done in such a manner as to ensure fairness and non-discrimination between public and separate sectors, and to ensure respect for minority language rights under Section 23 of the *Charter*.

Two causes of action have also recently been filed with the Ontario Court of Justice which challenge the validity of many of the legislative changes contained in Bill 160.³³⁵ The diverse legal arguments raised in these challenges go beyond the scope of the present study, although the eventual outcome of these cases could have an impact on French-language education. This is particularly true with respect to the governance provisions recently introduced and the manner in which financial resources available for education are distributed. While written factums have not yet been filed in these two cases, it would appear that the mechanisms recent statutory amendments have put in place, reorganizing the school board system and providing for its orderly implementation, will be challenged as violating constitutionally entrenched rights under Section 93 of the *Constitution Act, 1867*.

In addition, many components of Part IX of the *Education Act* (enacted by Bill 160) regarding the raising of revenue through property taxes and the rules for proportionate distribution to school boards are said to conflict with rights under Section 93. It is argued, for example, that Section 93 constitutionally entrenches the right of Catholic school boards to determine how, when and how much to tax the property of Catholic school board supporters. It is also argued, or so it seems, that the public school system is also within the scope of Section 93 with respect to local governance of schools and control over taxation of property for school board purposes. (Other grounds may also be raised in this litigation, including those based on alleged breaches of the rule of law and unconstitutional delegation of legislative authority to the executive arm of government. Some of these arguments will also place in question the mandate and powers of the Education Improvement Commission.³³⁶)

The transition to a new system of district school boards, which has significantly expanded the control and management of Francophones over their schools, necessarily involves the transfer of existing property, the amalgamation of smaller school districts, and a move towards a more equitable distribution of financial resources. The litigation referred to here could have a negative impact on the gains made in reforming an educational system which had not hitherto provided, in all areas of the province, a French-language education equivalent in quality to that offered in English. While the meaning and scope of Section 93 raise difficult issues, it should not be forgotten that a provincial government is constitutionally bound to put in place a school system which respects and implements minority official language education rights under Section 23 of the *Charter*. This includes rights to management and control, as well as access to an equitable portion of public funding.



3.7 Manitoba

3.7.1 Background

By the late 1960s, legislation in Manitoba accorded the Minister of Education the discretion to allow instruction in French for a part of the school day not to exceed 50%. A few years later both English and French were statutorily recognized as languages of instruction, allowing French to be used for up to 100% of the time from kindergarten to grade three,

and up to 75% of the time from grades four to twelve.³³⁷ Such programs were most often delivered within mixed school facilities, although the concentration of Francophones in some regions resulted in the emergence of a few distinct French-language schools.³³⁸ English was always a mandatory subject of study in schools where French was the language of instruction but the proportion of time allotted to English as a language of instruction for other subjects gradually diminished. By the 1980s, school regulations stipulated that the time allotted to English as a language of instruction was not to exceed 25% of total class time.³³⁹

The changing rules regarding the proportion of school time spent in one language or the other reflected the evolution in Manitoba towards a more homogeneous educational environment for Francophones. It also resulted in two types of French-language programs being available for Francophones: those in which instruction in French occupied 75% or more of total instructional time; and those in which only 50% of instruction was given in French (and 50% in English). This division corresponds to the distinction made between what was known as "Total français" programs and "Partial français" programs.³⁴⁰ While the former became the most widely-attended program, some Francophone parents insisted on maintaining "Partial français" programs (essentially bilingual schools).³⁴¹ Statistics showed that in 1987-89 twenty percent of enrolment was in "Partial français" programs. Furthermore, the actual school facilities in which French-language programs were offered varied from schools which were exclusively Francophone (i.e. a homogeneous "Total français" environment) to mixed schools which housed both English and French-language programs, as well as immersion classes.

Legislation in force in the 1980s made no provision for Francophone classes or schools to be managed by a Francophone school board.³⁴² However, school boards were required to offer a class in which French was the language of instruction if the parents of 23 or more pupils so requested. To assist school boards in this regard the Ministry of Education had established the Bureau de l'éducation française whose mandate was (among other things) to promote, plan, apply, administer and facilitate all aspects of French education for Francophones and Anglophone clients; and to study, develop and recommend to the Minister of Education various policies and priorities dealing with all aspects of French education.³⁴³ The Bureau dealt with French-first-language as well as immersion and bilingual programs. Schools where Francophone classes were offered also had school committees composed of parents who provided input to school boards and the Ministry of Education.

Statutory amendments were introduced in 1993 in the wake of the Supreme Court of Canada decision in *Reference re Public Schools Act (Man.)*³⁴⁴ providing for the creation of a Francophone school board and the transfer of existing Francophone programs (managed by majority language boards) to the jurisdiction of the new Francophone board.³⁴⁵

3.0 Provincial implementation of Section 23: Manitoba

3.7.2 Current legislative provisions

(a) Eligibility

For the purposes of the Francophone School Division (managed by the Francophone school board, to be discussed below), access to French-language education is determined by reference to the definition of "entitled person" under the *Public Schools Act*, which means:

- (a) a resident of Manitoba whose first language learned and still understood is French,
- (b) a Canadian citizen resident in Manitoba who has received at least four years of primary school instruction in a francophone program in Canada, or
- (c) a Canadian citizen resident in Manitoba who is the parent of a child who is receiving primary or secondary school instruction in a francophone program in Canada or who has received not less than four years of such instruction.³⁴⁶

This definition is different in several respects from the text of Section 23 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). First, unlike Paragraph 23(1)(a) of the *Charter*, the *Public Schools Act* does not require that those eligible by virtue of their first language learned and still understood (mother tongue) be Canadian citizens. Rather, it is sufficient that they be residents of Manitoba. This effectively broadens the scope of eligibility to persons legally resident in Canada (such as landed immigrants) who are not actually citizens.

The definition of entitled person also establishes a minimum number of four years of primary school instruction in a

Francophone program (somewhere in Canada). The equivalent provision in the *Charter* refers to citizens who "have received their primary school instruction in Canada in English or French..."³⁴⁷ The question of whether the statutory provisions are compatible with the *Charter* does not appear to have arisen.

The same four-year minimal requirement applies in cases where eligibility is claimed on the basis of the past language of instruction of a child, as provided for in Paragraph (c) above. This also deviates from the continuity of language of instruction rule set out in the *Charter*, which refers only to citizens "of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada..."³⁴⁸

The requirement that instruction was or is being received in a "francophone program" (under paragraphs (b) or (c) of the definition of entitlement) also differs from the wording of Section 23 of the *Charter*. Such a program is defined as "a primary or secondary educational program that provides classroom instruction in the French language and is designed for pupils whose first language learned and understood is French."³⁴⁹ This definition would appear motivated by a desire to exclude programs such as French immersion for Anglophones.

Regulations adopted under the *Public Schools Act* also require that those who claim to meet the eligibility criteria under the Act and who wish their children to receive instruction in a program offered by the francophone school board must complete the requisite form.³⁵⁰ The form repeats the eligibility criteria set out in the Act and also requests parents to provide factual information (name and dates of school attendance) to substantiate a claim to eligibility based on having received the minimum four years of instruction in a Francophone program. The parent must also certify that he or she is prepared to furnish the board with any information required to prove eligibility. The *Public Schools Act* entitles the Francophone school board to require a parent to provide "any information the board requests to establish that the parent is entitled to have the child attend a program provided by the board."³⁵¹

While the Francophone school board will be discussed below, it should be pointed out here that the *Public Schools Act* provides for the transfer of existing schools and programs to the Francophone board. Students attending existing Francophone programs could conceivably not have parents who would meet the definition of "entitled person". The *Public Schools Act* therefore recognizes that children of parents who do not meet the requirements of "entitled person" have the right nevertheless to be enrolled with the Francophone board if they attended a Francophone program that was transferred from a majority language board to the Francophone board in the initial set of transfers of programs.³⁵²

In addition to those who have the right to enrol in Francophone programs offered by the Francophone board, the *Public Schools Act* gives the Francophone board the discretion to admit children who are not strictly eligible, if their parents make a written request to the board. The board is also authorized to establish an admissions committee to review and make recommendations to the board about the admission of children.³⁵³ In certain cases, a parent may appeal a decision of the Francophone board regarding admissions to the Minister, who is required to appoint a person or persons to make a final determination as to entitlement.³⁵⁴

The issue of residency within the Francophone school division (which does not cover the entire province) also arises under the Act. While the Francophone board is obliged to admit a resident pupil of an entitled person, it has the discretion to admit a non-resident pupil of an entitled person "if it is reasonably practicable to do so."³⁵⁵

(b) Sufficient numbers

The Francophone school board is obliged to provide a Francophone program for resident pupils in such "minority language education facilities as may be required" as well as a "programme d'accueil for resident students whose French language skills do not meet the language requirements of the francophone program."³⁵⁶ The Act further stipulates that both these programs shall be provided "where numbers warrant, based on the number of pupils expected to take advantage of the programs."³⁵⁷ However, neither the Act nor regulations provide further detail regarding what constitutes reasonable numbers. The fact that the Act does refer to the number of students expected to take advantage of the programs means that the calculation will not be based only on actual enrollment.

The Act also provides that, after the first elections of the Francophone school board (which have already taken place), another school board shall not discontinue a Francophone education program unless the program is transferred to the Francophone board or at least 60 days notice of the proposed discontinuance is given to the Francophone board and the Minister and the Minister consents based on either "a decline in enrolment sufficient to render the continued

delivery of the program impracticable" or any other reason the Minister considers acceptable.³⁵⁸

(c) Minority language instruction

As mentioned above, a Francophone program is defined as "a primary or secondary educational program that provides classroom instruction in the French language and is designed for pupils whose first language learned and understood is French."³⁵⁹ However, in light of the history of bilingual schools (and even the attendance of Francophones in French immersion programs), some Francophone students may not have the language skills to participate fully in a Francophone program. The Act therefore provides that "the francophone school board may require a pupil whose French language skills do not meet the language requirements of the francophone program to attend a programme d'accueil for a period of time determined by the board."³⁶⁰

With respect to the Francophone program, the Act requires that the Francophone school board provide at least 75% of its classroom instruction in each grade in the French language. In order "to ensure that pupils develop and maintain proficiency in the English language", the Act requires that English be a subject of instruction in every class in Grades 4 to 12, although the time allotted to it must not exceed 25% of classroom instruction.³⁶¹

The minimal proportion of 75% of instruction in French did not apply, however, to existing Francophone programs transferred to the Francophone board when it began operations. In such cases, the Francophone board was obliged (for a maximum period of three years) to permit less than 75% of classroom instruction to be in French for pupils who attended the program before the transfer, if less than 75% of instruction in the transferred program had been in French. As regards programs transferred after the initial set of transfers, the Francophone board may permit less than 75% of French instruction for not more than three years after the transfer if less than 75% of the instruction in the Francophone program had been in French.³⁶²

(d) Minority language education facilities

As mentioned above, the Francophone board has the duty to provide a Francophone program in "such minority language education facilities as may be required."³⁶³ Neither the Act nor the regulations expand upon the question of what facilities are required. However, the Act did establish rules governing the initial transfer of programs and schools to the Francophone board during its initial period of operation. Regulations adopted under the Act designated the programs to be transferred.³⁶⁴

If only a Francophone program was being provided in a designated school, ownership of the school was transferred to the Francophone board.³⁶⁵ If the Francophone program designated for transfer was in a shared use school (i.e. in a school where other programs besides the Francophone one were being provided), the boards involved had to try to reach an agreement on the transfer of ownership or shared use.³⁶⁶ In the event of disagreement, the matter was to be referred to an arbitrator for a final determination.³⁶⁷ In addition, disputes concerning ancillary matters involved in a school transfer (for example, what furnishings and equipment were to be included) were to be settled by a three-person committee named by the boards involved and the Minister.³⁶⁸ The transfer of schools also involves issues related to the level of public funding accorded the Francophone school board to enable it to carry out its responsibilities. This will be discussed more fully below when dealing with financial resources.

The Act also establishes rules regarding the subsequent transfer of Francophone programs and of schools (i.e. transfers after the first two years of operation of the Francophone board).³⁶⁹ In this regard, certain persons are entitled to request that a Francophone program be transferred to the Francophone board and, to ensure that there are adequate premises, that either a school be transferred or that a shared use arrangement be implemented. Such a request may be made by the majority language board providing the program, or by entitled persons who are parents of at least ten pupils in a Francophone program (if it has fewer than 100 pupils) or 10% of the pupils in a Francophone program in the case of a program with more than 100 pupils.³⁷⁰

The Minister is obliged to refer requests for the transfer of programs and schools to the Board of Reference, which is a body of five persons appointed by the Lieutenant-Governor in Council to resolve certain disputes concerning the application of the Act.³⁷¹ In addition to holding a hearing with respect to the request, the Board is required to "take steps to determine the wishes of entitled persons whose children are enrolled in the Francophone program that is the subject of the request..."³⁷² If the Board decides that the request for a transfer should be granted, the Lieutenant-

Governor in Council must order that the transfer take place.

As already mentioned, the Francophone board may enter into agreements to provide a Francophone program outside its territory or in schools it does not operate. In these cases, the facilities in which the Francophone programs are provided may not, obviously, be distinct.

(e) Powers of governance

By way of regulation, a Francophone School Division was created in January of 1994. Known by the name of "la Division scolaire franco-manitobaine", it is divided into four regions: Urban (Winnipeg and surrounding areas), Eastern, Western and Southern. Its territory does not cover the entire province, although efforts were made to include pockets of territory where Francophones are present. Each division is divided into wards.³⁷³

The Act provides for the establishment of a Francophone school board responsible for the administration of the Francophone School Division.³⁷⁴ Trustees of the Francophone board are elected by members of regional committees. Membership in the latter committees is determined by way of general elections throughout the regions and wards of the Francophone School Division. Regulations establish the number of regional committee members to be elected from both the regions and wards.³⁷⁵

The criteria determining eligibility to vote in the first election of regional committee members (which has already taken place) differed from those that apply to subsequent elections. A person was entitled to vote in the first elections if he or she was a parent whose child was enrolled in a Francophone program located in the region, and in the ward if the region was divided into wards, but only if the program was designated for transfer from the majority language board to the Francophone school board. A person was also eligible to vote if he or she was a parent who was an entitled person residing in the region, and in the ward if the region was divided into wards, and had indicated that he or she wished the Francophone school board to provide instruction for his or her child who was of school age on the date the board first provided programs.³⁷⁶ Other criteria concerning age, citizenship, length of residency in Manitoba and not being otherwise disqualified (due to, for example, a conflict of interest) also applied.³⁷⁷

As regards subsequent elections of regional committee members, the Act³⁷⁸ stipulates that a person may vote if he or she is a parent whose child is enrolled in a program provided in the region by the Francophone school board (and in the ward if the region is divided into wards). The right to vote is also accorded to an entitled person who resides in the region (or ward if one exists) and who in the year before the election has requested the board to provide instruction for his or her school-age child, but whose child is not yet enrolled in a program provided by the Francophone school board. Other criteria concerning age, citizenship, Manitoba residency and non-disqualification also apply, as does the rule limiting an elector to voting only in one ward.

For the purposes of determining qualification to vote in both the first and subsequent elections of regional committee members, an entitled person is deemed to include a spouse of an entitled person who is either legally married or, if not legally married, has cohabited with the entitled person for a period of at least 12 months immediately before the election.³⁷⁹

The rules regarding the qualifications to be elected as a regional committee member are the same for current elections as they were for the first elections. The person must be a qualified elector or able to participate in the conduct of the school division business in French, at least 18 years old and a Canadian citizen resident in the region (or ward if one exists) for at least six months.³⁸⁰ In areas where there are no wards, candidates must be nominated by at least 25 electors of the region or not less than 1% of the electors of the region, whichever is less. Where there are wards, the candidate must be nominated by at least 25 electors of the ward or not less than 1% of the electors of the ward, whichever is less.³⁸¹ (There are currently wards in all four regions of the Francophone School Division.)

Besides being responsible for electing the trustees of the Francophone school board, the regional committees are responsible for advising the Francophone school board about school matters in the region, submitting to the board an estimate of the annual expenditures for the region, making recommendations about the proposed annual budget for the division, submitting to the board a list of capital construction projects for the region, monitoring programs, coordinating cultural and recreational activities in schools on a regional basis, making recommendations to the board about policies and programs and performing any duties delegated to the committee by the board.³⁸² The Act stipulates that the board must consult each regional committee regarding a number of matters, which include the proposed

annual budget, the opening, closure or transfer of schools, general criteria for selecting principals and teachers and the organization of social, cultural and recreational activities in schools.³⁸³

The Francophone school board (consisting of 11 trustees elected by members of the regional committees)³⁸⁴ has the general duty to provide a Francophone program for "resident pupils" in "such minority language education facilities as may be required", and a "programme d'accueil" for resident pupils whose French language skills do not meet the requirements of the Francophone program.³⁸⁵

A resident pupil is defined under the Act to mean a person who falls into one of the following four categories: (1) a pupil whose parent or legal guardian, with whom her or she resides, is a resident in the division or district; (2) a person who is 18 or over, a Canadian citizen or landed immigrant and a resident in the division or district; (3) a person under the jurisdiction of certain family services or young offenders legislation; (4) a person who is designated in writing by the Minister as a resident.³⁸⁶

Besides being obliged to offer a Francophone program or programme d'accueil to resident pupils, the Francophone school board has the option of providing a program to other students in two instances. First, the board may enter into agreements with other boards or the Minister regarding the provision by the Francophone school board of programs outside its boundaries or in schools it does not operate.³⁸⁷ It may also enter into agreements regarding the payment or sharing of costs regarding these programs. If the Minister considers it advisable or necessary, the Minister may direct the Francophone school board and another school board to enter into an agreement and, in that case, the Minister may set some or all of the terms of the agreement. Secondly, the Francophone school board is entitled to admit, "if it is reasonably practicable to do so" any non-resident pupil at least one parent of whom is an entitled person.³⁸⁸

In addition to the obligation to admit eligible students and provide the programs described above, the Francophone school board is also bound to perform the same general duties and enjoys the same general powers as majority language boards. Among its general duties, it must employ teachers and other personnel as required, arrange to purchase text books, select and purchase or rent school sites and repair, furnish and keep in order school buildings, determine the number, kind, grade and description of schools to be established, determine when and the manner in which reports respecting pupils shall be delivered by teachers, and arrange for transportation of students.³⁸⁹ The powers of school boards, i.e. what they may do, are broad. These include the authority to provide pre-school programs, enter into agreements with other boards and municipalities, suspend a student, hire superintendents, provide lunches, and furnish materials and equipment.³⁹⁰

All of these duties and powers are, however, circumscribed by powers of the Minister and rules set out in the Act and in the *Education Administration Act*, and in regulations enacted pursuant to these two statutes.³⁹¹ In particular, Subsection 3(1) of the *Education Administration Act* gives the Minister extensive powers to regulate most aspects of school board administration. While it is not possible to review all of the regulations and rules, mention is made below of the principal provisions concerning choice of curricula and teaching materials, employment of teachers and other personnel, and management of school property. The issue of finances is dealt with in the following section.

With respect to curricula and teaching materials, the *Public Schools Act* provides that boards may establish and provide for any course of study approved by the Minister and enter into an agreement with the Minister to establish and conduct special courses, whether or not such courses are part of the normal curricula.³⁹² However, the *Education Administration Act* allows the Minister to approve courses of study and text books to be used, to purchase books for school libraries and instructional materials and to sell them to school boards, to arrange for the publishing of text books and other instructional materials and to purchase text books and make arrangements with school boards for free distribution thereof to pupils.³⁹³ The same Act establishes the Manitoba Text Book Bureau, which is responsible for, amongst other things, printing and publishing or purchasing text books and other instructional materials and purchasing library books and other supplies and materials.³⁹⁴

The effect of these provisions is, generally speaking, to subject the curricula taught and texts used in educational programs to the approval of the Minister. While school boards may teach locally-developed courses in certain subjects, this too is subject to the approval of the Minister.

With regard to the Francophone school board, reference must also be made to the "Bureau de l'éducation française", a

division within the Ministry headed by an Assistant Deputy Minister. (As mentioned in the background section, the Bureau was established in the mid-1970s.) The Bureau currently has four branches: the Curriculum and Development Branch; the Educational Support Services Branch; the Official Languages Programs and Administrative Services Branch; and the Library and Materials Production Branch. Although not mentioned in any of the legislative provisions referred to above, the Bureau is responsible for developing curricula and teaching materials for the Francophone school board. Approval is then obtained from the Assistant Deputy Minister. Input regarding curriculum development also comes from the "Comité consultatif des programmes d'études", which is composed of representatives of the Bureau, of Francophone school board trustees, and of associations of superintendents, principals and teachers. An equivalent committee exists for the majority language sector.³⁹⁵

Subject to the Act and regulations, all school boards may employ such teachers and other personnel as may be required and prescribe their duties.³⁹⁶ However, all teachers must hold a certificate granted by the Minister pursuant to the *Education Administration Act*. A school board also has the authority to hire a superintendent, and is obliged to hire a secretary-treasurer, fixing (in both cases) his or her remuneration and defining his or her duties.³⁹⁷

While the Francophone school board is subject to the foregoing rules, its current situation as regards the contracts of its employees is unique, due to the transfer of employees that took place when it started operations in 1994. Because teaching and administrative personnel of the board arrived from many other boards, these employees brought with them their different contracts from their previous employer boards. A harmonization of the terms of these contracts therefore had to be undertaken but this process is not yet complete. Eventually, there will be one contract for each of the bargaining units of employees of the Francophone school board and this contract will be negotiated by the Francophone board, as is the case for other boards.

With respect to property, all school boards have a general power to select and purchase or rent school sites and premises and to build, repair, furnish, keep in order and regulate the use of the school buildings, lands, and movable property.³⁹⁸ However, the Act stipulates that a board may not:

...purchase, erect, enlarge or remodel school buildings, teachers' residences, students' residences or any buildings on property owned or leased by the school division or school district, or any one or more of them, or enter into a contract for any of those purposes, unless

(a) the purchase, erection, or enlargement, as the case may be, has received the prior approval of the minister; and

(b) the remodelling has received the prior approval of either the minister or the finance board.³⁹⁹

The finance board referred to is the Public Schools Finance Board, a five-person body appointed by the Lieutenant-Governor in Council and established by the *Public Schools Finance Board Act*.⁴⁰⁰ Besides granting authorizations regarding dealings with school board property, it is charged with administering and paying out capital support to boards, paying out such operational support as may be determined by the Minister and considering other matters referred to it by the Minister.

A board may not dispose of any land or buildings owned by it or any interest or right therein by way of sale, lease, gift or otherwise, unless it obtains the prior authorization of the Finance Board. The Board may require that any moneys received by a school board as a result of disposing of an interest in property be paid over to the fund administered by the Board.⁴⁰¹

(f) Financial resources

Like other boards, the Francophone school board must submit to the Minister, each year, an estimate of expenses and revenues for the next fiscal year.⁴⁰² The Minister then reviews the estimates for operational expenditures and makes an estimate of the amount of operational support that will be provided to each school division.⁴⁰³

Capital spending estimates are reviewed by the Finance Board. The Finance Board then makes an estimate of the amount of capital support that will be provided to each school division. The Minister is entitled to "instruct and advise" the Board as to the nature of the capital expenditures incurred by school divisions in respect of which support will be

provided under the Act.⁴⁰⁴

The Minister then notifies the Finance Board of the total amount of support (operational and capital) to be provided to each school division and the proportion that will be provided in the form of grants, with the balance to be raised by the "education support levy" on assessable property, in other words, property taxes for school purposes.⁴⁰⁵

Notwithstanding the roles of the Minister and the Finance Board in determining operational and capital support, a maximum amount of support may be set by regulation. The rates of taxation are set by the Lieutenant-Governor in Council and the Finance Board and collected by municipalities on behalf of the Finance Board.⁴⁰⁶

The Francophone school board is entitled to receive both grants and a share of provincial school tax revenues. In addition, it is entitled to be reimbursed for expenses it incurs in providing programs outside its territory or in schools it does not operate and to non-resident pupils.⁴⁰⁷ The *Public School Act* stipulates that the revenue of the Francophone School Division may include any support or grant necessary to enable it "to deliver the instruction required by Section 23 of the *Charter*."⁴⁰⁸ In this regard, it must be remembered that the Francophone school board has special duties additional to those exercised by a majority language school board. It must, for example, "provide a programme d'accueil for resident pupils whose French language skills do not meet the language requirements of the francophone program."⁴⁰⁹ Even though weak in French-language abilities, such students are nevertheless eligible under Section 23 of the *Charter* to French-language education. Consequently, sufficient funding must be made available to enable the Francophone school board to fulfil this additional responsibility. The latter board is also empowered by the *Public Schools Act* to:

(a) promote and distribute information in the province about programs available in the francophone school division; and

(b) engage in activities to promote the French language and culture in connection with its duty to provide education.⁴¹⁰

Activities of this sort also require additional funding over and above that which is available for general operating costs incurred in delivering a Francophone educational programs.

Guidelines for calculating the amount of capital and operating grants are set out in regulations.⁴¹¹ On top of a basic amount, the guidelines for the 1996-97 year allowed for adjustments for, among other factors, remoteness, new schools, small schools and pupils in French-first-language instruction. As regards capital support, the guidelines are very general, and for the most part decisions are left to the Finance Board, subject to the right of the Minister to advise the Board, as already mentioned above.

In addition, the Act entitles the Lieutenant-Governor in Council, upon the written recommendation of the Minister, to make a special grant in such amount as the Minister may approve, to be used for the purposes and subject to the terms set out in the order in council.⁴¹² At the present time, the Francophone school board is receiving additional grants for programmes d'accueil, administration and transportation. However, it would appear that money received from the federal government to assist provinces in meeting the costs of minority language education (the Official Languages in Education Program) currently covers a large portion of the extra costs associated with operating the Francophone School Division (approximately 8.5% of the latter's total budget). Suggestions have therefore been made by the Francophone school board that a more permanent funding arrangement be instituted by the provincial government which is not dependent upon the vagaries of federal-provincial agreements and arrangements.

Provisions in the *Public Schools Act* governing the transfer of schools from a majority language school board to the Francophone school board may also generate costs (in the form of liabilities) which hamper the effective operation of the latter board. While the transfer of possession and ownership to the Francophone board is made without compensation, the Francophone board must assume all existing "contractual liabilities and obligations" of the majority language board which related to the property ceded.⁴¹³ This may involve payments on large mortgages related to transferred schools which require a significant portion of the operating budget to meet. Funding of the Francophone school board should therefore take into account significant obligations of this type; all the more so because the Francophone school board cannot resort to any accumulated surplus other boards may enjoy related to their past operations.

Beyond grants and a share of the education support levy, majority language boards are also entitled to raise revenues

through a special levy on assessable property. The Minister may set a maximum amount of revenue that may be raised through the special levy for each school division.⁴¹⁴ This levy is then collected by municipalities on behalf of boards. The Francophone school board may not impose its own special levy. Instead, other boards whose territories are superimposed on that of the Francophone school board must remit to the latter a portion of the special levy calculated by dividing the total of the amount raised by the number of pupils resident in that division attending public schools, multiplied by the number of pupils resident in that division attending a program provided by the Francophone school board as of September 30 of each year.⁴¹⁵

The power of boards to borrow is regulated by Part XI of the Act. A board that wishes to borrow for capital purposes and issue debentures or other securities to secure payment of the monies borrowed must first request permission from the Finance Board. Where the Finance Board is satisfied that capital support is properly payable for the amount being borrowed or for the payment of the debentures or securities, it may approve the borrowing. Where the Finance Board is not satisfied, it may on its own initiative or at the request of a board refer the matter to the Minister. The Minister in turn may either approve of the borrowing or require the board to obtain approval of resident electors of the school division.⁴¹⁶

A board may also borrow for current purposes at any time before it receives its yearly allotment. It need not obtain the approval of the Minister or Finance Board for such a loan, but the amount of indebtedness may not exceed the amount of the estimate of its approved expenses for the current year, less any amount already received on account of those approved expenses.⁴¹⁷ It would appear that the Francophone school board must routinely borrow money due to delays in receiving its yearly allotment, thus increasing its operating costs in an amount equal to the interest charges on such loans.

3.7.3 Litigation

(a) Early cases

The roots of the second Supreme Court of Canada decision in 1993 (reviewed in Chapter 2 of this study) can be found in a judgment of the Manitoba Court of Appeal.⁴¹⁸ As was the case in other provinces, Francophones had been dissatisfied for some time with the manner in which provision was made for minority language educational programs and facilities (some of these issues are reviewed in the background section above). While a network of separate minority language schools had been established in areas of the province with significant Francophone population, no legislative provision had been made for parents of eligible children to exercise management and control over them. The *Public Schools Act* at the time simply obliged existing school boards, "where there are 23 or more pupils who may be grouped in a class for instruction,"⁴¹⁹ to so group the pupils and provide for French to be the language of instruction on the request of the parents concerned. The Act further authorized the Minister of Education, where there were less than 23 pupils, to require a school board to make arrangements for the use of French as a language of instruction in any class.⁴²⁰

The Manitoba Court of Appeal issued three separately motivated judgements on the Reference, making it particularly difficult to extract a single line of reasoning in support of any given point of law. Nevertheless, on the crucial issue of management and control, none of the five presiding judges concluded that Section 23 implicitly recognized the right of parents of eligible children to a meaningful management role. In this regard they rejected the reasoning found in decisions of the Alberta and Ontario Courts of Appeal, although the reasoning of these latter courts ultimately proved more influential before the Supreme Court of Canada.

Beside the issue of management and control, the Court of Appeal reviewed the validity of imposing a rigid number (set out in the prevailing Act) as a prerequisite to the provision of minority language education. On this issue, a majority of the Court found that the imposition of rigid numbers across the entire province was inconsistent with the rights set out in Section 23 which apply anywhere numbers so warrant. It was also the majority view of the Court that leaving the question of numbers to existing school boards would not be compatible with Section 23 (with Mr. Justice Monnin pointing out the additional difficulties engendered by the territorial limitations of school divisions). Furthermore, the issue of what constituted sufficient numbers was a question of fact to be assessed in light of all the circumstances, a question ultimately reviewable by the courts in each specific case.

(b) Recent or anticipated litigation

As mentioned above, the views of all Francophone parents who have children enrolled in a current French-language program offered by an already existing majority language school board must be taken into account when determining if the program should be transferred to the jurisdiction of the Francophone school board. At the time the latter board was brought into existence (1993), parents with children in various French-language programs were asked to vote regarding the initial set of transfers.⁴²¹ In the case of parents in the town of Laurier, the majority opted (by means of a general vote) to remain with the current school board. Those who disagreed with the majority view were thus denied access to a Francophone program within their local community managed and controlled by the Francophone school board. Although there is provision in the Act to hold a second vote two years after the initial consultation, no such vote took place (presumably because the majority were still in favour of remaining with the existing school board).

The minority of Francophone parents in Laurier felt that their rights under Section 23 of the *Charter* were not respected, in the sense that no provision was made to accommodate the needs of children (a total of 38) who, in the view of the parents concerned, should have been enrolled in Francophone programs managed and controlled by the Francophone school board. Since the government felt that it should not override the majority sentiment in the community in question, it refused at the time to exercise its discretionary powers under the *Public Schools Act* and order the provider school board to negotiate a shared use agreement with respect to the school facilities in the town of Laurier.⁴²² While the parents concerned had contemplated legal action against both the government of Manitoba and the provider school board (the Turtle River School District), it appears that for the moment the matter is in abeyance.

In another case, legal action has been filed which relates both to the financial resources necessary to provide a Francophone program to the children of parents in the town of St. Claude, and the refusal of the current school board to negotiate a shared use agreement regarding existing school facilities with the Francophone board.⁴²³ At issue is the request that a Francophone program be offered in distinct facilities in the town of St. Claude. The Minister's discretionary powers are also raised in the case, it being alleged that the current school board in St. Claude should be directed to enter into an agreement with the Francophone board. The Minister takes the view that the Section 23 rights of the parents involved are respected by the present arrangement of busing their children to the town of Notre-Dame-de-Lourdes where the Francophone school board currently provides a Francophone program.

Parts of the *Public Schools Act* are also placed in question by the plaintiffs in this action. For example, it is alleged that the purely discretionary powers of the Minister to direct that an agreement be entered into by another school board and the Francophone board are incompatible with constitutional rights protected by Section 23 of the *Charter*. Moreover, it is alleged that the purely permissive provisions regarding negotiations between another board and the Francophone board result in an unjustified veto in the hands of the other board. This too is considered to be incompatible with constitutional rights protected under Section 23 of the *Charter*. It will be argued that a proper dispute resolution mechanism should be provided regarding disagreements of the sort raised in this case.

The proposed solution of busing the children involved to a neighbouring town is also challenged in this legal action, as well as the fact that the *Public Schools Act* allows the school board having jurisdiction in St. Claude to offer partial French programs. Such programs compete for the same clientele as would be interested in Francophone programs offered by the Francophone school board and thus infringe the constitutional rights of Francophone parents under Section 23 of the *Charter*.

Litigation is also contemplated regarding the persistent financial difficulties faced by the Francophone school board in discharging its responsibilities and fulfilling its functions. As was mentioned when dealing with financial resources, the Francophone school board has obligations and responsibilities which are additional to those of a majority language board. These include the duty to offer a programme d'accueil for eligible students who are weak in French-language skills, and responsibilities regarding the promotion of French-language education and cultural and community-based activities. In addition, the Francophone board faces supplementary costs related to its very large territorial jurisdiction, its unique organizational structure, its duty to maintain relatively small French-language schools, and its frequent need to provide busing or transportation of pupils to appropriate educational facilities.

Despite the supplementary costs associated with operating a Francophone school board, it would appear that funding formulae used in allotting financial resources to school boards have not changed since the Francophone board began operations. Legal action is therefore contemplated which will argue that the special needs of the latter board are not adequately addressed when funding levels are approved by the Finance Board and the Minister of Education. Lack of appropriate financial resources thus encumbers the ability of the Francophone board to ensure that rights guaranteed

under Section 23 of the *Charter* are fully respected, and renders it difficult, if not impossible, for the board to discharge its statutory duties and adequately perform its functions under the *Public Schools Act*.



3.8 Saskatchewan

3.8.1 Background

By the beginning of the 1980s Saskatchewan had adopted a system of designating schools (through order of the Lieutenant-Governor in Council) where language other than English could be used as languages of instruction. Schools so designated were classed as either type A, where instruction took place exclusively in the other language (i.e. French), or type B, where instruction in the minority language constituted 50 to 80% of class time. The latter were essentially bilingual schools or schools offering immersion programs. However, type A schools were not necessarily homogeneous French-language environments, for they could house programs designed for both English- and French-speaking pupils. Where this was the case, the two programs were administered separately. Further, non-rights holders were allowed access to type A programs.

As in other provinces, enrolment in bilingual programs was far higher than enrolment in full French-language programs, especially at the secondary level. This detracted considerably from the preservation and enhancement of the minority official language by contributing to high rates of linguistic assimilation. Moreover, the management structures in place at the time inhibited the effective involvement of minority language parents. In this regard, both type A and B schools were subject to the jurisdiction of existing school boards which reflected the interests of the majority population. Legislation at the time did, however, provide for the creation of parents' councils and school advisory committees. These bodies gave minority language parents a voice in school and program administration, but they had no decision-making power of any significance and were often ignored by the boards of education.

The twin issues of homogeneous French-language educational environments and an effective role for parents in management formed the background to continued debate and discussions in the province about the future of French-language education. Subsequent to a successful Section 23 *Canadian Charter of Rights and Freedoms* (the *Charter*) case in 1988, funding was made available to develop a viable plan and management model for the delivery of French-language education in the province. This project brought together representatives of Fransaskois associations, the provincial government, school boards and educational professionals, resulting in a 1989 report entitled "A French Component for the Saskatchewan School System". The current provisions of the *Education Act*⁴²⁴ date from 1995.

3.8.2 Current legislative provisions

(a) Eligibility

The *Education Act, 1995* recognizes the right of children of a "minority language adult", subject to normal age requirements, to attend a "fransaskois school" in the "francophone education area" where his or her parent or guardian is resident.⁴²⁵ A "minority language adult" is defined in the Act as a Canadian citizen who is 18 years of age and:

- (a) whose first language learned and still understood is French;
- (b) who has received his or her primary school instruction in Canada in French, other than through a French immersion program; or
- (c) who has a child who has received or is receiving primary or secondary school instruction in Canada in French, other than through a French immersion program.⁴²⁶

A "fransaskois school" is defined as meaning a school that is in a Francophone education area (and subject to the jurisdiction of a "conseil scolaire", to be discussed below) in which:

- (a) courses are taught primarily in French;
- (b) the language of communication with pupils and parents is predominantly French; and
- (c) the French language is used and developed as a first language of instruction and in school

activities.⁴²⁷

A "francophone education area" is defined as either a geographic portion of the province under the jurisdiction of a "conseil scolaire" or an area established within an existing school division (by ministerial order).⁴²⁸ There are currently nine Francophone education areas, but their combined territory does not cover the entire province.⁴²⁹

Given the territorial limitations of the Francophone education areas, geographic isolation could render access to a "fransaskois school" problematic. The Act therefore provides for minority language instruction programs in which the language of instruction is French.⁴³⁰ Where a minority language adult is not resident within a Francophone education area, he or she may make application to the "Conseil général" (to be discussed below) for the provision of a minority language instruction program. In considering such a request, the "Conseil général" is required to consider a number of factors, including whether pedagogical concerns make such services appropriate, whether an existing Fransaskois school is located nearby, whether there is a demand for Francophone education in the area where the minority language adult resides, whether other minority language adults have indicated interest, whether physical facilities may be made available, and whether costs are reasonable.⁴³¹

3.0 Provincial implementation of Section 23: Saskatchewan

(b) Sufficient numbers

What constitutes a sufficient number of minority language parents to warrant the provision of minority language education is an issue which arises in the process of establishing a Francophone education area and its conseil scolaire. Provision is made in the Act for an application by two or more minority language adults to the province-wide "Conseil général" for the establishment of such an area and a conseil scolaire.⁴³² (The Conseil général has advisory, consultative and management functions with respect to the establishment and operation of French-language schools and programs in the province. It will be discussed more fully below under the heading of governance powers.)

While some of the factors considered by the Conseil général in reviewing an application deal with the issue of financial costs, others are related to the question of threshold numbers which would be necessary to justify the creation of a Francophone education area and a conseil scolaire. No specific numbers are set out in the Act, but the Conseil général is required to consider the level of demand in reaching its decision on the application.⁴³³

(c) Minority language instruction

The Act is clear that, where education is being dispensed by a Fransaskois school, "courses are taught primarily in French" and "the language of communication with pupils and parents is predominantly French."⁴³⁴ This wording appears sufficiently broad to allow for some form of English language instruction, at least insofar as such instruction does not detract from the "primary" use of French as the language of instruction. As regards a minority language instruction program, the Act defines it as being a "program of instruction in which the French language is used and developed as a first language in instruction and in school activities."⁴³⁵

(d) Minority language education facilities

Although the terms of the Act infer some flexibility regarding the precise proportion of school instruction given in French in Fransaskois schools, it would certainly appear that such schools were meant to provide a homogeneous French-speaking environment for the purposes of minority language education. The possibility of a school building being used by both English- and French-speaking students would nevertheless not be excluded. This seems to flow from the definition of the term "school" as well, which under the Act means "a body of pupils that is organized as a unit for educational purposes under the jurisdiction of a board of education, or of a conseil scolaire, or of the department and that comprises one or more instructional groups or classes..."⁴³⁶ This definition is broad enough to encompass something less than a separate building devoted exclusively to minority language education.

(e) Powers of governance

Current legislation provides for the creation of Francophone school boards called conseils scolaires which have jurisdiction within francophone education areas. As mentioned above, there are currently nine such areas with corresponding conseils scolaires (created by ministerial order). The Act establishes a procedure for the creation of a conseil scolaire and a Francophone education area. This involves a body known as the Conseil général des écoles

fransaskoises, whose membership is drawn from persons elected to the various conseils scolaires (one member from each conseil).⁴³⁷ Any two or more minority language adults can apply to the Conseil général to have a Francophone education area and a corresponding conseil scolaire established.

The first stage in the procedure is an obligatory notice of intention (setting out a description of the proposed area) to be published in at least one newspaper of general circulation among Francophones in the province and in the proposed Francophone education area.⁴³⁸ Within required time limits, the applicants are then required to submit a proposal (in prescribed form) to the Conseil général.

The Act requires that the proposal be evaluated by the Conseil général by reference to a number of factors:

- (a) whether the appropriate services, in pedagogical terms, can be offered;
- (b) whether there is an existing fransaskois school or schools in close proximity that could already meet the need of the students;
- (c) whether the proposed francophone education area is appropriate;
- (d) whether there is a demand for francophone education in the proposed francophone education area;
- (e) whether there is an indicated interest among minority language adults who would take advantage of the service;
- (f) whether the distances over which the students would be required to be transported are reasonable;
- (g) whether physical facilities may be made available;
- (h) whether the cost of the contemplated services is reasonable; and
- (i) whether there is any reason, based on any factor or consideration that the conseil général deems appropriate, not to establish a conseil scolaire and a francophone education area.⁴³⁹

Where the application is accepted by the Conseil général, those who submitted it may then file a formal petition (in prescribed form) within a year to the Conseil général for the establishment of a Francophone education area and a conseil scolaire. The Conseil général has the authority to accept or reject the petition. Should it be accepted, it is forwarded to the Minister who is required under the terms of the Act⁴⁴⁰ to establish by an appropriate order the Francophone education area and the conseil scolaire as proposed in the petition.

The Conseil général is also empowered to consider applications from a minority language adult for the provision of a minority language education program, as pointed out above when discussing eligibility criteria for French-language education. The Conseil général is required by the Act to consider the same factors as it does when evaluating an application for establishing a Francophone education area and conseil scolaire.⁴⁴¹ However, there are no similar provisions regarding petitions and ultimate ministerial orders.⁴⁴² It would appear that any decision on such an application is a matter for consultations and discussions with the Minister. Ultimate authority to actually establish a minority language program lies with the executive arm of government under the terms of the Act:

Subject to any conditions that may be prescribed in the regulations, the Lieutenant Governor in Council shall designate schools in which French is the principal language of instruction in a designated program.⁴⁴³

Once established, a conseil scolaire has essentially the same duties as other school boards created under the *Education Act* except for the power of taxation. These are set out in some detail under Section 86, and include:

- administering and managing the educational affairs of the francophone education area (in accordance with the Act and regulations);
- exercising general supervision and control over fransaskois schools under its jurisdiction (including the making of any relevant bylaws);
- hiring any teachers, principals and other staff (subject to departmentally approved qualifications);

- determining what classrooms and francophone schools are to be maintained in the francophone education area;
- authorizing and approving (subject to regulations) the courses of instruction that constitute the instructional program for each school under its jurisdiction.

Powers of a conseil scolaire are found in Section 88 of the Act, and include:

- entering into agreements (where it is considered necessary or advantageous to the quality of French-language education) with a variety of organizations, including agencies and departments of any Canadian provincial or federal government;
- approving, subject to regulations, textbooks, reference books and library materials for use in schools under its jurisdiction.

The duties and powers of the Minister of Education are, of course, quite extensive under the terms of the Act. For example, the Minister is required to:

- prepare courses of study or curriculum guides pertaining to courses of instruction authorized by regulation;
- provide lists of curriculum resource material that he may prescribe, approve or recommend for use in schools;
- make regulations for the classification and certification of teachers.⁴⁴⁴

The Minister is also empowered to:

- prescribe the subjects of instruction and issue courses of study for elementary and secondary school levels;
- prescribe compulsory and optional subjects and course requirements;
- acquire and make available material related to courses of study (school boards and conseils scolaires being required to make this material available without charge to pupils).⁴⁴⁵

In addition to receiving applications and petitions for the establishment of Francophone education areas and conseil scolaires (as well as requests for the establishment of minority language instruction programs outside a Francophone education area), the Conseil général helps administer and manage the system of French-language education. In this regard, it has a supportive role to play with respect to the successful operation of conseils scolaires. It may, for example:

- engage from time to time in any activities that have been delegated to it by a conseil scolaire;
- assist in identifying and evaluating teachers for a conseil scolaire and other personnel required by a conseil scolaire;
- assist in the evaluation of programs and courses of instruction that constitute the instructional program of francophone schools (subject to the regulations);
- provide special education services to francophone schools;
- assist in the preparation of budgets for a conseil scolaire;
- determine requirements for reserves and funding needs of francophone schools and conseils scolaires;
- negotiate funding requirements for francophone schools and conseils scolaires with the minister.⁴⁴⁶

The Conseil général also has a consultative role with respect to the Minister. The Act requires it to inform and consult with him, directors and superintendents of schools and other government agencies regarding the needs of francophone schools in order to foster quality education.⁴⁴⁷

Being a corporate body, the Conseil général also has a broad range of duties, responsibilities and powers relevant to

its own internal administration which are set out in the Act in Sections 15 to 36. In essence, the Conseil général offers services to the conseils scolaires and manages the programs of instruction that fall outside existing Francophone education areas.

Proposals for major changes to the existing administrative and management structure for Fransaskois schools were presented by the Conseil général to the Minister of Education in October 1997.⁴⁴⁸ The current structure, involving as it does nine conseils scolaires and the Conseil général, is considered overly complex and inefficient. It is therefore recommended that a single, province-wide school board (Commission scolaire fransaskoise) be created which would replace the current Conseil général and the conseils scolaires. In addition, it is proposed that the province be divided into nine Francophone education regions covering the entire province. The latter change would better help ensure that all Francophone children, regardless of place of residence, would have access to French-language education.

While the proposed Commission scolaire fransaskoise would exercise a broad range of administrative and management functions, it is also recommended that a school committee of parents (conseil d'école) be attached to each Fransaskois school. These school-based committees (which would also include two members of the teaching or other staff) would share management and administrative authority over the schools with the province-wide Commission scolaire fransaskoise.

It is felt that the proposals put forward by the Conseil général would both result in a more efficient administrative structure for French-language education and preserve the role and input of parents at the local level in the operation of schools and the educational programs they deliver.

(f) Financial resources

Statutory provisions regarding budgets for the operation of schools and educational programs are found in Part VI of *The Education Act, 1995*. Many detailed requirements are set out in the Act with respect to the preparation of annual statements of revenue and expenditures by school boards and conseil scolaires.⁴⁴⁹ A conseil scolaire is specifically required to include with any necessary estimate of annual revenue and expenditures a supplementary statement "referring to policies and programs of the conseil scolaire, together with any statistical data with respect to school enrolment and personnel requirements for the next fiscal year".⁴⁵⁰

Whereas school boards in general have a power of taxation,⁴⁵¹ the operating expenses of a conseil scolaire are considered grants under the *Education Act, 1995*. Pursuant to the Act, a conseil scolaire is "entitled for each fiscal year to an operating grant in an amount equal to the amount by which the recognized local expenditure of the conseil scolaire exceeds its recognized local revenue."⁴⁵² The Act further provides that the Minister shall calculate the recognized local revenue for each conseil scolaire consisting of:

- (a) any revenues from fees and other sources that may be recognized by the minister; and
- (b) recognized revenues received in previous years that were not taken into account in the grant calculations for those previous years.⁴⁵³

While such grants are considered applicable to current operating expenses, the Act also allows the Minister to make grants for capital expenditures of each conseil scolaire.⁴⁵⁴ With respect to all grants, the Act explicitly states that they are made on the condition that "the conseil scolaire and the fransaskois schools in the francophone education area under the jurisdiction of the conseil scolaire are organized, operated and maintained in accordance with this Act and the regulations."⁴⁵⁵ It is evident that the Minister retains absolute discretion regarding capital grants to conseils scolaires.

Given the duties and powers of the Conseil général, the *Education Act, 1995* also makes provision for the approval of an operating grant, although entitlement to such a grant is subject to any terms and conditions that might be prescribed in the regulations. In addition, the Act provides that the Minister "may require from the conseil général, in the form and at the times that the minister may prescribe, any returns, statements, reports and information that the minister considers necessary."⁴⁵⁶

Detailed rules regarding the calculation of operating and capital grants are found in the annual *School Grant Regulations*. The regulations applicable to the 1997 calendar year establish different formulas depending on the

category of expenditure.⁴⁵⁷

The basic operating grant for both school divisions and conseils scolaires, which covers the costs of administration, instruction, plant operation and maintenance, non-capital furniture and equipment, non-capital renovations and repairs, current interest expenses, bank charges and special events transportation, consists of a set amount per pupil.⁴⁵⁸ The set amount varies, however, depending on the level of student (for example, kindergarten versus secondary). Further, school divisions and conseils scolaires are divided into three categories, with different per pupil rates for each category. All conseils scolaires are currently grouped in the category with the highest per pupil rate.

Additional amounts are then added on to the per pupil rate to compensate for particular factors. These factors include geographic location, small schools, rapidly declining or increasing enrollment, scattered population, special needs students,⁴⁵⁹ and "language programs".⁴⁶⁰ Language programs are defined in the regulations to mean, with respect to a school division, a course of instruction in a language other than English and the teaching of English as a second language. With respect to a conseil scolaire, such a program is defined as a course of instruction for English as a second language.⁴⁶¹ Despite these definitions, additional funding is in fact currently given to conseils scolaires for French-first-language instruction. This discrepancy is reflected in Table 9 of the regulations, which refers, in the case of conseils scolaires, to the percentage of time used in French-language instruction. The additional amount a conseil scolaire is entitled to includes costs for the start-up or "implementation" year and ongoing instruction.⁴⁶²

Separate formulas exist for operating grants for transportation, room and board for students who receive services outside their home attendance area, facility rental, substitute teachers, payments to other school divisions or conseils scolaires for the purchase of educational services, and other miscellaneous items.⁴⁶³

The regulations also contain a catch-all section concerning operational funding: Section 26 states that the Minister may recognize any expenditures, in addition to those already covered by the operating grants just described, that the Minister considers appropriate. Further, Subsection 26(2) states that, in determining the recognized local revenue of a conseil scolaire for the purposes of an operating grant, the Minister shall recognize the expenditures described elsewhere in the regulations, "subject to any modifications that the minister considers necessary and appropriate". The Minister may also recognize any additional expenditures that he or she considers appropriate.

As already mentioned, the conseils scolaires do not have the power to levy taxes, unlike other boards. This lack of taxation power is taken into consideration in calculating the operating grant. The lack of a power to tax is also compensated for by Section 38 of the regulations: it provides that a conseil scolaire is entitled to a grant equal to the difference between the revenue generated by the actual mill rate and the mill rate established by the regulations, calculated for each pupil enrolled in the Fransaskois school in the Francophone education areas for a conseil scolaire. The mill rate set by the regulations is lower than the actual mill rate used by school boards, hence the difference between the two.

The regulations also establish rules regarding the calculation of capital expenditures and capital funding, but these rules only apply to school divisions. The conseils scolaires are therefore governed by the general sections in the Act (Sections 314 and 315), already mentioned above, as regards capital grants.

While both boards of education and conseils scolaires have borrowing powers, different rules apply to each. These rules are set out at Sections 319 and following of the Act. In very general terms, the differences concern the approval process for loans, the provision of security, and the issuance of debentures. In cases in which loans and the provision of security require approval, boards of education must obtain this approval from the Saskatchewan Municipal Board, while the Minister approves loans for conseils scolaires. In the case of loans for capital expenditures, the Minister has special powers to provide security on behalf of conseils scolaires that do not exist for boards of education. The power to issue debentures, subject to the conditions set out in the Act, is given to boards of education but not conseils scolaires.

3.8.3 Litigation

(a) Early cases

As in other provinces, early litigation in Saskatchewan contested the statutory mechanism by which decisions were made regarding the provision of minority language education, the lack of any role for parents of eligible children in the

management and control of minority language education programs and facilities, and the failure to provide for independent and distinct facilities for minority language education.⁴⁶⁴

At the time of this litigation, which predated the current statutory provisions reviewed above, existing school boards constituted the organizational units through which minority language education was delivered. Ultimate decisions regarding the provision of French-language education were made by the Lieutenant-Governor in Council, on recommendation of the Minister of Education. Requests to the Minister to provide for such education were made by existing school boards, either on their own initiative or following a request made by the parents or guardians of at least 15 eligible students. In the latter case, a school board was required to submit the request to the Minister who, in turn, was required (if certain conditions were met) to submit the request to the Lieutenant-Governor in Council. The government was obliged to act upon the recommendation for the establishment of a French-language program within a designated school.

Given the obligation of existing school boards to act on the request of a group of parents, the Saskatchewan Court of Queen's Bench saw no objection to their general jurisdiction regarding the provision of minority language education. It could not be said that they had "unfettered jurisdiction" in this regard. However, two elements of the then existing system for the treatment of requests for a French-language program were considered incompatible with Section 23. First, the territorial limitations of school boards could have resulted in an arbitrary splitting of Francophones of a particular region into separate school divisions, with the result that they might be insufficiently numerous within any given school division to satisfy the minimal number of 15 eligible students. Such a result would conflict with Section 23 of the *Charter*.⁴⁶⁵

The criteria used by the Minister of Education in reviewing a request for minority language education (which were set out in regulations) were also considered to be in conflict with Section 23. These required the Minister to be satisfied that a designated program (for instruction in French) could be operated for at least three years, and that adequate provision had been made for English-language education to pupils who did not wish to enrol in the designated program.⁴⁶⁶

The court further found that, where the numbers of eligible pupils were sufficient to warrant the provision of separate "minority language education facilities", parents had an implicit right under Section 23(3)(b) of the *Charter* to manage and control the relevant programs and schools. To the extent that provincial legislation failed to recognize this right, it was found to be incompatible with Section 23. Of course, elements of the court's reasoning in this regard have been supplanted by the two decisions of the Supreme Court of Canada, in particular the rigid two-tiered numbers test used by the Saskatchewan Court of Queen's Bench to determine when a right to management and control would apply. It was this two tiered numbers test which led the latter court to uphold the system of parents' advisory councils (purely consultative bodies without decision-making powers) in situations where the number of pupils justified only the provision of a minority language program of instruction, as opposed to the provision of a separate educational facility.⁴⁶⁷

(b) Recent or anticipated litigation

The most recently created conseil scolaire fransaskois (Zenon Park in 1997) has experienced significant difficulties related to lack of proper school facilities within which to offer its French-language program. The ministerial order which established the Conseil scolaire de Zenon Park did not make any provision for the transfer of school facilities to it. While negotiations did take place with an existing school board (Tisdale School Division No. 53) regarding the possible transfer of a school facility, they ultimately proved unsuccessful. The conseil scolaire was then obliged to offer its program in temporary premises located in an old convent in need of renovations (some of which were done). Given that the latter premises are not equipped with a gymnasium, the conseil scolaire requested that it be given access (one evening per week) to the gymnasium located in the school which originally was the subject of negotiations with the Tisdale School Division No. 53. This request was refused. Little or no explanation for this refusal has been forthcoming. Moreover, it appears that 50% of the funding for the original construction of the gymnasium in question came from the Department of the Secretary of State for Canada. The Conseil scolaire de Zenon Park believes its request has been treated in a very arbitrary fashion. It also maintains that provincial responsibilities under Section 23 of the *Charter* to ensure full and adequate funding for minority language education are not being respected. Not only are the "temporary" facilities in the old convent inadequate to delivering an educational program of equal quality to that of other schools, but even reasonable requests for access to a gymnasium outside of normal school hours are rejected

without explanation.

In light of the circumstances in which the conseil scolaire finds itself, serious consideration is being given to beginning court action to challenge the validity of decisions made concerning access to the gymnasium. This refusal is, of course, part of a broader problem related to the inadequate financial and material resources made available to the Conseil scolaire de Zenon Park.



3.9 Alberta

3.9.1 Background

By the mid-1960s provisions were in place that allowed French to be used as a partial language of instruction in publicly funded schools. The proportion of instruction given in French varied, but it generally decreased rapidly as pupils advanced into higher grades. By the end of the decade curriculum changes had been made to allow for 50% of instruction (grades 3-9) to be given in the minority language.

The evolution of French-language education in the 1970s was affected by the rising interest in French immersion programs and statutory amendments which placed all languages other than English on an equal footing as potential languages of instruction. In developing second-language programs, however, very little distinction was made between immersion as essentially a bilingual educational project and French-first-language programs delivered in homogeneous school environments. Thus, while enrolment in French-language programs rose, it was difficult to determine how many Francophone children were receiving their education in bilingual school settings or in immersion programs.⁴⁶⁸ By the mid-1980s, it would appear that only two homogeneous French-language schools operated in the province (in Calgary and Edmonton), with the remainder of French-language education being offered in programs delivered in mixed or bilingual school settings.

Management and control of schools lay with local school boards, although they were subject to the authority of the Ministry of Education. As in other provinces, a process of consolidation of school districts into larger divisions (governed by divisional school boards) decreased the degree of community control over schools. Community input through advice and consultation was preserved, however, through advisory boards (vestiges of the smaller local authorities) which had some influence regarding the teaching of religion and French. Ultimate decision-making authority rested nonetheless with divisional school boards.

Amendments to the *School Act*⁴⁶⁹ in 1988 replaced the then-existing system of advisory boards with school committees, which could be established by boards at the request of parents of students attending any given school. Under the amendments,⁴⁷⁰ boards were given the discretion to delegate decision-making powers to school committees, although there was no obligation to do so. At the time, Francophones were encouraged to use this consultative (and potentially decision-making) mechanism as a means of increasing their management authority over French-language education. However, given the paramount role of school boards controlled by representatives of the English-language majority, this mechanism did little to promote change. As will be explored in greater detail below when dealing with past litigation, legal action had already commenced which focused specifically upon the lack of management powers for Francophone parents, ending in the Supreme Court of Canada decision in *Mahé* in 1990 (already reviewed in Chapter 2 of this study).

A further statutory change was introduced in 1993 which set out a new mechanism for implementing rights to management and control.⁴⁷¹ Francophones in some regions of the province have access, as a result, to a management structure analogous to that represented by school boards controlled by the English-speaking majority. School governance will be discussed in the following review of current statutory provisions governing the access and delivery of French-language education in Alberta.

3.9.2 Current legislative provisions

(a) Eligibility

The *School Act* recognizes that "if an individual has rights under Section 23 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) to have his children receive school instruction in French, his children are entitled to receive that

instruction in accordance with those rights wherever in the Province those rights apply."⁴⁷² Reference to "wherever...those rights apply" would appear to relate to the criterion of sufficient numbers set out in Section 23. For the purposes of the *School Act*, individuals who enjoy such rights are referred to as Francophones.⁴⁷³ While the children of Francophones are entitled to instruction in French under these provisions, there is nothing in the Act which excludes the children of non-Francophones from admission to a French-language educational program or school. More will be said about this below when discussing the management authority of Francophones over the delivery of French-language education.

The Lieutenant-Governor in Council is also given the authority to make regulations giving effect to Section 23 rights, or relevant generally to the education of children of Francophone Albertans.⁴⁷⁴ No regulations have yet been adopted under this authority.

The Act also provides that students who are "enrolled in a school operated by a Regional authority" are entitled to receive school instruction in French.⁴⁷⁵ Regional authorities constitute the management structure (analogous to school boards) recognized under the Act (to be discussed below). They are required to provide an education program consistent with the Act and regulations.

(b) Sufficient numbers

There are no provisions in the Act or relevant regulations establishing threshold numbers necessary before French-language classes (or facilities) will be established. That the number of pupils involved will play a role in determining when, how and where French-language education will be made available is implicit in the eligibility criteria just mentioned. Decision-making powers and general authority inherent in management structures controlled by Francophones (as well as the role of the Minister of Education and the impact of decisions made by majority language school boards) are related to these issues.

(c) Minority language instruction

Neither the Act nor the regulations contain a specific definition of what constitutes French-language instruction. Section 5 of the Act, referred to above when discussing eligibility criteria, does speak of Regional authorities offering an "educational program consistent with the requirements" of the Act and regulations, but no further elaboration is given. General program development and support services are, of course, provided by the Ministry of Education. In this regard, the Language Services Branch helps develop curricula and provides support for French-language instruction, as well as for French immersion and other language programs. The programs of study developed by this Branch contain elements relevant not only to language skills *per se*, but also to the development and enhancement of one's identity and pride as a Francophone in Alberta.

(d) Minority language education facilities

There are no provisions in the Act or regulations which establish criteria relevant to determining when distinct educational facilities will be made available to Francophones. While Regional authorities clearly operate schools under their jurisdiction, the definition of what constitutes a school under the Act ("a structured learning environment through which an education program is offered to a student"⁴⁷⁶) is broad enough to include a class or classes housed in shared facilities. In order to clarify the manner in which decisions are made regarding the choice of a minority language educational facility, and what might be the possible factors to consider, one must turn to the division of management authority under the Act.

(e) Powers of governance

The Act authorizes the Minister of Education to establish "any portion of Alberta as a Francophone Education Region."⁴⁷⁷ No criteria are set out in the Act to help determine when and where such a region should be established. At the present moment there are seven Francophone Education Regions, their combined area covering the entire province. The Act also authorizes the Minister to create for each region either a Regional authority or a co-ordinating council.⁴⁷⁸ Three Regional authorities have been created: East Central Francophone Education Region #3; North Central Francophone Education Region #4; and Northwest Francophone Education Region #1.

A Regional authority is a corporate body similar to a school board.⁴⁷⁹ While transitional provisions allow the Minister to appoint no fewer than three Francophones as the first members of a Regional authority,⁴⁸⁰ the Act establishes

procedures for the election of subsequent members by eligible electors. To be an elector for a given authority, an individual must be a Francophone with a child enrolled in a school operated by that Regional authority.⁴⁸¹ (There are other "non-linguistic" requirements that must be met in order to vote, for example age, citizenship and residency in Alberta, but these will not be discussed here.) The Act allows a person who is eligible to vote in an election for a Regional authority to vote, as well, in an election for a school board.⁴⁸²

To be a candidate for election to a Regional authority one does not have to be a Francophone, nor have a child enrolled in a school operated by the authority. Candidates must, however, be nominated by at least five electors who are eligible to vote in the elections in question and are resident in the region on the date of signing the nomination.⁴⁸³ As is the case with eligibility to vote, there are other "non-linguistic" requirements to stand as a candidate, such as age, citizenship, residency in Alberta.⁴⁸⁴ The Act further stipulates that a person may not be both a member of a Regional authority and a school board trustee, and may not be both a member of a Regional authority and of a co-ordinating council at the same time.⁴⁸⁵

As already mentioned, a Regional authority exercises powers and fulfils functions similar to those of a school board. With respect to instructional content, this means that a Regional authority may "develop, acquire or offer courses or programs" and "develop or acquire instructional materials for use in programs or in schools".⁴⁸⁶ However, this power is subject to the Minister's extensive powers under the Act to prescribe, approve and prohibit courses and instructional materials, to prescribe instruction time and to set goals and standards.

Regional authorities may (like school boards) hire teachers, but only teachers who are properly "certified" by reference to criteria (training, experience and other requirements) set out in regulations developed by the Minister. The Act and regulations also impose conditions and procedures regarding the content of teachers' contracts, transfers, terminations and appeals from decisions regarding individual teachers.⁴⁸⁷

With regards to non-teaching staff, a Regional authority is obliged (as are boards) to hire a superintendent of schools and a secretary-treasurer.⁴⁸⁸ With respect to the former, the Minister is authorized to make regulations "governing the qualifications, appointment and conditions of employment..."⁴⁸⁹ The choice of superintendent must also be approved by the Minister. The Act authorizes Regional authorities to employ other non-teaching personnel they consider necessary.⁴⁹⁰

Besides being subject to the powers of the Minister and provisions of the Act, the powers of Regional authorities (and boards) as regards their personnel are also subject to any applicable collective agreements, which may in some or all cases be negotiated on a province-wide basis, and labour relations legislation.

A Regional authority (like a school board) has broad powers to acquire or lease land, buildings and other property.⁴⁹¹ However, with respect to selling, renting or leasing "real" property (generally speaking this includes land, buildings and things fixed permanently to buildings), a board or a Regional authority may have to seek written approval of the Minister and must follow procedures established in the *Disposition of Property Regulation*.⁴⁹² In addition, the construction of school buildings is subject to procedures set out in the Act, approval by the School Buildings Board and any regulatory requirements.⁴⁹³

The acquisition of property and other resources, for the purposes of delivering minority language education, is clearly essential for Regional authorities to carry out their mandate. In this regard, the Act requires that "a board of a district or division required by the Minister to do so must enter into an agreement with the Regional authority respecting any matter the Minister considers necessary, including, but not limited to, dealing with assets and liabilities and the transfer of employees."⁴⁹⁴ Such agreements might include the transfer of existing facilities controlled by school boards currently dispensing French-language education. That minority language schools or classes could be operated by a school board is possible under provisions in the Act which state that any board "may authorize the use of French or any other language as a language of instruction."⁴⁹⁵ At present, there are in fact French-language schools being run by school boards having jurisdiction in the same territory as Regional authorities.

In addition to Regional authorities, the Minister may create a co-ordinating council for a Francophone Education Region. There are currently three such co-ordinating councils in existence: Northeast Regional Francophone Co-ordinating Council, the South Central Regional Francophone Co-ordinating Council and the Southern Regional Francophone Co-ordinating Council. The Act stipulates that "a co-ordinating council shall not act as if it were a board." To a great extent,

a co-ordinating council plays a consultative role, the Act providing that it shall:

- (a) facilitate the education in French of the children of Francophones by advocacy or by entering into agreements, including agreements with boards or Regional authorities respecting the purchase of services;
- (b) advise boards, Regional authorities and the Minister respecting all matters relating to the education in French of the children of Francophones;
- (c) carry out any other task, inquiry or investigation requested by the Minister.⁴⁹⁶

A co-ordinating council is composed of no fewer than three individuals appointed by the Minister. There are no qualifications for membership set out in the Act, such as the requirement to be a Francophone (applicable to members of a Regional authority).

There are also no provisions in the Act which determine why a co-ordinating council, as opposed to a Regional authority, should be created. The Minister is simply given the discretion to create one or the other entity. However, one can presume that the choice of entity is somehow related to the number of Francophones resident in a given Region. Both a co-ordinating council and a Regional authority may be dissolved at the discretion of the Minister.

In addition to advice that may be given by a co-ordinating council, a Language Services Branch within the Ministry of Education assists in the development of curriculum and provides support for French language instruction. The Minister has also appointed an Advisory Committee for Francophone Education which formulates recommendations regarding Francophone education generally (including recommendations relevant to possible management models).

(f) Financial resources

Basic funding for Regional Authorities is provided, as for school boards, in the form of grants from the provincial government. Allocations to boards and authorities take into account the individual characteristics of school jurisdictions, such as size, remoteness, sparseness of population, numbers of special needs students and grade levels, as set out in the *School Grants Regulation*.⁴⁹⁷ While the latter regulation gives the Minister the power to make grants to school boards and Regional Authorities (and to attach conditions to them), detailed rules regarding grants are contained in administrative documents issued by the Ministry. According to the guidelines currently in place,⁴⁹⁸ which apply to both boards and Regional Authorities, grants are given in three blocks: instruction; support; and capital. Boards and Regional Authorities have a certain limited flexibility to transfer funds between these blocks. Funds may not, however, be transferred to or from the capital block.

Within the instruction block, each board or Regional Authority receives the same basic amount per student. Additional funds are then available to recognize differing student populations and geographic circumstances. For example, additional funds are given to students with learning disabilities, English-as-a-second-language students, home education, population density and distance factors, native education, school programs in institutions, economically disadvantaged students, physically disabled students, and boards or Regional Authorities with "emergent" financial needs. With regards to Francophone students, the guidelines state that special funding is provided by the Federal government. This presumably refers to money made available through the federal Official Languages in Education Program and as established under federal-provincial agreements. (It should also be mentioned that funding for the operations of co-ordinating councils is also provided for under federal funding initiatives.)

The support block provides financial resources for physical plant operation and maintenance, governance, system administration, student transportation and equipment. As for the capital block, it pays for each board's or Regional Authority's debenture and capital loan costs, and current payments for school buildings, equipment and related costs. As mentioned earlier, all "school building projects" must be approved by the School Buildings Board.

Funds for grants to boards and Regional Authorities originate in two sources: the general revenue fund, and the Alberta School Foundation Fund (ASFF) into which all money raised through education property taxes is placed. The system for levying education property taxes is set out in the Act.⁴⁹⁹ These taxes are collected by municipalities on behalf of and at rates set by the provincial government.

Separate school boards may opt out of the provincial tax levy system and ASFF and levy their own taxes from declared separate school ratepayers. Special rules exist when property is held by more than one person and for corporations

and co-operative associations that wish a portion of their property to be assessed for separate school purposes. However, there is no financial advantage in opting out since the province ensures that boards having opted out receive the same total amount they would have received had they been in the ASFF program. This is done by topping up the amount collected by the separate board.

Finally, boards, but not Regional Authorities, may take advantage of the provisions of the *Special School Tax Levy Plebiscite Regulation* and corresponding sections of the Act, which allow boards to hold a plebiscite to obtain approval to impose an additional tax for a purpose referred to in a board resolution.⁵⁰⁰ However, the revenues raised may not exceed 3% of the budget of the board in the year the resolution is passed.

3.9.3 Litigation

(a) Early cases

Litigation which ultimately formed the basis for the first Supreme Court decision on Section 23 (*Mahé*) originated in Alberta.⁵⁰¹ While some of the specific reasoning at both the trial and appeal court level was overturned by the Supreme Court, it is instructive to recall some of the more important aspects of the factual situation which gave rise to the litigation and the judicial findings resulting from it.

At the time the trial of the original lawsuit was heard, the Edmonton Roman Catholic Separate School District operated a combined elementary and junior high school where French was the principle language of instruction. Attendance at the school was restricted to children of Francophone parents, but the programs offered included a type of French immersion or bilingual education.⁵⁰² The lack of a fully French-language atmosphere at the school was a source of concern and dissatisfaction for the plaintiffs (persons who clearly qualified under Section 23 of the *Charter*). Indeed, it had motivated their original request to the Alberta Minister of Education (in 1982) that a fully French-language elementary school be established which, through being administered by an autonomous Francophone school board, would ensure a homogeneous linguistic environment reflecting the cultural distinctiveness of the minority.

In rejecting this request, the Minister made it clear that she would not create a French-language school division and suggested that the proposal be taken to existing Catholic or public school boards for their consideration. This was in line with provisions in the *School Act*⁵⁰³ at the time which recognized that a school board had the discretion to authorize the use of French as a language of instruction. In addition, the Act also provided that local advisory boards would be established if certain procedural requirements under the Act were met. Such advisory boards, attached to existing school boards, were empowered to request that instruction in the French language be initiated. Where such requests took the form of a formal resolution of an advisory board, the school board was obliged to implement the proposal as soon as it was practical to do so.⁵⁰⁴

The discretion of school boards to offer instruction in French, or the duty to do so as soon as practical, seemed a considerable distance from proper implementation of the language rights set out in Section 23 of the *Charter*. Moreover, the fact that a French-language school or program remained subject to the administrative authority of an existing board (representative of the majority population) did not in any way respond to the plaintiffs' legitimate expectation that important management decisions concerning minority language education be made by persons who enjoyed Section 23 rights. On both these points, the trial judge found that the legislation in place at the time did not respect the rights set out in Section 23. In so doing he adopted the reasoning of the Ontario Court of Appeal regarding rights to governance of minority language schools, finding that the number of children of eligible parents in the Edmonton area was sufficient to justify "a degree of exclusive management and control over provision and administration of minority language schools." Despite the conflict with Section 23, however, the trial judge refused to issue any binding order against the government of Alberta, arguing that it was sufficient to indicate the difficulties created by the existing legislation, leaving it to the government to decide upon the best means to cure the statutory defects.

The discretion enjoyed by existing school boards to offer French-language instruction, which the trial judge found to be in conflict with rights under Section 23, was also reviewed by the Court of Appeal. It concluded, however, that the purely permissive language of the statute did not detract from the rights set out in Section 23. Since the statute in question predated the constitutional entrenchment of Section 23, the Court of Appeal reasoned that "...it does no purport to be in compliance with Section 23, and is therefore supplementary to (and not contradictory of) any *Charter* rights..."⁵⁰⁵ While this conclusion was motivated by the desire not to interfere with the province's legislative jurisdiction

to chose the modalities by which Section 23 would be implemented,⁵⁰⁶ it also begged the question of how an individual could effectively enforce his or her rights under Section 23 in the event of a province's failure to act. The inadequacy of this approach was recognized by the Supreme Court, whose judgment on the same case clearly states that Section 23 "places positive obligations on government to alter or develop major institutional structures."⁵⁰⁷

On the issue of management and control of minority language schools by representatives of that minority, the Court of Appeal adopted a broad view of the rights recognized under Section 23(3)(b), but tied their exercise to a stringent test of reasonable numbers. Regarding the underlying right, it is worth remembering that the Court of Appeal declared:

I accept the argument of the appellants that the most effective guarantee to prevent assimilation is a facility under the exclusive control of that group. Any diminution in that power inevitably dilutes the uniqueness of the school and opens it to the influence of an insensitive if not hostile majority. No doubt some elements of control must be yielded, as we will see, but each measure of control lost represents a potential weakening of the decision-making power, and opens the door to an undermining of the difficult role of the facility.

In my view, s. 23(3)(b) guarantees to s. 23 students, where numbers warrant, an educational system (with all its complexity and cost) that not only offers the same quality of education as other systems but is run by the minority language group or its representatives.⁵⁰⁸

Broad phraseology used in describing the underlying right was, however, significantly qualified by the numbers necessary to invoke it successfully. The Court of Appeal felt that the numbers of students involved must not only be sufficient to justify the provision of separate educational facilities, but also be such as to make it financially feasible to maintain a distinct management structure for the minority. Moreover, the Court of Appeal took the position that the burden of proving that costs related to exercising the right were reasonable lay entirely with a plaintiff.⁵⁰⁹ Needless to say, the plaintiffs were found not to have discharged this heavy burden of proof. Given that the Court also decided that the absence of any statutory amendments intended to implement Section 23 was not a violation of the *Charter*, modalities of implementation being left to the province, the plaintiffs failed on the appeal.

As already mentioned, the Supreme Court has overturned or qualified the restrictive reasoning contained in the decision of the Alberta Court of Appeal. It has introduced a more generous numbers test (based on actual and potential demand for minority language education in any given region), ruled that management rights are not dependant on the existence or creation of a wholly separate school building, and required provinces to take positive, concrete measures (including legislative amendment) to ensure the proper implementation of Section 23 requirements.

(b) Recent or anticipated litigation

Access to French-language education, including distinct facilities and effective management rights, is now available in some regions of the province (since 1993). Beyond these regions, however, difficulties have been experienced with respect to the nature of facilities made available for instruction in French. A case which illustrates the type of problems which Francophones may face, in particular in areas where the administration of French-language education remains in the hands of school boards controlled by the majority population, recently arose in the city of Lethbridge.

Over the course of two years (1991-1993), a group of Francophone parents made formal efforts to have an elementary French-language school established in the city. These efforts included conducting a survey of parents of eligible children, the submission of an official request to two school boards with jurisdiction in the city, consultations with the Minister of Education, and participation in various committees struck to study the matter. Initially the two school boards appear to have claimed that neither could accommodate the proposed school because of lack of space. After further study, provincial officials who considered the matter recommended that a distinct French-language school be established. Both school boards rejected the recommendation and the matter was once again returned to the Minister of Education, who recommended to the Catholic separate school board to offer a "school within a school" with a separate administration. The school eventually offered an elementary French-language program within an existing school but without any separate administration, which offer was rejected by the parents concerned. The Minister eventually ordered the school board to provide a "school within a school" (more than two years after the beginning of the original request of the parents), but the school board ultimately put in place only a program.

Obviously, the two school boards involved in this request did not respond with alacrity. In addition to a lack of

enthusiasm, the French-language program was offered in the basement of an existing school which also housed a French immersion program, an English-language program and a special program for aboriginal students. Parents rightly saw the situation as uncondusive to the preservation and enhancement of the French-speaking minority of the city. In their view, the situation did little to halt and reverse the disquieting rates of linguistic assimilation of Francophone children.

Given the original delays and reluctance, it is not surprising that little effort was made by school board officials to help promote and build upon the modest beginnings of the French-language program. Indeed, five years of efforts to procure a distinct facility for the French-language program failed, even though it would appear that empty schools existed in the area which the parents felt were completely adequate to the needs of the program, and allowed for expansion to include higher grades.

While parents now have some consultative role to play in the operation of French-language educational programs, via co-ordinating councils established by the Minister, they enjoy no real decision-making powers. Yet, as the Supreme Court of Canada has said, school boards representing the majority population cannot always be expected to be sensitive to the needs and aspirations of minority language speakers. This makes it important that the representatives of the minority group have a meaningful role in the management of minority language education programs and facilities. Where this is not the case, and majority language boards exercise broad management powers over minority language programs, including their development and expansion, the very purpose of Section 23 is endangered.

Given the difficulties experienced by the parents in the case reviewed here, preparation of litigation was under way by the autumn of 1995. Anticipated legal issues related to whether Francophone parents in Lethbridge enjoyed the right to have their children educated in distinct facilities that fully reflected the minority language and culture, whether the alleged dilatory and adverse behaviour of school boards and the Minister of Education was a breach of Section 23, and whether the facilities made available should allow for and accommodate a French-language educational program encompassing both primary and secondary grade levels. However, legal action has not proceeded due to an agreement to place the French-language school facilities in Lethbridge under the management and control of the Regional authority that operates schools in the city of Edmonton.

The fact that co-ordinating councils have no management powers or control over the provision of French-language education may very well be a source of future litigation. Situations similar to that which arose in Lethbridge may occur elsewhere, or controversy may arise in localities where existing French-language schools are under the management of school boards representative of the majority population. Indeed, it would appear that even within Francophone Education Regions where a Regional authority exists, French-language schools and programs are still offered and managed by majority language boards. In either case, it is unclear how it can be said that Francophone parents with children in such schools or programs exercise significant powers of management over them. While it may be true that requests for French-language education from eligible parents are met by arranging for inter-board transfers of children towards existing French-language educational facilities, the very terms of those transfers may be problematic (for example, with respect to financial costs). This, when combined with the evident lack of significant management powers for Francophone parents (at the very least in regions where only co-ordinating councils exist), may prove to be fertile ground for further litigation.

Two situations have in fact arisen which may result in legal action being taken in the near future. One involves difficulties encountered by parents in Calgary to enrol their children in a publicly funded French-language school that is non-confessional in nature. While a Catholic separate school board operates a large French-language school in the city, the only non-confessional facility is currently limited to offering only elementary level classes (grades 1-5). Parents who wish a non-confessional school environment beyond the elementary level thus find it necessary to enrol their children in a privately funded French-language school. The school board in the district where the parents reside initially contributed to the costs of enrolment in the private school by transferring to the latter the allotment of public monies which would otherwise have been available to educate the children. This arrangement was subsequently cancelled (and allegedly not implemented in one instance) and the parents found themselves liable to cover the entire costs associated with the enrolment of their children in the private French-language school. The parents therefore feel that their rights under Section 23 of the *Charter* to publicly funded French-language education for their children have not been respected.

The second situation involves the financing and construction of a school and community centre ("centre scolaire et

communautaire") in Calgary. Such a centre is considered essential to the enhancement and the vitality of the French-speaking community in the city. While the community conducted a successful funding drive to collect the money necessary (\$250,000) to purchase the land where the centre will be built (as part of a complex which includes the large French-language separate school known as Sainte-Marguerite-Bourgeoys), it subsequently found itself liable to pay considerable property taxes related to ownership of the land. The community feels that it was promised an exemption from property taxes related to the land, particularly since the land in question (part of a former military base) was allegedly purchased by the city of Calgary for one dollar. The case may raise the cultural component of Section 23 of the *Charter*, in the sense that the construction of the centre is deemed essential to the preservation and enhancement of the French-speaking community of the city. As interpreted by the Supreme Court, this is one of the underlying purposes of minority language education rights under Section 23. Decisions regarding public finances should therefore be made with this purpose in mind.



3.10 British Columbia

3.10.1 Background

French-language education first emerged in British Columbia in the late 1960s in the form of bilingual programs. While such programs were not always clearly distinguished from French immersion programs, government directives eventually established what was called a "programme cadre de français". The latter was designed to provide instruction to Francophones in their mother tongue. In 1979, nine school districts in the province, under the management of majority language school boards, began operating such programs (with a total enrollment of approximately 200 pupils).

As the programme cadre de français evolved, policies were developed by the Minister of Education to regularize the manner in which the program was delivered. As a result, directives were issued dealing with such matters as the number of pupils necessary to warrant the establishment of a programme cadre de français, criteria for admission, the number of pupils which would warrant a homogeneous school setting (as opposed to shared facilities), teacher selection, authorized textbooks, and funding.⁵¹⁰

Ministerial policies also recommended the formation of parent advisory committees for school boards operating a programme cadre de français. The mandate of such committees was to be worked out between the parents and the school board, although Ministerial policies at the time (1987) recommended that committees be given the maximum amount of responsibility regarding the programme cadre de français as was compatible with the necessary administrative procedures required for conducting the business of the school district as a whole. As in other provinces, such purely consultative bodies were never satisfactory to the French-speaking minority. For one thing, all decision-making powers were still in the hands of majority language school boards. As the Supreme Court of Canada was eventually to point out, representatives of the majority interest are not always sensitive to the educational needs of the minority. Moreover, the parent committees envisaged at the time had no particular legal status their creation and mandates being subject to the authority of majority language boards.

By 1989 the *School Act*⁵¹¹ had made the first legislative reference to Section 23 of the *Canadian Charter of Rights and Freedoms* (the *Charter*), by recognizing the rights of parents under that section and empowering the Lieutenant-Governor in Council to make regulations to give effect to section 23 and to determine how school boards could exercise their powers to achieve that result. In the same year, legal action was commenced challenging the inaction of the provincial government in giving effect to minority language education rights under Section 23 (which will be discussed below when reviewing past and present litigation).

Following the decision of the Supreme Court of Canada in *Mahé*, the government of British Columbia established a Task Force (in exchange for a suspension of legal action) whose mandate was to determine how best to implement minority language education rights under Section 23. That Task Force recommended (among other things) that representatives of the minority be given the management and control over French-language education (in line with the decision in *Mahé*), that three regional Francophone School Boards be established (with provision to increase that number) and that a bilingual unit in the Ministry of Education be established dedicated solely to French-language education. While various responses to these recommendations were considered by the government, it ultimately issued the *Francophone*

Education Regulation in 1995 which established the *Autorité Scolaire*.⁵¹² The latter was recognized as having certain powers and management responsibilities over French-language education offered within the territory under its jurisdiction. The deficiencies of this regulation as determined by the British Columbia Supreme Court (the suspended legal action having been reactivated) are reviewed below when discussing past and present litigation.

In light of the court ruling against it, the government introduced further amendments to the *School Act*, providing a mechanism for the creation of Francophone Education Authorities, and setting out in the statute the powers, duties and functions of any such authority.⁵¹³ These amendments are meant to implement the management rights over French-language education enjoyed by the minority or its representatives, and to provide the instruments necessary for ensuring access to minority language education equivalent in quality to that available in the majority language. As we will see below, the adequacy of these provisions is still the subject of legal action before the British Columbia Supreme Court.

3.10.2 Current legislative provisions

(a) Eligibility

While the *School Act*⁵¹⁴ provides that English will be the general language of instruction in British Columbia schools, it also carves out an exception for students whose parents have rights under Section 23 of the *Charter*:

Students whose parents have the right under Section 23 of the *Canadian Charter of Rights and Freedoms* to have their children receive instruction in a language other than English are entitled to receive that instruction.⁵¹⁵

Other provisions in the Act define what constitutes an eligible child (for purposes of French-language education) as a child who has an eligible parent. The latter is defined as an individual who has the right under Section 23 of the *Charter* to have his or her children receive primary and secondary instruction in French.⁵¹⁶

The Act also provides that the Lieutenant-Governor in Council may make regulations "respecting the provision of educational programs in languages other than English" and to give effect to Section 23 of the *Charter*.⁵¹⁷ Other powers of regulation also exist with respect to the establishment of Francophone educational authorities exercising control over French-language education programs and schools. Regulations have in fact been adopted to create such an authority (known as the *Conseil scolaire francophone de la Colombie-Britannique*), which will be reviewed below when discussing powers of management.

Until very recently, access to French-language education was to some extent conditioned by rules of residency. In effect, the *School Act* recognizes that eligible children resident within the territorial jurisdiction of a Francophone authority (of which only one exists) have the unqualified right to be admitted to a French-language educational program offered by that authority.⁵¹⁸ The extension of the territorial jurisdiction of the Francophone authority (made on March 25, 1998 by Order in Council) has had an impact on the ability of previously non-resident eligible students to enrol in programs delivered by the authority. Before the extension, such enrolment was subject to the consent of the school board within whose jurisdiction the student resided.⁵¹⁹ As of July 1, 1998, however, eight more school districts have been added to the territorial jurisdiction of the Francophone authority, with that territory scheduled to be enlarged to cover the entire province on July 1, 1999.⁵²⁰

The Act also allows children of permanent residents to be registered in a Francophone education program if, had the permanent residents acquired Canadian citizenship, they would have had rights under Section 23. However, the right to register was made subject to the agreement of the Francophone education authority exercising jurisdiction over the program.⁵²¹ More will be said about this possibility when reviewing issues relevant to management powers over minority language education.

Finally, parents who wish to enrol a child under any of the above provisions must provide an affirmation in the form prescribed by regulation to the effect that they are either a Canadian citizen or a landed immigrant parent, and that they meet the criteria of either 23(2) or 23(3) of the *Charter*.⁵²²

(b) Sufficient numbers

As already mentioned, Section 5 of the Act recognizes that all students eligible under Section 23 of the *Charter* are

entitled to receive their instruction in French. The Act does not contain any reference to a minimum number of students required to give effect to the right.

As regards the right to receive that instruction in minority language educational facilities, the approval of the Minister is required to open, close or reopen a school permanently or for a specified period of time.⁵²³ This is a rule of general application which applies to all school boards.

(c) Minority language instruction

The Act refers to French-language instruction as a "francophone educational program". It is defined as an educational program containing "linguistic and cultural components" that is designed for eligible children. It does not include a course in French that is part of an educational program designed for children other than eligible children.⁵²⁴

Neither the Act nor the regulations contain any further details regarding the content of a Francophone education program, although the Minister exercises a number of powers over curricula and teaching materials which can have an impact on the content of French-language education. These powers are referred to below when discussing the management powers of a Francophone school authority.

(d) Minority language education facilities

To a great extent, the type of physical facility within which instruction in French takes place is closely linked to the authority to acquire land and other assets vested in the Conseil scolaire francophone de la Colombie-Britannique (to be discussed below). On the face of the Act, it is difficult to determine when, or under what circumstances, instruction in French will take place in a separate building devoted exclusively to it or in some type of shared facility.

The Act defines a "francophone school" to be:

- (a) a body of francophone students that is organized as a unit by a francophone education authority for educational purposes under the supervision of a francophone administrative officer,
- (b) the francophone teachers and other staff members associated with the unit, and
- (c) the facilities associated with the unit...⁵²⁵

A similar definition applies to schools run by majority language boards. Until recently, other sections in the *School Act* suggest that Francophone schools would exist only within the territorial jurisdiction of a Francophone Education Authority, of which there is only one. For example, provisions in the Act make it mandatory for parents to enrol their children in school. With respect to children eligible for French-language education, this obligation is met by registering a child in any of the types of schools set out in the Act (which operate in English) or "a francophone school of the parent's choice that is operating in the francophone school district in which the parent resides".⁵²⁶ While there are provisions for the registration of eligible students residing outside the Francophone school district, this is subject to the agreement of the school board or boards which have jurisdiction where such children reside. However, given recent changes to the territorial jurisdiction of the Francophone authority, this potential problem has been eliminated.

(e) Powers of governance

The *School Act* specifically authorizes the Lieutenant-Governor in Council to establish, by way of regulation, a Francophone Education Authority and to "prescribe an area, to be known as a francophone school district, over which a francophone education authority has jurisdiction."⁵²⁷ Prior to this specific authority being enacted, the government of British Columbia had adopted a regulation (based on general enabling provisions later found to be inadequate by the British Columbia Supreme Court) which established a Francophone Education Authority known as the *Autorité Scolaire*.

Current statutory provisions recognize and continue this latter authority, but under the name "Conseil scolaire francophone de la Colombie-Britannique".⁵²⁸ The original 1995 regulation has now been replaced with one based upon the more specific statutory authorization referred to here.⁵²⁹ While the *School Act* authorizes the creation of more than one Francophone school authority, only one has so far been created. Where reference is made to the Conseil scolaire, it should be read as referring to any Francophone school authority which might be created in the future pursuant to provisions in the *School Act* now in effect.

Until recently, regulations established that the geographical boundaries of the Conseil scolaire francophone comprise

18 pre-existing school districts located in the Vancouver/Lower Mainland and Victoria regions.⁵³⁰ By virtue of the *School Act*, the Lieutenant-Governor in Council may by regulation alter the boundaries of a Francophone Education Authority or even abolish an authority, though no criteria are set out in the Act to guide the exercise of this discretionary power. As already mentioned, the boundaries of the Conseil scolaire were extended by Order in Council on March 25, 1998 (and will cover the entire province as of July 1, 1999).

The Conseil scolaire is required by the Act to provide Francophone educational programs to those who are properly registered. Provisions in the Act permit the authority to deliver its programs either directly or, by agreement, through the services provided by a majority language board.⁵³¹

The Conseil scolaire francophone de la Colombie-Britannique is defined as a body corporate, membership in which is limited to eligible persons and immigrant parents (as defined at subsection 1(1) of the Act).⁵³² The Conseil is obliged to admit anyone submitting an application who falls within the definition of "eligible person" and is resident within an area prescribed by regulation (the "Membership Area"). An eligible person is a parent who qualifies under Section 23 of the *Charter* or an adult individual who would be eligible under Section 23 if that person had children. As to immigrant parents resident within the same area, their admission is subject to the discretion of the Conseil.⁵³³ Regulations define the Membership Area for the Conseil scolaire francophone as comprising five wards, which are in turn made up of many pre-existing school districts.⁵³⁴

Subject to a number of disqualifying factors,⁵³⁵ members of the Conseil scolaire francophone are entitled to vote in elections for both the directors and the delegate members of the Conseil, provided they are Canadian citizens, 18 years of age or older, and have been a member of the Conseil for at least 120 days.⁵³⁶ The requirement of citizenship would exclude immigrant parents (who are members of the Conseil) from the right to vote in such elections. (The *School Act* also contains transitional provisions allowing the Lieutenant-Governor in Council to appoint the first directors of the Conseil.⁵³⁷)

Elected directors constituted the Board of Directors of the Conseil scolaire francophone and thus represent a body of persons analogous to a majority language school board (composed of trustees). Under current provisions there are five elected directors, one for each of the wards comprising the Membership Area. A candidate for election as a director must be a member of the Conseil. The Board of Directors may "exercise all the powers, functions and duties" of the Conseil scolaire francophone.⁵³⁸ The powers and duties of the Conseil are similar to those of a majority language school board.⁵³⁹ It may employ and manage persons it deems necessary for its operations (subject to collective agreements and legislation dealing with labour relations and teachers certification), it may open and close schools (subject to ministerial approval) and it may acquire and hold land and improvements for educational purposes.⁵⁴⁰ With respect to hiring of teachers for the first year of operations of a Francophone educational program, the Conseil is required to attempt to fill any available positions with teachers who are or were employed (in the immediately preceding school year) by a school board to teach a Francophone educational program (where the latter is or was offered within the territorial jurisdiction of the Conseil).⁵⁴¹ Only candidates who are qualified and suitable, in the opinion of the Board of Directors, are eligible for appointment.

The position of superintendent of schools (applicable to majority language boards) is filled, with respect to the Conseil scolaire francophone, by a chief executive officer. The Conseil is required to hire such an officer who, under the general direction of the Board of Directors, is given the responsibility to supervise and direct educational staff employed by the Conseil, and to organize, administer, supervise and evaluate all Francophone educational programs provided by the Conseil.⁵⁴²

In addition to the Board of Directors, the Act provides for the election of delegate members of the Conseil scolaire francophone.⁵⁴³ The rules regarding eligibility to vote are the same as those which apply to the election of directors. Similarly, candidates must be members of the Conseil. There are currently five wards for the purposes of these elections, with the number of delegate members per ward varying from two to four.

Delegate members of the Conseil are mandated to provide advice and recommendations to the Board of Directors on "matters respecting the provision and administration of francophone educational programs by the authority".⁵⁴⁴ They thus constitute an advisory body, with day to day management being the responsibility of the Board of Directors.

While the powers and duties of the Conseil scolaire francophone are significant with respect to the provision of

Francophone educational programs, they must also be placed in the context of ministerial authority. For example, Ministerial orders (binding on both school boards and the Conseil scolaire francophone) set out the obligatory courses that students must take at each level of studies. Adjustments are made as regards the language arts content for students of a Francophone Education Authority, and school boards and the Conseil may develop "additional learning outcomes" (this term is not defined) that are part of a local program developed by them for that part of the curriculum which is not determined by the Minister.⁵⁴⁵

As regards teaching materials, a Ministerial order specifies the "educational program guides" to be used at each level and for each subject. Different materials are specified for students in French-language instruction.⁵⁴⁶ It should also be noted that a French Programs Branch has been established within the Ministry and is charged with preparing or adapting curricula, teaching resources and examinations, and developing policies for Francophone education programs and for French immersion and Core French programs.

(f) Financial resources

Various provisions in the *School Act* applicable to school boards regarding the submission of financial information to the Minister and the preparation of annual budgets are made to apply to the Conseil scolaire francophone.⁵⁴⁷ Funding to meet the needs of school boards and the Conseil are, to a great extent, supplied by grants as determined by the Minister of Education, Skills and Training.⁵⁴⁸ However, provisions in the Act allow school boards to raise additional revenue by way of residential taxes if such taxes are approved by their electors in a referendum.⁵⁴⁹ This specific authorization does not apply to the Conseil scolaire francophone.

With respect to grants, the Minister establishes a yearly allocation for each board or authority, based on a funding formula which takes into consideration the number of students and the "reasonable costs of delivering educational programs provided by the board" (or the Conseil scolaire francophone).⁵⁵⁰ An allocation is divided into four components: general operating, targeted, capital, and developmental.

The general operating grant is composed of a common core portion (standard across all school districts according to the number of students), and a specific district portion (allowing for variations across districts based on geographical and demographic differences, educators' salaries and enrolment in specific programs). The specific district portion therefore allows for adjustments in the case of Francophone Educational Authorities and school districts offering a Francophone educational program.

Targeted funding provides for special education, aboriginal education, learning resources and administration costs. Developmental funding is for initiatives that have specific time lines and goals. Capital funding is, as the name suggests, for capital projects. The Minister may, in respect of an allocation, provide a direction to the board or authority specifying the manner in which the board or authority must budget, spend and account for one or more of these components.

In addition to ordinary grants, the Act makes provision for the payment to school boards (and the Conseil scolaire francophone) of special grants and grants for the operation of Provincial resource programs and distance education programs. The former are defined as programs established by order of the Minister and operated by a board or authority. Provision is also made for the payment of the capital costs of a capital project if the Minister considers that the capital project should include accommodation for a Provincial resource program or any other special program or activity.⁵⁵¹

Finally, the Act establishes rules regarding the powers of school boards to borrow for current and capital expenditures, as well as the implementation of capital expenditure plans.⁵⁵² These powers are, as regards both school boards and the Conseil scolaire francophone, circumscribed by either the Act and regulations or requirements for ministerial approval. While no attempt will be made to describe these rules here, it should be noted that the Conseil is governed by essentially the same rules in this regard as school boards in general.

3.10.3 Litigation

(a) Recent or anticipated litigation

The Supreme Court of British Columbia issued an important decision in August of 1996 regarding the validity of regulations adopted in that province pursuant to school legislation enacted prior to landmark judgments of the

Supreme Court of Canada interpreting Section 23 of the *Charter*.⁵⁵³ Although litigation had originally been initiated in March of 1989, the case had been adjourned pending the review of a Task Force mandated to provide advice as to how the provincial *School Act*⁵⁵⁴ might be amended so as to respect Section 23 rights. When the recommendations of the Task Force were not accepted by the government of British Columbia and subsequent negotiations with the province failed, the plaintiffs resumed their action before the courts.

The provincial government maintained at the time that the *Francophone Education Regulation*,⁵⁵⁵ adopted in 1995 under the existing *School Act*, fulfilled provincial responsibilities under the Constitution. That regulation established the Francophone Education Authority and conferred upon it the exclusive right to provide French-language education in the geographic area over which it had jurisdiction.⁵⁵⁶ The power to make the regulation was allegedly found in Section 5 of the *School Act* which provides in its opening clause that every student is entitled to receive an education in English. Section 5 then proceeds to supplement this principle in two ways. First, students whose parents qualified under Section 23 of the *Charter* to have their children instructed in a language other than English are entitled to that instruction. Second, existing school boards are allowed to provide for education in a language other than that provided for in Section 23 of the *Charter* or in the opening clause of Section 5 of the *School Act*. There was no direct mention in Section 5 of French-language education, although those familiar with the *Charter* know that Section 23 provides for English and French minority language instruction paid for out of public funds. The Lieutenant-Governor in Council was accorded authority to make regulations under Section 5(4) with respect to the provision of educational programs in languages other than English, giving effect to Section 23 of the *Charter*, and determining how school boards might give effect to the rights under Section 23.

While Mr. Justice Vickers of the Supreme Court of British Columbia found the *Francophone Education Regulation* to be inconsistent with provisions in the *School Act* itself, and hence invalid on that basis alone,⁵⁵⁷ he went on to consider the degree to which its substantive provisions respected constitutional rights under Section 23 of the *Charter*. The plaintiffs had challenged the constitutional validity of various items in the Regulation, such as the manner in which funding was allotted to the Francophone Education Authority, restrictions on capital expenditures by the Authority, and the absence of any dispute resolution mechanism concerning the leasing of school facilities by the Authority from existing school boards. Mr. Justice Vickers also reviewed arguments that provincial governments were obliged to enact an appropriate legislative framework for the implementation of Section 23 rights, and could not rely solely upon regulatory schemes.

Access to public funding is essential to the operation of any school board or analogous statutory body. In this regard, Section 7 (1) of the *Francophone Education Regulation* provided that "the Minister may provide to the Francophone Education Authority a grant." The permissive phraseology of the Regulation contrasted sharply with Sections 124 and 125 of the *School Act*, which provides that the Minister "shall allocate" funds to existing school boards in the manner set out in the statute. Mr. Justice Vickers pointed out that the Supreme Court of Canada has "enunciated a principle of funding equivalency saying that funds allocated to minority schools should at least be equivalent, on a per student basis, to the funds allocated majority schools..." It was therefore unacceptable to use a permissive word such as "may" regarding funding to the Francophone Education Authority while using the obligatory "shall" regarding funding to majority official language school boards. Moreover, Section 23 establishes a constitutional obligation which cannot be diluted through the use of discretionary grants of power under the *School Act*.⁵⁵⁸

The Regulation also prohibited the Francophone Education Authority from using any money provided by the province for the purposes of capital expenditures. However, the Regulation permitted money provided by the federal government to be used for such purposes, but only with the approval of the Minister. These restrictions on the spending authority of the Francophone Education Authority were not imposed on school boards representing the majority population. In the words of Mr. Justice Vickers:

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 seems to me that the fact the Authority may only use federal government money for capital expenditure is a clear attempt to shift that responsibility...

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. 23.⁵⁵⁹

Mr. Justice Vickers also found that the spending restrictions imposed on the Francophone Education Authority cut into the heart of the powers of management and control of minority language school facilities, powers which Section 23 of the *Charter* accords to members of official language minorities, and thus violated the *Constitution*.

With respect to the rental of appropriate building space for minority language education, the Francophone Education Authority was placed in the position of negotiating with existing school boards. This was rendered inevitable by the restrictions imposed on the Authority regarding the acquisition of land and buildings in its own right. Moreover, no mechanism was envisaged in the Regulation to resolve disputes which could arise regarding rental costs, which, as Mr. Justice Vickers concluded, left the Authority at the mercy of school boards. As a result, the degree of management and control enjoyed by members of minority official language communities pursuant to Section 23 of the *Charter* was not equivalent and not adequate.

Mr. Justice Vickers also concluded that Section 23 of the *Charter* required provincial governments to enact, where numbers warrant, appropriate legislative mechanisms designed to implement minority language educational rights. He cited the Supreme Court of Canada in both the *Mahé* and *Manitoba Reference* decisions to support this conclusion. In addition, he had no difficulty in concluding that, as a question of fact, the number of students covered by the geographical area involved in the case before him was sufficient to warrant the maximum level of management and control by parents entitled under Section 23. As a result, the Province of British Columbia was obliged to enact a precise legislative scheme, as opposed to one based only on regulations, providing for full implementation of Section 23. He explained the need for statutory enactment in the following words:

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.⁵⁶⁰

Although Mr. Justice Vickers found that the current statutory and regulatory framework violated Section 23 of the *Charter*, he concluded that it was in no one's interest that the existing framework be declared immediately inoperative. He therefore ruled that the *Francophone Education Regulation* would remain in effect until the Legislative Assembly of British Columbia enacted appropriate legislation to give effect to Section 23 of the *Charter*, such legislation to be adopted no later than the last day of the next session of the Legislative Assembly.

Despite the adoption of the *School Amendment Act, 1997*,⁵⁶¹ which Act was meant to comply with the decision of Mr. Justice Vickers, the plaintiffs in the original action remain dissatisfied with a number of elements of the current legislative framework. They have therefore initiated a new cause of action which places in question the constitutional sufficiency of the legislation presently in effect.⁵⁶² In their statement of claim, the plaintiffs point out that the current legislation does not provide the Francophone Education Authority with access to capital acquisition for future schools equivalent to that available to school boards in general. With respect to existing school facilities, no provision is made in the legislation for the transfer of four existing stand-alone schools to the Francophone Education Authority, the latter being the successor to the school boards which previously exercised jurisdiction over (and appear to retain ownership in) the schools in question. The plaintiffs also maintain that capital costs potentially facing the Francophone Education Authority should be reduced by the linguistic minority's past contributions (in the form of property, school and income taxes) to the acquisition of school facilities currently operated by majority school boards. They claim that such contributions should be legislatively recognized, and that the law should also provide for remedial "catch-up" funding for capital acquisitions and operations of the Francophone Education Authority.

Since the action was commenced prior to the very recent changes to the territorial jurisdiction of the Conseil scolaire, the plaintiffs also placed in question the territorial restrictions imposed on the Francophone Education Authority at the time. They argued that Francophones who live outside the greater Victoria and Vancouver/Lower Mainland regions were not accorded any meaningful role in the management of French-language educational programs (or facilities) which majority school boards may make available. Given the changes made by Order in Council on March 25, 1998, the government can be said to have accepted the plaintiffs' claim that there are sufficient numbers of eligible children in

Vancouver Island North and Okanagan-Columbia-Interior to require not only the provision out of public funds of French-language instruction, but also the recognition of the right to management and control under Section 23 as interpreted by the Supreme Court of Canada.

The plaintiffs raise further issues related to the management authority of the Francophone Education Authority over programs and schools within its jurisdiction. They argue that the failure to exempt the Francophone Education Authority from the provisions of *Public Sector Employers Act* and the *Public Education Labour Relations Act*,⁵⁶³ regarding province-wide collective bargaining, violates the management rights of Francophone parents (or their representatives) under Section 23 of the *Charter*. More specifically, the requirement under these Acts to negotiate with employees in one-table bargaining on a province-wide basis conflicts with the constitutional right of the Francophone Education Authority (as representative of Francophone parents):

- (a) to appoint and direct personnel in the administration of instruction and facilities, and
- (b) to recruit and assign teachers and other personnel.

In light of all these alleged deficiencies, the plaintiffs are seeking a number of declarations from the British Columbia Supreme Court regarding the unconstitutional nature of parts of the current *School Act*⁵⁶⁴ and amendments, in particular with respect to management rights under Section 23 and the failure to provide to the Francophone Education Authority with material and human resources equivalent to those furnished for the operation of majority language schools.⁵⁶⁵ The plaintiffs are also asking the court, inter alia, for specific orders to issue against the defendants (Minister of Education, Attorney General and Province of British Columbia) regarding the transfer of real property, equipment and other assets to the Francophone Education Authority, the allocation of specific monies for the implementation of minority language education in all regions of the province, the extension of the jurisdiction of the Francophone Education Authority to cover the entire province, and the payment of a lump sum (10 million dollars) into trust as reparation for damages suffered by the plaintiffs and other Francophone parents due to the alleged infringement of constitutional rights.

While this case was scheduled to proceed in the spring of 1998, the recent changes to the territorial jurisdiction of the Conseil scolaire have resulted in an adjournment to the autumn of 1998. These changes will no doubt result in modifications being made to the arguments and evidence to be presented in court. It would appear that a major focus of the case will be the alleged lack of proper school facilities and public funds being made available to enable the Conseil scolaire to fulfil its responsibilities.



3.11 Yukon

3.11.1 Background

Before any specific statutory recognition, French-language classes were offered in Whitehorse in shared school facilities. This took place at a time when the educational system was essentially administered directly by the Department of Education (through a network of school superintendents) without the involvement of school boards. Community input was facilitated by the establishment of a school committee for each school, members of which were elected from among the parents of registered pupils. Committees performed an essentially consultative role, and were authorized to make recommendations to the Minister of Education.

By the end of the 1980s, consolidation of French-language instruction in Whitehorse had led to the opening of a homogeneous school facility known as École Émilie-Tremblay. However, there were problems with overcrowding in this small facility, a pre-fabricated building apparently of substandard quality and poorly ventilated. These obvious deficiencies led to requests for material improvements. A new building was ultimately obtained in 1996.

A new *Education Act*⁵⁶⁶ in 1990 (to be reviewed in detail below) provided for the creation of school councils (elected in accordance with provisions in the Act), whose members participated in the administration of the schools. For example, a school council had the duty to make recommendations to a superintendent of schools for the allocation of available resources, and participated in the interview and selection of a school principal. It also was authorized to make recommendations to the Minister regarding teaching and support staff requirements, school renovations and capital expenditure budgets, and school programs. While the system of school councils did give a voice to parents in the

general administration of the schools, it fell short of according the decision-making powers normally attached to school boards. A school council was established for École Émilie-Tremblay and the area to which it was attached (then, Attendance Area #23) was defined as encompassing the entire territory of the Yukon.⁵⁶⁷

The number of pupils registered at École Émilie-Tremblay had grown to almost one hundred (from kindergarten to grade 11) by the mid-1990s. It was at this time that other provisions in the *Education Act* allowing for the creation of actual school boards (to replace school councils) were used by Francophone parents to gain general governance authority over the only French-language school in the Yukon. The scope and manner in which that authority can be exercised, as well as other statutory provisions relevant to the implementation of Section 23 rights of the *Canadian Charter of Rights and Freedoms* (the *Charter*), are reviewed in the next section.

3.11.2 Current legislative provisions

(a) Eligibility

The *Education Act* recognizes that students of parents who have rights under Section 23 of the *Charter* to have their children receive an educational program in the French language "are entitled to receive that program in accordance with the regulations."⁵⁶⁸ Regulations were adopted under the Act in 1991. With respect to eligibility, the regulations operate so as to expand eligibility beyond the criteria under Section 23 of the *Charter*, by recognizing that the notion of "eligible student" includes students "whose parents or siblings would have the right under Section 23 if they were citizens of Canada or if the instruction referred to in Section 23 was not limited to Canada."⁵⁶⁹ This has the effect of allowing permanent residents, who are not citizens but whose mother tongue is French, to enrol their children in French-language education programs. It also extends the same possibility to parents who received their primary education in French outside Canada (whereas Paragraph 23(1)(b) of the *Charter* only guarantees access to children of parents who received their primary education in French in Canada).

Access to a given school or educational program is also subject to rules of residency. However, the attendance area for the purposes of providing French-language education (Education Area #23) is defined as encompassing the entire territory of the Yukon. To be a resident of Education Area #23 a person must be resident in the Yukon and be a citizen of Canada, in addition to having rights under Section 23 of the *Charter* or being an actual or potential parent of an eligible student.⁵⁷⁰ As a result, the broader definition of "eligible student" under the regulations does not seem to operate when determining which parents are residents of Education Area #23. Only citizens who are also actual or potential parents of eligible students may be recognized as resident within Education Area #23, provided certain declarations are made regarding the facts supporting a claim of eligibility. Declarations are filed with the School Council or School Board having jurisdiction (to be discussed below), although the Minister of Education makes the final determination "on the eligibility of the citizen to be a resident of Education Area #23."⁵⁷¹ Parents who had a child attending École Émilie-Tremblay (referred to above in the Background section) were exempted from the requirement of filing a declaration and deemed to be resident in Education Area #23.

(b) Sufficient numbers

Neither the Act nor the regulations establish specific threshold numbers for determining when instruction in French will be offered. However, with regard to the offer of French-language classes outside of Whitehorse, the regulations stipulate that the number of pupils concerned and the potential for future admissions are relevant factors which must be considered.⁵⁷² "Where numbers warrant", the Yukon Francophone School Board (to be discussed below) is required to "provide French Language instruction in an area outside of Whitehorse by offering classes in that area."⁵⁷³

(c) Minority language instruction

The regulations define French-language instruction to be "an educational program in which the language of instruction is French, but does not include the French immersion program, French as a Second language program and French Adult classes."⁵⁷⁴

(d) Minority language educational facilities

Nothing on the face of the Act or regulations indicates when separate educational facilities, as opposed to classes located in mixed facilities, will be offered. As already mentioned, a homogeneous French-language school facility currently operates in Whitehorse. While the regulations recognize the power of the Minister to establish schools for

Education Area #23 (in accordance with the *Education Act* and the *Charter*), they also allow him or her to close any school where the number of students does not warrant the school's continuation. The regulations stipulate that before doing so the Minister should take into consideration, among other things: "the number of Section 23 children in the area" and "the potential for future admissions."⁵⁷⁵ One can only presume that these are some of the factors that the Minister considers when deciding whether to open a school in the first place. The regulations also stipulate that "the determination of numbers warranting the continuation of a school shall be in accordance with section 23 of the *Charter*."⁵⁷⁶

With respect to the opening of French-language classes in areas outside of Whitehorse, the regulations stipulate that the Francophone School Board (to be discussed below) must obtain prior approval from the Minister regarding "the projected number of Section 23 children to be served by the class" and "their reasonable assembly for a class".⁵⁷⁷ In determining whether the children can be reasonably assembled, the Minister is authorized to examine if the children are "sufficiently concentrated both geographically and by grade level" taking into account a number of factors:

- (a) the proximity of existing classes and facilities to the region,
- (b) the number of section 23 children in the region,
- (c) the potential for future admissions,
- (d) the distances over which the children must be transported, and
- (e) the ages of the children.⁵⁷⁸

Once a new French-language class has been opened, the regulations stipulate that it shall remain in operation for at least three years, unless extraordinary circumstances arise making that impractical.

(e) Powers of governance

The *Education Act* authorizes the Minister of Education to create both Attendance and Education Areas. For each Attendance Area, the Act provides that "there shall be a School Council", and that for each Education Area "there shall be a School Board".⁵⁷⁹ Both bodies have roles to play in school administration, although only school boards enjoy any significant decision-making and management authority (with councils performing essentially consultative functions).⁵⁸⁰

After one or more school years of operation, a School Council may by resolution request the Minister "to establish a School Board in substitution for the Council".⁵⁸¹ Where such a request is made, the Minister is obliged to organize a vote of electors in the attendance area. If more than 50% of voting electors vote in favour of a school board, the Minister is obliged to establish it and determine its education area. The process of transforming a School Council into a School Board was successfully engaged during the summer of 1995 by the parents of children who attended École Émilie-Tremblay in Whitehorse. There is thus a Yukon Francophone School Board whose territorial jurisdiction extends throughout the Yukon.⁵⁸²

Members of school boards are known as trustees and are elected by eligible electors who meet residency, citizenship, age and other requirements under the *Education Act*. The Act specifically provides that "for the election of trustees of a School Board or members of a Council that is established on the basis of language pursuant to the rights referred to in Section 23 of the *Canadian Charter of Rights and Freedoms*, only those persons who possess the rights referred to in Section 23 of the *Canadian Charter of Rights and Freedoms* may vote in the election." General residency, citizenship and age requirements would apply as well. To become a candidate for election to the Yukon Francophone School Board one must be qualified to be an elector of that board.⁵⁸³

A school board under the *Education Act* is given broad management powers over schools under its jurisdiction, in contrast to the authority of the Minister to operate and manage "any school in an attendance area in which there is a school committee or Council."⁵⁸⁴ For example, a school board is mandated to "select staff, including principals and teachers, for hiring, dismissal, discipline, transfer, promotion, and demotion..." subject to the Act and to any collective agreements; review, modify and approve school plans; provide education programs (as required by the Act); and "establish policies for the administration, management and operation of its schools..."⁵⁸⁵ The regulations introduce a further principle applicable to the Francophone School Board when exercising its authority to hire staff: it "may establish specific hiring selection criteria in accordance with aims and goals of a French first language school."⁵⁸⁶ All

school boards also have the power to purchase or rent school premises, and acquire real and personal property by way of purchase, bequest or lease.⁵⁸⁷

School board authority to manage schools and acquire and maintain real property is, of course, circumscribed by ministerial powers. We find, for example, that the Minister "shall establish courses of study for the implementation of the goals and objectives for the Yukon education system" and "shall provide lists of textbooks, apparatus, equipment and other materials that are prescribed, approved or recommended for use in any school".⁵⁸⁸ The Minister is also authorized to "approve a locally developed course or courses of study for use in a school."⁵⁸⁹ The Minister's prior approval is also required before a school board "may authorize the use of a textbook, instructional materials, apparatus, or equipment for any course of study in addition to those prescribed by the Minister."⁵⁹⁰ With respect to school facilities, the Minister "may establish schools and provide for the closure of schools subject to the guidelines."⁵⁹¹ The Minister's authority to approve capital expenditures is important as well in the establishment of new schools.

Ministerial involvement in the administration of schools is also facilitated through superintendents of schools and directors of education. While the Act stipulates that a school board "shall select for appointment a director of education who shall be the chief executive officer for the School Board and shall establish terms and conditions of employment for the director," a director is nonetheless an employee of the Government of the Yukon.⁵⁹² Among other things, a director of education has the statutory duty to prepare and forward to the Department of Education such reports and returns as may be required from time to time, the duty to provide general supervision and evaluation of schools, principals and teachers, and the duty to ensure that schools operate according to the requirements of the *Education Act*.⁵⁹³ Superintendents perform duties similar to those of a director of education but are assigned to designated school Councils by the Minister.⁵⁹⁴

(f) Financial resources

School boards are required to prepare and submit to the Minister an annual "operations and maintenance budget", containing costs items related to administration, regular and special instruction, plant operation and maintenance, and other required expenditures. The Minister reviews proposed budgets, consults with school boards involved, and makes a final determination as to the annual operations and maintenance budget for each board. The Minister then provides funding to meet these budgets from money appropriated by the Legislative Assembly.⁵⁹⁵

In addition to funding for "operations and maintenance", further provision is made for capital grants. These are subject to appropriations made by the Legislative Assembly and any conditions established by way of regulations. Two important items to which capital grants apply are: (i) the acquisition of school sites or buildings by construction or purchase for use as schools, and (ii) the acquisition of capital equipment and materials for the operation or renovation of schools.⁵⁹⁶

As already mentioned, school boards have the authority to purchase school premises, though this is clearly only effective if a capital expenditure grant is approved by the Minister. As the Act also makes clear, it is the Minister who has the authority to establish schools generally. With respect to French-language schools, the regulations further provide that the Minister may not only establish them in accordance with the Act, but also in accordance with the *Charter*.⁵⁹⁷ This would appear to be a recognition that Section 23 gives rise to financial obligations of a constitutional nature.

Those responsible for the management of École Émilie-Tremblay continue to experience problems of underfunding which affect the quality of minority language education. Questions have been raised about the necessity of supplementary financial resources to improve the programs that the school is able to offer.

(No case law.)



3.12 Northwest Territories

3.12.1 Background

It was not until the late 1980s that French-language educational programs first began operating, two in Iqaluit

(Eastern Arctic) and one in Yellowknife.⁵⁹⁸ Given the small numbers of pupils involved, the programs were housed in shared facilities. Statutes and regulations governing the school system at the time did not provide explicitly for the use of French as a language of instruction, although school authorities and ministerial officials had sufficient discretion to allow this. For example, local education authorities were authorized to determine the language of instruction from kindergarten to grade two; while in higher grades the language of instruction was determined by the Minister (in consultation with local education authorities).⁵⁹⁹

In part, institutional flexibility regarding the language of instruction (in particular with respect to bilingual programs) reflected linguistic realities in the Northwest Territories. Indeed, by 1984 these realities were formally recognized with the adoption of a Territorial ordinance entitled the *Official Languages Act*.⁶⁰⁰ While this Act did not purport to apply to the educational system, it did provide official status to not only English and French, but also to six aboriginal languages: Chipewyan, Cree, Dogrib, Gwich'in, Inuktitut and Slavey.⁶⁰¹ Educational programs obviously had to be adaptable to the varying needs of children of such diverse linguistic backgrounds.

The design and delivery of French-language education developed in an ad hoc manner within a system of school management that was never intended to provide a framework for Francophone governance. The absence of an explicit statutory basis for such governance led the Territorial government to request, in 1994, that a Yellowknife school board adopt regulations providing for an interim school management model for Francophone parents.⁶⁰² As a result, the majority language school board created a subsidiary body known as a conseil scolaire which fulfilled a number of administrative functions regarding the French-first-language program offered at a specific school, École Allain St-Cyr. Decision-making authority was for the most part shared between members of the conseil (appointed by the board), the school principal and the superintendent of schools. In addition, the school board exercised its own authority with respect to the school, although it deferred to the conseil in matters involving pedagogy. This model appears to have operated between January 1, 1994 and June 30, 1995.

The government of the Northwest Territories undertook major reform of the *Territorial Education Act*⁶⁰³ in 1995. It introduced amendments which statutorily recognize Section 23 rights of the *Canadian Charter of Rights and Freedoms* (the *Charter*), although with few details, and provide for regulations to be adopted regarding their implementation.

3.12.2 Current legislative provisions

(a) Eligibility

The statutory rules on language of instruction are found in Part III of the new *Education Act*, entitled Cultural Diversity. There we find that: "students whose parents have a right under Section 23 of the *Canadian Charter of Rights and Freedoms* to have their children receive instruction in French are entitled to receive that instruction in accordance with the regulations wherever in the Territories that right applies."⁶⁰⁴ The Minister of Education is given the authority to make regulations "respecting anything that may be required to give effect to Section 23" of the *Charter*, as well as other matters relevant to school governance.⁶⁰⁵ Although regulations regarding French-first-language education in general have been made, there are no provisions which address the issue of eligibility beyond what is stated in the Act itself. Right of access to French-language education is thus governed by the rules set out in Section 23 of the *Charter*.

(b) Sufficient numbers

Authority to determine whether Section 23 rights "apply" in any part of the Northwest Territories is given to the Minister of Education, in accordance with regulations now in effect.⁶⁰⁶ With respect to the provision of instruction in French, the regulations require the Minister to consider a number of factors in reaching his decision, including "the number of and ages of eligible children in the education district; the number of and ages of the eligible children in a neighbouring education district; and the number of potential registrations of children in the education district and of children in a neighbouring education district."⁶⁰⁷ No specific numbers are set out in the regulations, although it is clear that the existence of a program in a neighbouring district, and the distances involved, will be considered in making a decision. The possibility of transporting students in order to assemble a reasonable number for the purposes of French-first-language instruction is thus envisaged. Where a program is established, the regulations require the Minister and District Education Authority to "make every effort to continue that program for a minimum of three years."⁶⁰⁸ As will be discussed below, a specific threshold number of students does apply with respect to the implementation of one of the two Francophone school governance models envisaged in the Act.

(c) Minority language instruction

There is little explicit reference in the Act to what constitutes French-first-language education, beyond the fact that French is used as a language of instruction. However, the regulations define French-first-language instruction as "instruction in the education program in French but does not include a French immersion program or the teaching of French as a second language."⁶⁰⁹ Where the Minister determines that French will be the language of instruction in a school program, he or she directs the District Education Authority to establish such a program.⁶¹⁰ The regulations provide for the creation of Francophone parents' committees (comités de parents francophones) as a first stage leading to the establishment of a conseil scolaire francophone for a school offering a French-first-language program. This latter body is delegated the duty to "develop and deliver culture based school programs in accordance with the requirements of the curriculum."⁶¹¹ The exercise of this responsibility should have an influence on the content of French-first-language education. Details regarding the role and authority of a conseil scolaire francophone will be reviewed below.

The *Education Act* also stipulates that a District Education Authority shall (in accordance with any directions of the Minister) "determine a language to be taught as part of the education program..."⁶¹² This is supplementary to the language of instruction. Furthermore, the Act requires that English "must be taught as a language as part of the education program"⁶¹³ if an official language other than English is the language of instruction. The Act sets out criteria to be considered by a District Education Authority when determining if one of the aboriginal languages will be used as a language of instruction.⁶¹⁴ Where English is the language of instruction, one of the other official languages (of which there are seven) must be a subject matter of study.

The Act contains a further general provision applicable to the cultural content of educational programs, requiring the Superintendent and principals of schools in any given educational district to plan (in accordance with the direction of an education body) "the delivery of culture based school programs as part of the education program..."⁶¹⁵ Since "education body" is defined in the Act as including a "commission scolaire francophone de division,"⁶¹⁶ this general provision could have some application to the area of French-first-language education. As will be explained below, no commission scolaire francophone de division currently exists.

(d) Minority language education facilities

The Act does not set out any criteria to be used when determining how a French-first-language educational program will be delivered. Quite clearly this could occur in shared facilities. The acquisition or construction of physical facilities involves issues of governance, as well as mechanisms in place for the determination of what financial resources will be available for the delivery of educational programs.

(e) Powers of governance

The *Education Act* requires the Minister to divide the Northwest Territories into education districts and authorizes him or her to establish a District Education Authority for each district.⁶¹⁷ By virtue of provisions in the Act and regulations, each District Education Authority is granted a number of powers and duties, although this can vary as between Authorities as a function of what duties and powers are "necessary for the delivery of the education program and individual education plans and the management of the education district."⁶¹⁸ The Minister determines, by way of regulation, what powers and duties are necessary in each case.

The powers and duties that can be accorded District Education Authorities are set out generally in Sections 117, 118 and 119 of the Act. Although too numerous to reproduce *in extenso*, they include general administration and management of educational affairs, liaison with other government agencies and the public, the duty to monitor, evaluate and direct the delivery of school programs, and the duty to hire a superintendent. They also include the authority to develop and produce learning resources and materials to support the delivery of culture based school programs (and other local programs), to acquire personal property, and to hire teachers for local programs. District Education Authorities are also authorized to hire a principal (who must also be a qualified teacher) for each school.⁶¹⁹ Beyond these two references, the Act contains no specific provision acknowledging the power of Authorities to hire teachers in general. The qualification of teachers are, of course, subject to extensive regulation.⁶²⁰ However, whether they are employees of the Ministry of Education or of the District Education Authority in the district where they work is not clear on the face of the Act. In practice, they are employees of the Ministry of Education.

The role of Superintendents of Education is significant with respect to the general administration of schools (including hiring). The Act obliges a District Education Authority to employ a Superintendent, who exercises authority under various provisions in the Act, regulations and Ministerial directions, and to set out any supplementary powers and duties it wishes the Superintendent to perform.⁶²¹ With respect to a Superintendent employed "for an education division", the Act stipulates that he or she "shall have general supervision of the education staff of the education district or districts in the area within his or her jurisdiction."⁶²² Other provisions in the Act give the Superintendent wide disciplinary powers over teachers, including the authority to dismiss.⁶²³ The role of the Superintendent in hiring is apparent in various regulations establishing District Education Authorities. For example, one frequently finds that a District Authority shall provide "direction to and supervise the Superintendent in the recruitment, hiring, employment... of education staff and school staff in accordance with the Act, the regulations made under the Act and the *Public Service Act*."⁶²⁴

The Act also authorizes the Minister to establish Divisional Educational Councils which are larger in territorial jurisdiction and encompass smaller District Educational Authorities.⁶²⁵ The Councils are composed of representatives from the District Authorities, and any other persons appointed by the Minister at the request of a Council. The Minister may accord any of the powers and duties, set out in Sections 117 to 119 of the Act, to a Divisional Education Council.

With respect to the governance of French-first-language instruction, the Act and regulations provide that where Section 23 rights apply (as determined by the Minister) the education authority concerned (either a District Authority or a Divisional Council) shall first establish a comité de parents francophones (upon the request of at least three parents).⁶²⁶ Nothing in the regulations establishes specific duties or responsibilities for a comité de parents francophones, although it is required to "make by-laws and policies to govern the conduct of its business that are consistent with the Act and the regulations made under the Act."⁶²⁷ Presumably the committee's duties and responsibilities are negotiated with the District Education Authority.

After one year of operation, a District Authority is obliged to create (at the written request of the committee) a conseil scolaire francophone.⁶²⁸ The conseil is composed of three to five members (as requested by the comité) and is elected pursuant to provisions in the *Local Authorities Elections Act*.⁶²⁹ To be eligible to vote a person must have rights under Section 23 of the *Charter* and have a child registered in the French-first-language program offered by the school in question. Candidates for election must have rights under Section 23.

Upon creation of a conseil scolaire francophone, the District Education Authority is required to delegate to it a number of duties the Authority would otherwise exercise under the Act. These include the duty to provide students with text books and other learning materials; to provide library, audio-visual and other resource materials; and to develop and deliver (with the advice of education staff, parents, persons having rights under Section 23 of the *Charter* and other community members) culture based school programs in accordance with the requirements of the curriculum.⁶³⁰ The Act provides that the Minister "shall establish the curriculum" and "standards for the education program".⁶³¹ Several other duties are to be performed "in accordance with the directions of the District Education Authority", such as the duty "to monitor, evaluate and direct the delivery of school programs to assure the highest possible education standards in the schools."⁶³² With respect to the delivery of a French-first-language program, the conseil is also subject to the direction of the District Education Authority regarding agreements for the use of education facilities for purposes outside the education program; and must cooperate with the District Authority regarding the provision of equipment and facilities for school programs for physical education, athletics and recreation.⁶³³ At the same time, the conseil is delegated "the duty to have custody and safekeeping of all the education facilities that are used for the education program and maintain the education facilities in good condition."⁶³⁴

With respect to the expenditure of money, the regulations require that the conseil be delegated the duty to make expenditures to meet the requirements of the French-first-language education program. However, expenditures related to capital costs are not delegated "duties" of the conseil. In effect, the regulations provide that a conseil has the duty to "provide advice to the District Education Authority regarding the purchase or construction of education facilities". The conseil also prepares an annual estimate of revenues and expenditures for all capital items (in accordance with directions of the Minister), but this is submitted for the approval of the District Education Authority.⁶³⁵ Grants or contributions by the Minister for the use of the conseil scolaire francophone for the delivery of the program are received directly by the conseil.

The powers of a conseil scolaire francophone listed in the regulations are far less numerous than the enumerated duties. Among them we find the power to develop and produce materials to support the delivery of culture based school programs and other local programs; the power to "guide" the District Education Authority with regard to the entering into of agreements with other education bodies to deliver programs; and the power to establish committees and assign powers and duties to them.⁶³⁶ With respect to hiring teachers, the regulations provide that the conseil will have the power "to provide direction to the Superintendent regarding the recruitment." This would suggest that the authority to hire teachers rests ultimately with the Superintendent (who is hired by the District Education Authority).⁶³⁷

The conseils scolaires francophones are school-based. As a result, more than one conseil can exist within the same school district. The Act provides that two or more conseils may request the Minister to establish a "commission scolaire francophone de division".⁶³⁸ Prior to a formal request, the regulations require that a number of preliminary facts be submitted to the Minister, including:

- (a) projected enrolment for the program of French first language instruction;
- (b) proposed budget for the commission scolaire francophone de division;
- (c) proposed governance structure;
- (d) plans for staffing for the program;
- (e) the method for the fulfilment of the duties of a Superintendent set out in the Act.⁶³⁹

In reviewing the information submitted, the Minister determines if the proposed Commission will:

- (i) fulfil the duties of an education body under the Act;
- (ii) meet the standards established by the Minister for the education program; and
- (iii) be able to fulfil the duties of a Superintendent under the Act.⁶⁴⁰

If the Minister is satisfied that these conditions (established by regulation) will be fulfilled, the Commission scolaire francophone de division is created. The Minister then establishes by regulation the responsibilities, authority and powers of the Commission by reference to Sections 117 to 119 of the Act. The Commission would function essentially as any other District Education Authority. The regulations provide for the dissolution of the conseils scolaires francophones involved in the request for a Commission. The members of the new Commission would be elected (either two or three from each school district concerned) according to the same rules as applied to a conseil scolaire francophone.⁶⁴¹

Despite the detailed procedure just reviewed regarding a request to the Minister, the regulations provide a second possibility for the creation of a Commission. Where more than 500 students are registered in the French-first-language program offered in the proposed territorial jurisdiction of the new education body, the Minister is obliged to create the Commission scolaire francophone de division.⁶⁴² Given present enrolment, it is unlikely that the minimal number of 500 students will be attained in the Northwest Territories. At the moment, no Commission scolaire francophone de division exists.

(f) Financial resources

The *Education Act* contains no specific provisions on the allocation of financial resources to French-first-language education programs. We have already seen that a conseil scolaire francophone has a limited decision-making role with respect to the preparation of budgetary estimates. While it prepares an estimate of costs for program operations and capital expenditures, such an estimate must be submitted to the District Education Authority for its approval.⁶⁴³ Authorities themselves must submit their annual estimates of revenue and expenditures to the Minister for approval.⁶⁴⁴ However, this is subject to one important qualification regarding revenue. The Act provides that an education body may be given the power to acquire funds for educational purposes through taxation of property.⁶⁴⁵ Where this is the case, the education body does not require the approval of the Minister for that portion of its annual estimate of revenue and expenditures "for operation and maintenance and capital which relates directly"⁶⁴⁶ to the funds so acquired. The definition of "education body" under the Act does not include a conseil scolaire francophone, but does include a Commission scolaire francophone de division (of which none currently exist).

Regarding financial resources generally, the Act authorizes the Minister to provide to an education body a grant or contribution (or a combination of the two) for operation and maintenance costs associated with delivering an education program. The same authority applies with respect to funds made available for capital expenditures required for the delivery of an education program.⁶⁴⁷ The Minister has the power to reduce or suspend such payments if certain conditions are not fulfilled by an education body. As already mentioned, a conseil scolaire francophone is delegated "the duty" to receive funds that are provided by grant or contribution by the Minister for the delivery of a French-first-language education program.

3.12.3 Litigation

(a) Recent or anticipated litigation

No judicial decisions have been issued in the Northwest Territories with respect to Section 23 of the *Charter*. However, litigation was commenced in Yellowknife in 1990 which centred on the lack of appropriate minority language education facilities in the city and the absence of a management model which recognized the role of the Francophone community.⁶⁴⁸ Negotiations with the government on the type and quality of educational facilities made available for French-language education, and the legislative review process leading to the enactment of a new *Education Act* in 1995, resulted in this action being suspended.

Given the limitations imposed on the authority and role of conseils scolaires francophones (as a result of their delegate status vis-à-vis District Education Authorities), there is a possibility that further legal proceedings will emerge. The manner in which the provisions in the new Act are implemented will have an effect on any decisions of Francophones to reactivate or commence new court action. Full governance rights under Section 23 of the *Charter* appear, in theory, to apply only to a Commission scolaire francophone de division. While the Act does provide a mechanism for the creation of such a Commission, the prerequisite as to the number of registered students (500) seems presently unlikely to be attained. Nonetheless, the Minister retains the discretion to establish such a Commission if other conditions are met (as set out in the *Regulations*). At present no such Commission exists, and it is unclear whether one will be created in the near future. A further complicating factor is the division of the Northwest Territories into two separate territories effective April 1, 1999. The opportunity of having two conseils scolaires francophones (one in Yellowknife and one in Iqaluit) requesting the Minister to establish a Commission scolaire francophone de division is even more remote.



4.0 Summary and overview of provincial implementation

This survey shows that there is considerable diversity in legislative and regulatory provisions and in provincial and territorial policies on instruction in the minority official language. The demolinguistic realities are not uniform, and the specific circumstances of each situation have an impact on the methods chosen to implement Section 23 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The Supreme Court of Canada foresaw the likelihood that specific modalities chosen to respond to the needs of minority language education might vary from one province to the next. As the Court said in *Mahé*: "Imposing a specific form of educational system in the multitude of different circumstances which exist across Canada would be unrealistic and self-defeating."⁶⁴⁹ At the same time, however, the Court made it clear that Section 23 imposes important obligations on provinces to take positive steps to ensure that inequities in various educational systems are rectified. In other words, Section 23 is designed to remedy injustices which have in the past impeded access to minority language education by placing "...positive obligations on government to alter or develop major institutional structures."⁶⁵⁰

In developing educational institutions and structures, provinces must therefore be mindful of their impact on the rights of members of minority language communities. Choices in this regard should be made which promise the widest possible benefit to the health and vitality of these communities, educational programs and schools. This approach has been explicitly endorsed by the Supreme Court of Canada:

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 the use of minority language facilities should be considered and implemented.⁶⁵¹

4.1 Eligibility

The application of basic eligibility criteria is a first step towards determining the number of children who should be considered for minority language education. In many provinces, statutory provisions either incorporate by reference or restate directly the criteria found in Section 23 of the *Charter*. Generally speaking, Section 23 guarantees access to minority language education to children on the basis of the mother tongue of one of their parents (the first language learned and still understood), on the basis of their sibling status to a child who has received or is receiving education in the minority language of a given province, or on the basis of the official language in which a parent was educated in Canada (at the primary level). These general criteria in Section 23 are contingent, however, on parents being citizens of Canada.

The requirement of citizenship is tempered in a number of provinces (New Brunswick, Prince Edward Island, Ontario, Quebec and Manitoba). In provinces where French is the minority language, the arrival of French-speaking immigrants should be seen as a welcome opportunity to enhance the size and diversity of the minority community. By recognizing the right of permanent residents in Canada (whose mother tongue is that of the linguistic minority of the province where they reside) to enrol their children in minority language programs and schools, provincial law can contribute to enlarging the pool of eligible children. The greater the number of students enrolled in minority language programs and schools, the greater the ability to provide education of high quality by means of a broader choice of courses and education-related services. In Quebec, where the mother tongue rule does not apply, the requirement of citizenship is lifted only with respect to parents who received the major part of their primary education in English in Canada. While this is consistent with rules of access that predate Section 23 of the *Charter*, only a limited number of persons are likely to be affected by this particular provision of the *Charter of the French Language*.⁶⁵²

The possibility that residents of Canada, regardless of citizenship, might have access to official minority language education (where the mother tongue rule applies) leads naturally to the issue of whether minority language school boards (or equivalent bodies) should enjoy a discretion to admit children who are not strictly eligible under the terms of Section 23 of the *Charter*. Discretionary admissions (should they be made) must always be mindful of the linguistic homogeneity of the educational programs in question. There may very well be circumstances where children of non-eligible parents are sufficiently competent in French, for example, that their admission would contribute positively to the underlying purpose of a French-language school. However, such discretion (if accorded) is best exercised by the members of the minority (or their representatives). Only then would it be possible to conclude that decisions made did not jeopardize the linguistic homogeneity of a minority language educational program or school.

Residency requirements can affect the manner in which otherwise eligible parents are able to exercise their rights, in particular if they live outside the territorial jurisdiction of a minority language school board (or equivalent authority). In such cases, provincial law often provides for agreements between boards on the transfer of eligible students to schools or programs under the jurisdiction of a minority language board, or to another board which operates minority language classes (Ontario, Manitoba, Alberta). However, procedures of this sort may be problematic if transfers are made subject to the discretion of the majority language school board exercising authority over the pupils concerned. Rights under Section 23 cannot legitimately be qualified by unfettered discretionary powers. Moreover, the transfer of eligible students towards minority language programs or schools could involve costs which should be addressed in legislation or regulations.

The issue of transfers does not arise, of course, in those jurisdictions where minority language school boards or authorities have province-wide jurisdiction (Newfoundland, Nova Scotia, Prince Edward Island, Saskatchewan and, in the near future, in British Columbia). Nevertheless, the geographic isolation of some minority language members does raise analogous issues related to the transportation of eligible pupils to schools and programs offered in other areas. These issues are best grouped together under the notion of sufficient numbers.

4.2 Sufficient numbers

The issue of numbers is central to selecting the means adopted in particular situations to ensure that Section 23 rights are fully respected. Where numbers are very small in a given locality, public officials may well consider transporting eligible pupils to existing schools or programs in an adjacent region or territory. This choice must be exercised without losing sight of the welfare of the pupils in question. It should not be a routine policy to subject children to long bus rides, nor should busing be a substitute for carefully considering the establishment of a community-based minority language educational program. While the scope and level of educational services in the minority language is clearly tied to the number of pupils to be served, a proper balance must be sought between the development of smaller, local

schools and larger educational facilities serving a broader and more diverse region.

Since so much depends on the numbers involved, the manner in which they are calculated must be closely considered. As the Supreme Court of Canada has ruled, basing that calculation solely upon the number of children registered in a given program could undermine the remedial nature of Section 23. Frequently, the number of children registered or pre-registered will be less than the total number of eligible children residing in the community where the program is, or will be, located. Indeed, demand for official minority language education will, to a great extent, follow its effective implementation, rising as the viability of the program becomes apparent. For this reason, the calculation of the number of students who will ultimately register in a given program must be an estimate based on the total eligible population in a given locality as well as on the total registration during its start-up years. As the Supreme Court has pointed out, the relevant figure for Section 23 purposes is "...the number of persons who will eventually take advantage of the contemplated programme or facility."⁶⁵³

Only Prince Edward Island currently uses a specific minimal number of eligible children as a benchmark in determining if a minority language educational program will be offered in a given community. Most provinces simply refer to numbers generally (without specific figures) as a factor that will be considered in determining whether a minority language educational program will be offered. Some provinces dispense with any reference to numbers and guarantee access to minority language education to all eligible children (New Brunswick, Quebec, Ontario), although the means chosen to achieve access (for example, busing to a neighbouring community, one or more classes within mixed school facilities, or a homogeneous, distinct school) is ultimately numbers-related.

The assessment of what level of minority language educational services a given number of eligible children require, and where such services must be offered, merge with concerns about decision-making authority. In this regard, there are significant differences from province to province, though quite often the Minister of Education retains the ultimate authority to decide if and how a minority language program will be delivered or a school established. In addition, financial resources made available to support official minority language education have an impact on the quality and scope of programs. Ultimately, even where a minority language school board has the authority to decide if a program will be offered, the effective exercise of that authority is contingent upon sufficient public funds being made available.

Conflicting points of view may arise in discussing the relationship between numbers and the type of educational service provided (busing to a neighbouring facility, establishment of a local class, or a distinct school facility). In the absence of a dispute resolution process, conflict over the required level of educational service inevitably involves the intervention of the courts, a time-consuming and expensive process. While the Supreme Court contemplated the use of the courts to resolve such differences,⁶⁵⁴ every effort should be made to provide for alternative means to arrive at final decisions on the type of educational services warranted by a given number of students. In addition, a dispute resolution process favours the use of clear and understandable criteria, and thus diminishes the need to have recourse to the courts.

4.3 Minority language instruction

Despite differences in phraseology in various provincial statutes and regulations related to education, there is general agreement that instruction in the minority language means that the full range of school curricula will be offered in that language. Provincial law and policy also recognize that immersion programs (which constitute second-language training programs for children who speak the majority language) are not an appropriate means to meet constitutional requirements under Section 23 of the *Charter*. While immersion is an important pedagogical approach to second-language learning that has contributed greatly to the increase in the number of bilingual Canadians, it falls well short of the comprehensive first language educational programs mandated by Section 23.

The proportion of classroom time spent in the minority official language varies significantly. In some provinces, a minimal percentage is established in order to ensure the linguistic integrity of minority language education programs (Manitoba) or a more general reference is made to the predominant use of the minority language (Saskatchewan). In either case, the possibility is left open that the majority language might be used for more class time than that normally associated with a single course of second-language training. Even where law and policy are silent on this issue, programs delivered to minority language children may incorporate bilingual components at the request of parents (Nova Scotia).

Demand for bilingual programs in some communities can adversely affect the rights of parents who want their children to be educated in homogeneous minority language programs. While parents eligible under Section 23 cannot be required to enrol their children in minority language programs that meet the requirements of that section, public

authorities cannot remain unresponsive to the desire of parents seeking the full benefit of an education in linguistically homogeneous programs. The linguistic homogeneity of educational programs under Section 23 is an issue that is also related to the types of physical facilities where such programs are delivered. This is particularly true when both bilingual programs and homogeneous minority language programs are housed in the same school. As this issue involves the type of educational facility within which minority language programs are delivered, more will be said about it in the next section.

Educational programs for the children of parents with Section 23 rights may incorporate a component designed specifically to upgrade language skills ("programme d'accueil"). Since the eligibility of most children to minority language instruction is determined by reference to the mother tongue of a parent (or the language in which a parent received primary schooling), there is no guarantee that in all cases such children will be sufficiently fluent in the minority language to enable them effectively to receive their instruction in it. Intergenerational decline in the ability to speak or understand the minority language can be linked to the effects of linguistically mixed marriages or even to the lack of opportunities parents had to receive their own schooling in their mother tongue. Whatever the reasons, the children of such parents are nevertheless eligible for minority language education under the terms of Section 23 of the *Charter*. Moreover, given the remedial nature of Section 23, it is not surprising that the scope of the rights protected thereunder encompasses the recovery of a waning linguistic heritage. Specific programs which address the needs of such children are therefore a necessary adjunct to minority language education programs in general, and should be considered in all jurisdictions.

The implementation of language upgrading programs may raise issues about the linguistic homogeneity of programs designed for children already fluent in the minority language. If the number of children enrolled in upgrading programs is high, this might detract from the homogeneous language environment considered essential to the effective delivery of minority language instruction. This in turn could increase costs associated with the delivery of minority language education, whether such costs are related to the scope of upgrading programs or to the need to house them in a facility separate and apart from that used for minority language programs in general.

4.4 Minority language education facilities

The nature of facilities available for minority language programs has an important impact on the ability to achieve the underlying purpose of Section 23 of the *Charter*: "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."⁶⁵⁵ The key to realising this objective lies in the establishment of minority language schools which provide homogeneous linguistic environment. Such schools are the first line of defense against linguistic assimilation and a corresponding decline in the number of minority language speakers in any given jurisdiction. In effect, institutions such as schools provide a significant physical and social space where the minority official language of a province can find full expression -- all the more so if it is both a school and a community centre.

Shared or mixed educational facilities which house both official minority language programs and other programs (such as second-language immersion, bilingual or majority language programs) may detract from the ability to provide an educational framework that enhances the vitality of the official minority language of a province. Indeed, studies have consistently shown that mixed facilities tend to encourage the use of the majority official language outside the classroom, to the detriment of the minority official language.

The establishment of linguistically homogeneous minority language educational facilities is clearly dependent upon the availability of appropriate levels of financial support. This, in turn, is dependent on the potential numbers of students who will ultimately receive their education in such facilities. The manner in which sufficient numbers are calculated has been reviewed above, but it is useful to recall that the criteria used to determine whether a distinct building dedicated exclusively to homogeneous minority language programs will be made available are not always clearly stated in law or policy. It may be appropriate, therefore, to consider the possible benefits which could flow from the establishment of specific criteria, criteria which would clearly reflect the underlying purpose of Section 23 of the *Charter*.

The establishment of a homogeneous minority language school may, of course, involve the use of an existing facility. In such circumstances, appropriate provision have to be made for the transfer of the facility from one educational authority to another, whether by way of inter-board negotiations or by ministerial order. Once again, the principles and criteria that apply to such transfers should be clearly stated and a dispute resolution process established.

4.5 Powers of governance

The review of provincial efforts to implement Section 23 rights has shown that a central element is the growing recognition that effective management powers over official minority language education should be exercised by members of the minority community. While details vary significantly from one province to the next, there is now widespread acknowledgement that the best means of enhancing and preserving the vitality of minority language communities lies in according them important governance functions with respect to minority language programs and schools. As the Supreme Court said in *Mahé*, "...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."⁶⁵⁶

Generally speaking, minority language school boards (or equivalent authorities) exercise or assume powers and responsibilities similar to those of a majority language board. These normally include the authority to hire teachers and other staff, the implementation of educational programs, control over the physical plant and the day to day operations of schools. While boards generally have a responsibility to ensure that school curricula are properly implemented, their role in the development of curricula is often limited by regulatory powers retained by provincial Departments of Education. As indicated in Chapter 3 of this study, virtually all provincial Departments of Education have developed sections devoted to the program needs of official minority language education. However, it remains an open question whether adequate mechanisms are in place in all provinces to ensure that members of the minority population have a sufficient voice in the development of these programs. In a number of provinces, school boards (including those of the minority) may develop programs of a local nature, subject to ministerial approval and provided they are compatible with established curricula. Nevertheless, concerns continue to surface about the adequacy of the role of minority language school boards (or equivalent authorities) in the development of curricula, especially as they relate to the linguistic and cultural interests of the minority.

As already mentioned, some provinces have accorded province-wide jurisdiction to a single minority language school board (Newfoundland, Prince Edward Island, Nova Scotia, Saskatchewan and, in the near future, British Columbia), while others have implemented multiple management structures. Where the minority language population is small and geographically dispersed, the creation of a province-wide minority language board is an effective and efficient way to manage educational programs and schools. However, such a model is clearly less attractive in provinces such as Ontario and Quebec, where the official minority language population is large. Both provinces have a system of minority language boards which are territorially defined but whose combined area includes the vast majority of, if not all, minority language speakers.

The decision-making power of minority language boards (or equivalent authorities) to determine if a school facility (or even a minority language class) will be established in a given locality is far from universal. Some provinces include this authority under the discretionary powers of the Minister of Education, who ideally should make a decision by reference to a set of criteria set out in law or regulations. Where no guiding criteria exist, questions arise about how to determine whether decisions are made in conformity with Section 23 rights. Even when criteria are set out, there are concerns that decisions essentially pedagogical in nature and related to linguistic and cultural matters are being made by persons other than minority language parents themselves (or their representatives). For example, busing children to a school in a neighbouring community (as opposed to offering classes closer to home) may be an attractive solution, in the eyes of the Minister of Education, to meet a request from parents who have Section 23 rights. This is particularly true if busing is cheaper. However, such a view might not give sufficient weight to the importance, for the health and vitality of the local community and of the children, of establishing local minority language classes. In other words, the views of minority language parents in this regard could be quite different from those of a minister and his advisors.

The authority to provide minority language education programs is not always an exclusive prerogative of minority language boards (or equivalent authorities). Where it is not, questions arise about the consequences of allowing a type of competition to develop between majority and minority language boards. As the pool of eligible minority language students is often small, any loss of potential students can adversely effect the ability of a minority language board to offer choices and quality in education. A large and varied student body is important in ensuring diversity in an educational program. Moreover, issues related to the governance powers accorded to the linguistic minority communities may be ignored if, because of their place of residence, significant numbers of eligible children fall under the jurisdiction of majority boards (which may themselves offer minority language programs).

Management of a minority language program in an educational facility shared with a majority language board may lead

to disputes which are difficult to resolve about joint authority over the premises. Where such situations arise, it is preferable to have a mechanism for resolving differences. It is of course even better policy to provide separate and distinct facilities for each official language community, although the key to achieving this lies in the availability of enough public funds to establish and maintain school buildings.

In delivering programs, minority language school boards (or equivalent authorities) may also be faced with the issue of needs in the area of pre-school programs, special language skills upgrading programs, as well as that of the professional and administrative support designed specifically for minority language parents. Pre-school and language skills programs are important to ensure that children starting school are able effectively to receive their instruction in the minority official language. Those charged with the governance of minority language education must therefore provide for such special needs, since failure to do so would detrimentally affect the success of the education. Such needs should be taken into account in determining the material and human resources made available to minority language school boards (or equivalent authorities).

We cannot conclude this section without mentioning a fundamental debate that has been taking place for some time in New Brunswick. That province's government decided to restructure the system of education governance by replacing school boards with two provincial commissions, one English-language and the other French-language, with essentially advisory committees at the school and district level.

The Act providing for this restructuring gave significant powers to the Minister of Education and limited those given to parents' representatives. In the opinion of many (including the Commissioner of Official Languages), the balance is not what it should be: the powers of the parents are less than prescribed by the Supreme Court of Canada. As we go to press, the debate is continuing.

4.6 Financial resources

The financial resources allotted to official minority language education have a decisive impact on almost all issues of importance to minority language parents, from the levels of educational services offered to a given number of pupils, to the nature and location of facilities in which a program is delivered, to the ability of minority language school boards to fulfil their mandate. The levels of public funding for official minority language education are seldom referred to directly in statutes, although in some jurisdictions the legislation enunciates a principle of equality of treatment or refers to a level of funding mandated by Section 23 of the *Charter*. More often than not, funding concerns (both for general operations of schools and for capital expenditures) are found in annual budgetary rules as either form of formal regulations or policy guidelines.

Items in the budgetary rules applicable to education can lead to supplementary funds being made available for minority language schools or programs. For example, the base funding allotted to school boards can be adjusted, in some jurisdictions, to take into account factors such as remoteness and sparseness of population, the number of small schools, or socio-economic disadvantages. When applied to the operations of minority language school boards (or equivalent authorities) these factors can result in supplementary sums being made available. Though less specific, the discretionary powers of the Minister of Education to make "equitable" adjustments can work in favour of minority language education funding as well. Whether this actually occurs must be determined in each provincial jurisdiction.

Some provinces specifically identify grants of money for the needs of minority language school boards; however, this practice does not appear to be widespread. A current example is the recently announced reform of grants for education in Ontario. In addition, Ontario now identifies language upgrading programs (for students eligible under Section 23) as programs eligible for supplementary funding.

Since in most provinces minority language school boards (or equivalent authorities) do not have the power to tax, the system of education grants is central to their ability to deliver educational programs of equal quality to those of majority language boards. Indeed, even in jurisdictions where minority school boards do have the power to levy taxes on real property, the proportion of revenue derived from such taxation is falling and is being replaced by increased grants from provincial governments. A system of grants must therefore have the flexibility to respond adequately to the needs of official minority language education. Of all the questions touched upon in this study, the issue of material and human resources is the one paramount in the minds of most people involved in managing minority language programs and schools.

The design and delivery of official minority language education could involve higher per pupil costs than those

associated with majority language education. There are also increased costs associated with the management of school districts or divisions covering unusually large geographical regions, with the number of small schools to be managed, and even with capital acquisitions necessary to achieve an acceptable level of parity with facilities available to the majority population (the latter having benefitted from many years of public school development).

The federal government has recognized these needs by providing funding under the Official Languages in Education Program of the Department of Canadian Heritage. Within the framework of a general protocol, the federal government negotiates bilateral, multi-year agreements with each province and territory on financial support for official languages in education. Such agreements deal with the costs of two components of a provincial or territorial education system: second-language acquisition programs (French or English), and official minority language education.⁶⁵⁷

The categories of expenditures to which the federal government contributes are set out in the general protocol (infrastructure support; program expansion and development; student support; teacher training and development; other program expenditures). The infrastructure costs are based on a per student calculation (in both components of the Program) and amount to 80% of the overall financial contribution of the federal government. In other areas, such as community-based projects, bilateral agreements have allowed for funding of school and community centres. The latter are of particular importance to official minority language communities.

Past and projected decreases in the financial support of the federal government under these agreements, have worried those concerned with minority language education programs and schools. While the constitutional responsibility to meet the costs of providing official minority language education lies with the provinces, the bilateral agreements have proven essential to the establishment and development of official minority language education in all regions of the country.

Given the remedial nature of Section 23 of the *Charter*, the issue of adequate material resources to compensate for the supplementary costs inevitably associated with achieving parity between the minority and majority language school systems will remain a source of controversy. One matter of particular importance is the transfer of existing school buildings (as opposed to capital funding for construction projects) to minority language school boards (or equivalent authorities). As this involves the interests of majority language boards, any requirement that such transfers be subject to negotiations between the boards concerned should be accompanied by a dispute resolution process. Any such process implies of course that specific criteria be established to regulate the transfer of schools from one school board to another. Some provinces leave this matter to be determined by the Minister of Education, but even so there is a need to establish a set of rules that can be applied to resolve contentious issues.

From a more general point of view, the remedial nature of Section 23 suggests that funding models for official minority language education should incorporate factors associated with the extra costs of developing and delivering it. Without such recognition, it will be increasingly difficult to ensure that the quality of minority language education is equal to that which is offered in the majority language of any given jurisdiction and that comparable results will be achieved. Inequality in that regard will, in turn, impede the ability of official minority language schools to grow and prosper.



5.0 Conclusion

This study comes at the juncture of two major phases in the history of the official language minority communities: the struggle to obtain their education rights on the one hand, and the enhancement of education, which is the keystone of their vitality, on the other.

The first phase began over 15 years ago with promulgation of the *Canadian Charter of Rights and Freedoms* (the *Charter*), Section 23 of which guaranteed these communities the right to instruction in their language. This assurance was particularly solemn and irrevocable because it was enshrined in the fundamental law of the land, the Constitution of Canada.

This study shows that school governance has not been implemented without difficulty. It ran counter to certain deeply rooted habits, to routine and to the force of inertia. It required not only legislative and administrative changes at the provincial level, but above all a change in ways of thinking.

It has required 20 years for the structure finally to take shape. It was the intention of this study to chronicle this

process, the struggle of the communities, the resistance of various forces, the frustrations and, finally, the victories.

Today the structure is clearly visible. In every province, school governance finally rests on firm foundations -- at least in terms of the structures, the framework of education -- although in some cases what is in place is still not fully consistent with the requirements of Section 23, and in many cases funding remains inadequate.

The official language communities are thus on the threshold of the second major phase in their struggle to regain control of their children's education. Now that the structure is nearly complete, now that the infrastructure is in place, what will the superstructure be like? In other words, what will the content of education be? How will the programs be designed? What values and purposes will minority education pursue? How will results be guaranteed? How can the continuity of minority language education be guaranteed by ensuring the transmission of a language that is correct to the young, of a living culture to all? How can young people in the communities be prepared to take their proper place in the labour market? Finally, how can all these challenges be met while working closely with the members and institutions of the majority (governments, departments of education, majority school boards, etc.)?

These problems and questions may not have been fully in the minds of those who voted, in 1982, to adopt the *Charter*. They began to emerge and take shape, however, as the establishment of the institutions of school governance progressed.

In this regard, Section 23 can be compared to a seed planted in the ground. We do not really know how it will germinate and grow. But, if we take good care of it, it can give rise to a vigorous tree that extends its branches in many directions at once and provides the oxygen required for life to the natural environment in which it flourishes.

School governance has grown. Its branches extend in many directions. It is beginning to provide the minority communities with the oxygen vital to their development. And the tree continues to grow, spreading out into new spaces.

This study was intended to be useful in two ways: by pointing out the distance travelled, by attempting, through analysis of the struggles of the minority communities when they obtained and created the education infrastructure, to identify useful lessons; and second, from these lessons, to identify future paths, to outline elements of the superstructure that the communities have begun to build, so that minority education, in form and substance, structure and content, may be the cornerstone of the survival and vitality of the communities.

Finally, this study has also shown how, on the long road already travelled and still to be covered, the Office of the Commissioner of Official Languages, and the present Commissioner in particular, have been active allies of the communities, constant companions on their journey. In doing so, they also helped to strengthen one of the values essential to Canada, its linguistic duality.



Notes

1 *Mahé v. Alberta*, [1990] 1 S.C.R. 342 at 362.

2 *Ibid.* at 362.

3 *Id.* at 363.

4 *Id.* at 363. This declaration is found in an earlier Supreme Court decision regarding restrictive eligibility criteria for access to English language education in Quebec. See: *Attorney General for Quebec v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66 at 79.

5 *Id.* at 363. This declaration is found in an earlier Supreme Court decision regarding restrictive eligibility criteria for access to English language education in Quebec. See: *Attorney General for Quebec v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66 at 79.

...courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should

6 *Mahé v. Alberta*, supra, note 1 at 365.

7 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being schedule B of the *Canada Act*, 1982, 1982, c. 11, (U.K.), in R.S.C. 1985, App. II, no 44, para. 23(3)(a) and (b).

8 *Mahé v. Alberta*, supra, note 1 at 366.

9 Ibid. at 366-367.

10 Id. at 384.

11 Id.

12 Id. at 385.

13 Reference Re *Public Schools Act (Man.)*, [1993] 1 S.C.R. 839.

14 Ibid. at 853.

15 Id. at 854.

16 Id. at 855.

17 Id. at 856.

18 Id. at 856. The actual words of Chief Justice Lamer are as follows:

Therefore, while I endorse a general right to distinct physical settings as an integral aspect of the provisions of educational services, it is not necessary to elaborate at this point what might satisfy this requirement in a given situation. Pedagogical and financial considerations would both play a role in determining what is required. Obviously the financial impact of the provision of specific facilities will vary from region to region. It follows that the assessment of what will constitute appropriate facilities should only be undertaken on the basis of a distinct geographic unit within the province.

19 *Mahé v. Alberta*, supra, note 1 at 370.

20 Ibid. at 371-372.

21 This position was reiterated in 1993 in Reference Re *Public Schools Act (Man.)*, supra, note 13 at 858:

The degree of management and control under this sliding scale approach thus depends on the number of children, which is determined by reference to both actual and potential numbers... The rights to language education which flow from s. 23 of the *Charter*, therefore, will give rise to differing types of government obligations, depending on the number of students involved.

22 *Mahé v. Alberta*, supra, note 1 at 373.

23 Ibid. at 377.

24 Id. at 380.

25 Id. at 378.

26 Id.

27 Id.

28 *An Act to Amend the Schools Act, 1991*, S.N. 1991, c. 20.

29 *Schools Act, 1996*, S.N. 1996, c. S-12.1.

30 *An Act to Amend the Schools Act, 1996*, S.N. 1997, c. 8.

31 *Schools Act, 1997*, S.N. 1997, c. S-12.2, ss 8-9.

32 Ibid. at subsection 2(i).

33 Id. at s. 113.

34 Id. at subsection 2(p).

35 Id. at s. 94. The same section defines the conseil scolaire as a corporation, which is obliged to operate ("shall operate") in the French language, using English when necessary.

36 Id. at s. 95 for elections to the conseil scolaire; and s. 102 for elections of the conseils d'école and qualifications of electors.

37 Anglophone school board duties and powers are set out in ss 75 and 76 of the *Schools Act, 1997*. Although the same duties and powers apply to the conseil scolaire by virtue of ss 97 and 98, subsection 111(3) of the *Schools Act, 1997* declares that ss 75 to 88 of the Act do not formally apply to the conseil scolaire. This apparent contradiction is inexplicable on the face of the Act.

38 Id. at s. 99.

39 Id. at para. 75(1)(a) and (b).

40 Id. at subsections 117(a) and 118(a).

41 Id. at para. 75(1)(g) and (h).

42 Id. at para. 24(3)(m) and subsection 33(f).

43 There are currently four conseils d'école located in regions of the province where a French-language educational program previously existed: (a) the conseil d'école de Port-au-Port; (b) the conseil d'école de l'ouest du Labrador; (c) the conseil d'école de l'est du Labrador; and (d) the conseil d'école de St. John's. Id. at subsections 95(4) and 102(3).

44 Some persons, under the terms of the Act, are not eligible for election, such as a principal or teacher at a French-first-language school of the director of the provincial conseil scolaire. Id. at subsections 102(6) and (7). However, the principal and a maximum of two teachers are non-elected and non-voting members of a conseil d'école. Id. at s. 103.

45 Id. at s. 106.

46 Id. at para. 107(1)(a) and (b).

47 Id. at para. 108(1)(a) and (b).

48 Id. at subsection 97(2).

49 Id. at subsection 112(1):

Title to all real and personal property used for the purpose of education at École Ste. Anne and École Notre Dame du Cap in the communities of Mainland and Cape St. George that were, on the coming into force of this Part, operated by a board as French first language schools shall be transferred to the conseil scolaire by the board or denominational authority having title.

50 Id. at subsection 116(3).

51 Id. at subsections 116(2) and (4) regarding contracts and debts, as well as employment contracts. Where there is a dispute regarding any of these matters, the Minister is authorized to make an order determining the issue: id. at subsection 116(5).

52 Id. at s. 113.

53 Id. at s. 100.

54 Id. at s. 101.

55 *Velma Felix et al. v. Her Majesty the Queen in Right of Newfoundland and the Minister of Education for the Province of Newfoundland* (2 April 1996), St. John's 1081 (Nfld S.C.T.D.)

56 In a study released in 1991 (Office of the Commissioner of Official Languages, *Official Language Minority Education*

Rights in Canada: From Instruction to Management, 1991 by A. Martel, (Ottawa, Ont.: Office of the Commissioner of Official Languages, 1991)), it was found that the Minister set the proportion of the school day at elementary levels devoted to French at 100%, while the proportion in secondary school levels could fall to less than 50%. Ibid. at 166.

57 This was in fact the case in the Clare-Argyle School Board in the 1980s. Even so, a school board with a majority of French-speaking members did not exercise any specific jurisdiction with regards to minority language education. Its management authority over a French school flowed from its jurisdiction over the district in which the school was located. Id. at 169.

58 Id. at 168-169.

59 Nova Scotia, *Education Horizons, White Paper on Restructuring the Education System*, (Halifax, N.S.: N.S. Department of Education, 1995).

60 *Education Act*, S.N.S. 1995-96, c. 1, subsection 3(h).

61 Ibid. at para. 146(1)(i).

62 *Governor in Council Education Act Regulations*, N.S. Reg. 74/97, subsections 55(1) to (5). The prescribed form of the declaration is set out in Schedule "B" to the Regulations. Subsection 55(3) gives the Minister the authority to review ("may review") declarations filed with the Conseil and make a final determination of eligibility.

63 *Education Act*, supra, note 60 at s. 12.

64 Ibid. at para. 146(1)(j).

65 N.S. Reg. 74/97, supra, note 62 at subsection 56(1) for the authority of the Conseil acadien regarding numbers; and subsection 56(2) for the requirement of the Minister's approval.

66 Ibid. at subsection 56(3).

67 *Education Act*, supra, note 60 at subsection 3(f).

68 Ibid. at subsection 14(1).

69 Id. at para. 146(1)(m).

70 Id. at para. 146(1)(d) and (o).

71 Id. at para. 146(1)(n).

72 Id. at s. 11.

73 *School Boards Act*, S.N.S. 1991, c. 6.

74 *Education Act*, supra, note 60 at para. 14(2)(a) and subsection 14(3).

75 Ibid. at subsections 14(9) and (10).

76 Id. at para. 11(4)(c) and (f).

77 Id. at s. 34.

78 Id. at subsections 15(1) and (2).

79 Id. at subsection 88(1).

80 Id. at para. 64(2)(b).

81 Id. at ss 41-51 generally, and subsection 13(5) which applies specifically to the Conseil acadien.

82 Id. at subsections 13(2) and (3).

83 Id. at subsection 20(1) and s. 21.

84 Id. at subsection 20(3) and ss 22-23.

85 Id. at para. 64(2)(m).

86 Id. at s. 39, in particular para. 39(1)(d) and (k).

87 Id. at subsections 145(g) and (p).

88 N.S. Reg. 74/97, *supra*, note 62.

89 *Education Act*, *supra*, note 60 at s. 88.

90 *Ibid.* at s. 87.

91 *Id.* at s. 79.

92 *Id.* at s. 87(1).

93 *Lavoie et al. v. Nova Scotia (Attorney-General)* (1988), 47 D.L.R. (4th) 586 (N.S.S.C.T.D.); (1989), 58 D.L.R. (4th) 293 (N.S.S.C.A.D.).

94 This conclusion is supported by the fact that the Nova Scotia Court of Appeal, in considering the same number of eligible children who pre-registered for a particular program of French-language instruction, reversed conclusions arrived at by the school board in question and the trial judge: *Lavoie et al. v. Nova Scotia (Attorney-General)* (1989), 58 D.L.R. (4th) 293 (N.S.S.C.A.D.).

95 *Ibid.* at 308.

96 *Glenda Doucet-Boudreau, Alice Boudreau, Marie-Claire Doucet, Bernadette Cormier-Marchand et la Fédération des parents acadiens de la Nouvelle-Écosse Inc. v. Le Procureur général de la Nouvelle-Écosse représentant en chef de Sa Majesté la Reine en Nouvelle-Écosse et le Conseil scolaire acadien provincial* (15 June 1997), Chéticamp H. 137725 (N.S.S.C.) [Notice of intent]. On January 21, 1998 a new notice was served on the defendant indicating a new Originating notice of motion was to be filed.

97 A provincial commission was established to inquire into and make recommendations for the reform of the existing school system in New Brunswick. It submitted its findings under the title: *Report of the Committee on the Organization and Boundaries of School Districts in New Brunswick*, Fredericton 1979, often referred to as the Finn-Elliot Report. The recommendations of this report formed the basis for the statutory changes introduced in 1981.

98 *An Act to Amend the Schools Act*, S.N.B. 1981, c. 71, s. 3.

99 This prohibition applied to any school board where (i) school districts organized on the basis of different official languages existed in the same geographical area, or (ii) a minority language school board existed in the same district. *Ibid.* at subsection 3.3.

100 *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. 0-1. Section 12 proclaimed in force on July 1, 1977.

101 *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, R.S.N.B. 1981, c. O-1.1. The principle of the equality of the two official linguistic communities was later entrenched in the *Canadian Charter of Rights and Freedoms* (*supra*, note 7 at s. 16.1) by way of a constitutional amendment.

102 *Ibid.* at s. 2.

103 A. Martel, *supra*, note 56 at 152.

104 *Schools Act*, S.N.B. 1990, c. S-5.1. The latter Act, proclaimed in force January 1, 1992, replaced the *Schools Act*, R.S.N.B. 1978, c. S-5 (consolidated to February 28, 1982).

105 *Ibid.* at ss 6-7 and 10.

106 *Id.* at subsection 15(1):

School districts, schools and classes shall be organized on the basis of one or the other of the official languages of New Brunswick and the language of instruction in schools and classes of a school district shall be in the official language on the basis of which the school district is organized.

The creation of school districts was done by way of regulation. Regulations adopted in 1992 established 18 districts, six of which were organized on the basis of the French language and 12 on the basis of the English language: *School Districts Regulations -- Schools Act*, N.B. Reg. 92-27.

107 N.B. Reg. 92-27, *ibid.*

108 *Schools Act*, *supra*, note 104 at ss 26, 31 and 33.

109 *Ibid.* at s. 16.

110 *Id.* at s. 36.1.

111 *Id.* at s. 36.5.

112 *Education Act*, S.N.B. 1997, c. E-1.12, s. 5.

113 The principles found in s. 5 of the new Act, *ibid.*, reflect those that have been used in New Brunswick schools for many years. More will be said about this matter in the section dealing with litigation, in particular with respect to the case of *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549; (1984), 8 D.L.R. (4th) 238; (1983), 48 N.B.R. (2d) 361; (clarified (1983), 50 N.B.R. (2d) 41; (1983), 51 N.B.R. (2d) 219).

114 *Education Act*, *supra*, note 112 at subsection 4(1) provides that:

two distinct education sectors are established consisting of: (a) school districts organized throughout the Province in the English language, and (b) school districts organized throughout the Province in the French language.

115 *Ibid.* at subsection 4(2) declares: "Schools and classes of a school district shall be organized in the official language of the school district." Subsection 4(3) declares: "The language of instruction in schools and classes of a school district, other than second language instruction, shall be the official language of the school district." See also, subsection 4(6) which specifically prohibits the provision of educational programs and services in an official language other than that of a given district to those who speak that other official language.

116 *Id.* at s. 43. Regulations regarding school districts came into force December 29, 1997: *School Districts Regulations - Education Act*, N.B. Reg. 97-149. As under the previous Act, there are six French and 12 English school districts, with specific schools being attached to each district as set out in schedules to the regulation.

117 *School Administration Regulation -- Education Act*, N.B. Reg. 97-150: provisions relating to the curriculum advisory committees are found in ss 31-36.

118 *Ibid.* at subsection 33(2).

119 *Education Act*, *supra*, note 112 at s. 1.

120 *Ibid.* at subsection 2(1).

121 N.B. Reg. 97-149, *supra*, note 116.

122 *Education Act*, *supra*, note 112 at subsections 32(3), (4), and (5). Provision is also made for the election of a pupil to the parent advisory committee, under subsection 32(6) of the Act.

123 *Ibid.* at s. 34.

124 *Id.* at s. 37.

125 *Governance Structure Regulation -- Education Act*, N.B. Reg. 97-148.

126 *Education Act*, *supra*, note 112 at subsection 49(1).

127 *Ibid.* at subsection 48(1).

128 *Id.* at subsection 33(1).

129 *Id.* at para. 33(2)(a).

130 Id. at subsection 35(1).

131 Id. at subsection 35(2).

132 Id. at subsections 36(1) and (2).

133 Id. at para. 49(2)(a).

134 Id. at para. 49(2)(d).

135 Id. at para. 49(2)(c). Also s. 56 of the Act deems all school personnel to be part of the public service.

136 Id. at para. 48(2)(b), (c) and (g).

137 Id. at subsection 4(4). Subsection 4(5) of the Act further provides that:

he educational programs and educational services provided within a school district, other than second language instruction, shall be developed, implemented and delivered by persons who speak the official language of the school district and so as to preserve and promote that language and culture.

138 N.B. Reg. 97-148, *supra*, note 125.

139 N.B. Reg. 97-150, *supra*, note 117 at ss 31-36.

140 *Education Act*, *supra*, note 112 at subparagraph 38(2)(b)(iii).

141 *Ibid.* at ss 45-46. General administrative authority is found under s. 42.

142 *Id.* at s. 44.

143 *Société des Acadiens v. Association of Parents*, *supra*, note 113.

144 The statutory amendment to the *Schools Act* (*supra*, note 98 at subsection 3.3) provided that:

...a school board shall not provide for persons of the other official language classes or schools in which the language of instruction is that other official language when

(a) school districts organized on the basis of different official languages exist in the same geographical area, or

(b) there is in existence in the school district a school board established under section 18.1 (i.e. a minority language school board).

145 *La Société des Acadiens du Nouveau-Brunswick Inc. et al. v. Minority Language School Board No. 50* (1983), 48 N.B.R. (2d) 361 *supra*, note 113 at 381-382: In addressing the issue of bilingual schools, the court found:

[Trans.] It is clear that for a number of years in New Brunswick, many people thought that the bilingual school was turning out "fluently bilingual people". Experience has shown the contrary, because, again relying on the testimony of Dr. Etienne as well as on that of Dr. Desjarlais, personal bilingualism is good for the individual provided that he has sufficiently mastered his first language (that acquired during infancy and afterwards learned). In other words, the learning of a second language must take place in a manner that does not jeopardize the first language...

The New Brunswick *Schools Act*... therefore established two homogeneous school systems: one French and the other English. There are no more bilingual schools in New Brunswick. The school districts exist and must henceforth be organized on the basis of one language only.

146 *Ibid.* at 400.

147 *Id.* at 404. On the issue of language competence, the Court determined that: [Trans.] "School boards have the power and the duty to determine whether a pupil has sufficient knowledge of the chief language of instruction in order to be admitted into its system." *Id.* at 408.

148 *Comité de sauvegarde de l'École La Découverte de Saint-Sauveur et al. v. Le Ministre de l'Éducation du Nouveau-*

Brunswick et al. (26 June 1997), Moncton M/M/154/97 (N.B.T.D.), Daigle J.

149 *Education Act*, supra, note 112 at para. 38(2)(iii).

150 Ibid. at para. 38(2)(a).

151 Id. at para. 48(2)(g).

152 Id. at subsection 48(1).

153 Id. at subparagraph 38(2)(b)(i).

154 *School Act*, R.S.P.E.I. 1988, c. S-2, as am. by the *School Act*, S.P.E.I. 1993, c. S-2.1.

155 *School Act Regulations* (EC674/76) at subsection 6.03(1), as am. to May 1, 1996.

156 Ibid. at subsection 6.03(3).

157 Id. at subsection 6.13(1).

158 Id. at subsection 6.12(1).

159 Id. at subsection 6.12(2).

160 Id. at subsection 6.01(f).

161 Id. at s. 6.07.

162 Id. at subsection 6.08(1). The latter also provides that the board "may conduct a pre-registration of section 23 children in order to determine the demand for French language instruction in the area."

163 Id. at subsection 6.08(2).

164 Id. at subsection 6.08(3).

165 *School Act*, supra, note 154 at subsection 1(k).

166 Ibid. at subsection 1(m).

167 EC674/76, supra, note 155 at s. 6.11.

168 Ibid. at subsection 6.01(b).

169 *School Act*, supra, note 154 at subsection 112(3).

170 *School Boards Regulation* (EC225/96) at subsection 2(1) (as am. by EC242/96) which revoked EC674/76, supra, note 155 at s. 6.04.

171 EC674/76, supra, note 155 at subsections 6.05(1) and (4).

172 Section 146 refers to "regional school boards". These entities were abolished in a previous version of the Act and the use of the term in s. 146 therefore appears to be a drafting error. In any event, the *Real Property Tax Act*, R.S.P.E.I. 1988, c. R-5 at subsections 1(r) and 8(5), provides for the levying of tax on real property for the purpose of a supplementary educational program.

173 Reference Re *Minority Language Educational Rights* (P.E.I.) (1988), 69 Nfld & P.E.I. R. 236 (P.E.I.S.C.A.D.).

174 Ibid. at 249-250: the Court of Appeal also determined that the calculation of "where numbers warrant" should not be confined to the geographic limits of any given school district or division.

175 Id. at 259.

176 *Arsenault-Cameron v. Prince Edward Island* (8 January 1997), Charlottetown GSC-14794 (P.E.I.S.C.T.D.) [unreported].

177 Ibid. at para. 14 of decision.

178 *Mahé v. Alberta*, supra, note 1 at 362.

179 Ibid. at 362.

180 Id. at 364.

181 *Arsenault-Cameron et al. v. Prince Edward Island*, supra, note 176 at para. 96 of decision.

182 Ibid. at para. 101 of decision.

183 Id. at para. 109 of decision.

184 Id. at para. 110 of decision.

185 Id. at para. 111 of decision.

186 Id. at para. 112 of decision.

187 *Arsenault-Cameron et al. v. Government of Prince Edward Island* (9 June 1997), Charlottetown GSC-14794 (S.C.P.E.I.T.D.) [unreported].

188 Ibid. at para. 12-13 of decision.

189 *Government of Prince Edward Island v. Arsenault-Cameron et al.* (24 April 1998), Charlottetown AD-0727 (P.E.I.S.C.A.D.) [unreported].

190 *Government of Prince Edward Island v. Arsenault-Cameron et al.*, supra, note 189 at para. 3.62 of respondents' factum: in referring to the trial judge's refusal to issue a declaration of unconstitutionality as regards parts of the regulations, the respondents make the following points in their factum:

Firstly, and as stated in paragraph 120 of his decision, the learned judge wanted to interpret the *Regulations* in a manner consistent with the requirements of the *Charter* as interpreted by the Supreme Court. Secondly, where it appeared to him that the *Regulations* did not incorporate to the fullest extent the requirements of section 23 as interpreted by the Supreme Court, he wanted to give the Government direction on legislative changes without declaring the *Regulation* unconstitutional.

191 Ibid. at para. 81 of intervenor's factum: The intervenor places in doubt the validity of the rigid numbers test found in the regulations. However, it offers the following interpretation of the provisions in question:

The only way to justify the non-striking down of this disposition of the *Regulation* would be to consider that the learned trial judge used the number of pupils who would eventually take advantage of the system, and having found that these numbers respect the rule of 15 children over 2 consecutive levels, did not find it useful to strike down the *Regulation*... This interpretation has the dubious merit of leaving s. 6.01(f) intact while giving the plaintiffs the full extent of their constitutional rights.

192 The protection referred to here is found in Section 93 of the original *British North America Act, 1867* (now the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, R.S.C. (1985), Appendix II, No. 5). The applicability of this section to six provinces and its variable impact from province to province involve complex historical and legal factors well beyond the scope of the present study. A recent review of the effect of s. 93 in Quebec can be found in: J.-P. Proulx & J. Woehrling, *La restructuration du système scolaire québécois et la modification de l'article 93 de la Loi constitutionnelle de 1867*, (1997) 31 R.J.T. 399.

193 The principle of freedom of choice was embodied in Bill 63 introduced in 1969: *An Act to Promote the French Language in Québec*, S.Q. 1969, c. 9. The criterion of sufficient knowledge of the language of instruction was found in Bill 22 introduced in 1974: *Official Language Act*, S.Q. 1974, c. 6.

194 The restrictions on access to English-language schools were contested in the courts but upheld by the Quebec Superior Court: *Protestant School Board of Greater Montreal et al. v. Minister of Education of Quebec et al.*, [1976] C.S. 430; (1976), 83 D.L.R. (3d) 645.

195 *Charter of the French Language*, R.S.Q. 1977, c. C-11, ss 72-73. While s. 72 declared that instruction in the schools "shall be in French", four exceptions to this rule were set out in s. 73. In addition to the basic rule based on whether

the mother or father had received the major part of his or her elementary instruction in English in Quebec, s. 73 also established transitional and continuity rules based on sibling status, and place of domicile and language of instruction at the time the new provisions came into effect.

196 This is found in the *Canadian Charter of Rights and Freedoms*, *supra*, note 7 at para. 23(1)(b), which provides:

Citizens of Canada... (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.

197 *Ibid.* at para. 23(1)(a) with respect to the right to have their children receive primary and secondary school instruction in the official minority language is accorded to 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.

198 *Id.* at s. 59.

199 *A.G. (Que.) v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66. Relevant provisions in Bill 101 were declared to be of no force and effect to the extent of their inconsistency with s. 23 of the *Canadian Charter*.

200 A succinct summary of the effect of s. 93 in Quebec is found in an article published by J.-P. Proulx & J. Woehrling, *supra*, note 192 at 403:

[Trans.]

Section 93 of the *Constitution Act, 1867* protects certain confessional education rights. As applied in Quebec, it results in two systems under law. Thus, in Quebec City and Montreal, Catholics and Protestants enjoy the constitutional right to have and manage their denominational schools, regardless of whether they constitute the minority or the majority. Outside these two cities, in the rest of the province, they enjoy the same right only where they form the minority. This is the "dissentient" right that allows them to be exempt from the authority of their municipality's ordinary school board and form their own board, which then administers schools reserved for the children of "dissentient" parents only.

201 *Quebec Association of Protestant School Boards v. Attorney General of Quebec*, [1985] C.S. 872.

202 Reference Re *Education Act*, [1990] R.J.Q. 2498 (Que. Sup. Ct); [1993] 2 S.C.R. 511.

203 Bill 109 was adopted on June 19, 1997: *An Act to amend the Education Act, the Act respecting school elections and other legislative provisions*, S.Q. 1997, c. 47. Other amendments to the *Education Act* were introduced in November and Bill 180 was adopted on December 19, 1997: *An Act to amend the Education Act and various legislative provisions*, S.Q. 1997, c. 96.

204 *Charter of the French Language*, *supra*, note 195. Section 72 establishes French as the mandatory language of instruction, with the main exceptions in favour of English being found in s. 73. The effect of the requirement that French be the mandatory language of instruction is reinforced by provisions in s. 78.1 declaring that "no person may permit or tolerate a child's receiving instruction in English if he is ineligible therefor."

205 *Ibid.* at subsections 73(1) and (2).

206 *Canadian Charter of Rights and Freedoms*, *supra*, note 7 at para. 23(1)(b). Subsection 23(2) of the *Canadian Charter* sets out the eligibility rule applicable to siblings: "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."

207 *Charter of the French Language*, *supra*, note 195 at subsections 73(3), (4) and (5).

208 *Ibid.* at s. 86.1 and *Application to English-speaking persons from New Brunswick*, R.R.Q. 1997, c. C-11, r.0.1.

209 *Charter of the French Language*, *supra*, note 195 at s. 81 (learning disabilities) and s. 85 (temporary residents).

Other provisions in the latter statute establish qualified exceptions for Cree, Inuit and Naskapi Native Persons (s. 88); still other exceptions for native persons are found in the *Language of Instruction (Children Residing on Indian Reserves) Regulation*, R.R.Q. 1997, c. C-11, r. 6.1.

210 Specific requirements of proof are set out in *Regulation respecting requests to receive instruction in English*, R.R.Q. 1977, c. C-11, r.4.2; see ss 3-4 of the Regulation for requests based on past language of instruction of the parent.

211 *Ibid.* at s. 1 (request to school body having jurisdiction) and ss 13-15 (transmission to designated person within the Ministry of Education and final decision).

212 *Charter of the French Language*, *supra*, note 195 at ss 82-83.

213 *Ibid.* at 83.1.

214 *Id.* at s. 85.1.

215 *Education Act*, *supra*, note 203 at s. 36 (as am. by Bill 180 at s. 13).

216 *Ibid.* at s. 39 (as am. by Bill 180 at s. 13).

217 *Id.* at s. 111 where the authority to divide the territory of Quebec into French and English-language school boards is found:

The Government of Quebec shall, by order, divide the territory of Québec into two groups of territories; one of territories for French language school boards and the other, of territories for English language school boards...

Certain boards for native peoples, such as the Cree School Board and the Kativik School Board, are excluded under Section 111 from the division into French and English territories. *Division of the territory of Québec into territories for French language school boards and territories for English language school boards*, O.C. 1014-97, 13 August 1997, G.O.Q. 1997.II.5572, established the new English- and French-language boards.

218 *An Act respecting school elections*, R.S.Q. 1997, c. E-2.3, s. 6, as am. to September 30, 1997.

219 *Education Act*, *supra*, note 203 at s. 143.

220 *An Act respecting school elections*, *supra*, note 218 at s. 15.

221 *Education Act*, *supra*, note 203 at s. 205.

222 This possibility is provided for in *An Act respecting school elections*, *supra*, note 218 at s. 15:

Any elector who... does not have a child who is admitted to educational services provided in schools of any school board having jurisdiction over the territory in which the elector is domiciled may vote at the election of the commissioners of the French language school board, unless he has chosen to vote at the election of the commissioners of the English language school board having jurisdiction over the territory in which he is domiciled.

Ibid. at ss 17-18 for requirements regarding time limits and written notice.

223 *Education Act*, *supra*, note 203 at s. 189 (as am. by Bill 180 at s. 34).

224 *Ibid.* at ss 143 (as am. by Bill 180 at s. 17) and s. 148 (as am. by Bill 109 at s. 8).

225 *An Act respecting school elections*, *supra*, note 218 at ss 20-21.

226 *Education Act*, *supra*, note 203 at s. 212.

227 *Ibid.* at s. 461.

228 *Id.* at s. 462.

229 The obligation of schools board to follow the basic school regulation is found in the *Education Act*, *supra*, note 203 at s. 222 (as am. by Bill 180 at s. 60). The regulations are (for elementary and secondary levels): *Regulation to amend*

the Basic school regulations for preschool and elementary school education, R.R.Q. 1997, c. I-13.3, r.3, s. 447 and *Regulation to amend the Basic school regulation for secondary school education*, R.R.Q. 1997, c. I-13.3, r.4, s. 447.

230 *Ibid.* at s. 222 (as am. by Bill 180 at s. 60).

231 *Id.* at s. 222.1 (as am. by Bill 180 at s. 61).

232 *Id.* at s. 230. Section 229 does permit a school board to adopt criteria for "the introduction of new methods of instruction" and "the selection of textbooks and instructional material required for the programs of studies established by the Minister and for the programs of studies adopted by the school board".

233 *Id.* at s. 266.

234 *Regulation to amend the Regulation respecting the norms, conditions and procedure for disposing of an immovable of a school board*, R.R.Q. 1997, c. I-13.1, r.2, s. 452 which provides detailed rules for the sale of land or buildings whose market value is more than \$100,000; and *Regulation to amend the Regulation respecting construction contracts for immovables of school boards*, R.R.Q. 1997, c. I-13.3 r.0.01, s. 452 for mandatory procedures regarding construction projects estimated at over \$50,000.

235 *Education Act*, *supra*, note 203 at s. 259.

236 *Ibid.* at s. 260.

237 *Id.* at s. 261.

238 *Id.* at Chapter VII, Division I setting out the powers of regulation of the government.

239 *Id.* at Chapter VII, Division II.1, ss 477.2 to 477.28 (as am. per Bill 180 at s. 145).

240 *Id.* at Chapter III, Division II, s. 42 (as am. per Bill 180 at s. 13).

241 *Id.* at Chapter III, Division III (as am. per Bill 180).

242 *Id.* at s. 303 which provides, in part, that "a school board, other than a school board situated in whole or in part on the Island of Montréal, may levy a school tax."

243 *Id.* at s. 304.

244 This would appear to be the net result of s. 305 of the *Education Act*, *id.*:

An immovable owned by a natural person to whom section 304 does not apply and whose name is entered on the latest list of electors of a school board having jurisdiction over the territory where the immovable is situated or who has since effected the voting option referred to in section 18 of the Act respecting school elections (chapter E-2.3) is taxable exclusively by that school board.

245 *Id.* at s. 306.

246 *Id.* at 307.

247 *Id.* at ss 312-313.

248 *Id.* at ss 308, 345-353.

249 *Id.* at Chapter VI.

250 *Id.* at ss 434-434.1 for levying of taxes and s. 434.2 for rates of taxation.

251 *Id.* at s. 439.

252 *Id.* at s. 288.

253 *Id.* at s. 423.

254 *Id.* at s. 472.

255 *Id.* at s. 473.1.

256 *A.G. (Que.) v. Quebec Protestant School Boards*, supra, note 199.

257 These provisions were found in paragraphs 73(b), (c) and (d) of the *Charter of the French Language*, supra, note 195 (as it then stood), which allowed instruction in English to:

(b) a child whose father or mother domiciled in Québec on 26 August 1977, received his or her elementary instruction in English outside Québec;

(c) a child who, in his last year of school in Québec before 26 August 1977, was lawfully receiving his instruction in English, in a public kindergarten class or in an elementary or secondary school;

(d) the younger brothers and sisters of a child described in paragraph c).

258 *Ibid.* at subsection 73(a).

259 This is a reference to the general interpretive provisions found in the *Canadian Charter of Rights and Freedoms*, supra, note 7 at s. 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.

260 *A.G. (Que.) v. Quebec Protestant School Boards*, supra, note 199 at 86.

261 *Ibid.* at 81. The court also pointed out that the type of protection accorded Anglophones in Quebec before Bill 101 was the type of protection s. 23 was designed to guarantee. As the court said, *id.* at 84:

The framers' objective appears simple, and may readily be inferred from the concrete method used by them: to adopt a general rule guaranteeing the Francophone and Anglophone minorities in Canada an important part of the rights which the Anglophone minority in Quebec had enjoyed with respect to the language of instruction before Bill 101 was adopted.

262 *Id.* at 79.

263 Two important cases in this regard are: *Quebec Association of Protestant School Boards v. A. G. of Quebec*, [1985] C.S. 872 (Que. Sup. Ct) and *Reference Re Education Act* (Que.), [1990] R.J.Q. 2498 (Que. Sup. Ct); [1993] 2 S.C.R. 511.

264 *Griffin v. Blainville Deux-Montagnes Commission Scolaire Régionale* (1990), 63 D.L.R. (4th) 37 (Que. Sup. Ct).

265 *Ibid.* at 63.

266 *Lakeshore School Board v. Szasz et al.* (12 August 1996), Montreal 500-05-020615-967 (Que. Sup. Ct.).

267 *Education Act*, R.S.O. 1990, c. E-2, s. 292.

268 *Canadian Charter of Rights and Freedoms*, supra, note 7.

269 *Education Act*, supra, note 267 at ss 314-315 for specific provisions regarding elections. The authority of the Minister to appoint in order to ensure a minimum of three members can be found in subsection 315.1(15). Substantial reform of the educational system in 1997 has led to the repeal of large portions of the *Education Act*, including the sections referred to here, and the creation of a new system of governance.

270 *Ibid.* at subsection 318(1), now repealed.

271 *Id.* at subsection 318(3); the definition of "centralized services" is found in subsection 318(5), now repealed.

272 *Id.* at 292, now repealed.

273 *Id.* at 297(5), now repealed, although the Commission itself still exists and plays a role under the new system of governance.

274 *Id.* at s. 308, now repealed.

275 In the case of Toronto, the French-language school authority was known as The Metropolitan Toronto French-

language School Council, created under the *Municipality of Metropolitan Toronto Act*, R.S.O. 1990, c. M.62; in the case of Ottawa, the public board was created by *Ottawa-Carleton French-Language School Board Act*, R.S.O. 1990, c. O.44, as am. by *An Act to amend certain Acts related to The Regional Municipality of Ottawa-Carleton and to amend the Education Act in respect of French-language School Boards*, S.O. 1994, c.1; in the case of Prescott-Russell, the change was made by way of regulation: *Prescott and Russell County Roman Catholic French-Language and English-Language Separate School Boards Regulation*, O. Reg. 479/91 as am. by O. Reg. 759/91.

276 This is now found in subsection 1(1) of the *Education Act*, supra, note 267, by virtue of the *Education Quality Improvement Act*, S.O. 1997, c. 31 (Bill 160, given royal assent on December 8, 1997). The same definition of "French-speaking person" was found in the *Education Act* prior to these recent amendments, at s. 288, now repealed.

277 The issues of residency and support of a given board are set out in new ss 33 and 36 of the *Education Act* as amended by Bill 160, *ibid*.

278 By virtue of Bill 160, *id.*, Part XII of the *Education Act* was replaced by a new Part XII. See s. 288 of the *Education Act*, supra, note 267, as amended, for the obligation of French-language district school boards to operate classes, etc. in French only.

279 *Id.* at ss 290-291.

280 *Id.* at s. 35 with respect to elementary level education.

281 *Id.* at ss 42-43.

282 *Id.* at s. 293.

283 *Id.* at subsection 1(1).

284 *Id.* at s. 292.

285 *Id.* at subsection 1(1).

286 *Id.*

287 Two major pieces of legislation have spearheaded this rationalization of school board structures: Bill 104, the *Fewer School Boards Act*, enacted under the title *An Act to improve the accountability, effectiveness and quality of Ontario's school system by permitting a reduction in the number of school boards, establishing an Educational Improvement Commission to oversee the transition to the new system, providing for certain matters related to elections in 1997 and making other improvements to the Education Act and the Municipal Elections Act, 1996*, S.O. 1997, c. 3, royal assent April 24, 1997; and Bill 160, supra, note 276, royal assent December 8, 1997. These Acts effected major amendments to the *Education Act*, supra, note 267.

288 *Education Act*, as am. by Bill 160, supra, note 276 at subsection 58.1(2).

289 *Establishment and Areas of Jurisdiction of District School Boards*, O. Reg. 185/97, filed May 20, 1997.

290 *Education Act*, supra, note 267 at subsection 327(2) per *Fewer School Boards Act*, (Bill 104) supra, note 287 at s. 7.

291 *Education Act*, *ibid.* as am. by Bill 160, supra, note 276 at ss 170-171 which provides a long list of duties and powers.

292 These conclusions seem to follow from a reading of subsection 1(10) and ss 50.1, 54, 58.8 and 58.9 of the *Education Act*, *id.*

293 *Id.* at subsection 1(1).

294 *Id.* at subsection 294(2). This provision is based upon old s. 297 (now repealed) of the Act setting out the responsibilities of a French-Language Advisory Committee. Although some additions have been made, the scope of proposals that can now be made to a school authority is substantially the same as the scope of advice a Committee could have made under the previous legislation.

295 *Id.* at subsection 294(1).

296 Id. at subsection 294(3) for the complete list.

297 Id. at s. 295.

298 Id. at subsections 295(7) and (9).

299 Id. at s. 295.

300 Id. at ss 296 and 297 for mediation procedures.

301 Id. at s. 299, for the role of the Minister in settling disputes.

302 Id. at ss 201, 202-205, with respect to Committees; paragraph 170(1):17.1 with respect to School Councils.

303 The Commission was created by the *Fewer School Boards Act*, supra, note 287 at s. 8, which added s. 334 and following to the *Education Act*, supra, note 267. Some of the functions and powers of the Commission have been repealed or altered by Bill 160. In this regard changes have been made to s. 335 and s. 336 has been repealed: Bill 160, supra, note 276 at s. 133.

304 *Education Act*, ibid. at para. 335(3)(a) and subsection 334(2) per *Fewer School Boards Act*, ibid. at s. 8.

305 *Education Act*, id. at subsection 234(1). (Bill 160, supra, note 276, enacted a new Part IX (ss 231-259) entitled Finance).

306 Id. at subsection 234(2).

307 Id. at subsection 234(3).

308 Id. at s. 257.12.

309 Id. at s. 257.8.

310 Id. at subsection 257.9(1) for the distribution rules. For example, para. 259(1):3 provides that: "An amount levied on property taxable for French-language public district school board purposes shall be distributed to the French-language public district school board in the area of the jurisdiction of which the property is located." Paragraph 257.9(2) of the Act provides that: "Property is taxable for a board's purposes if it is assessed to the support of a board." In other words, one has to be a supporter of a board (and on the assessment roll) in order for one's residential property taxes to be distributed to it.

311 *Assessment Act*, R.S.O. 1990, c. A.31.

312 *Education Act*, supra, note 267, at subsections 236(3) and (4).

313 Ibid. at subsection 238(1) for the definition of designated ratepayer. Division B rates levied against ratepayers are distributed according to the rules set out in ss 257.8 and 257.9

314 Id. at subsection 237(3).

315 Id. at subsections 237(9) and (11).

316 Id. at s. 257.54.

317 Id. at subsections 257.52(1) and (2).

318 Id. at subsection 1(1).

319 Reference Re *Education Act of Ontario and Minority Language Education Rights* (1984), 10 D.L.R. (4th) 491 (Ont. C.A.).

320 Ibid. at 519-521 for a more detailed discussion of the legislative provisions then in place.

321 Id. at 520.

322 Id. at 521.

323 Id. at 522.

324 Id. While the Court of Appeal found that a school board was empowered to enter into agreements with a neighbouring board, there was no compulsion to do so. It thus envisaged a possible conflict between the territorial limitations of school boards and Section 23:

...[Section] 23 of the *Charter*... refers to the provision of instructional services and facilities wherever in the province the numbers are sufficient to justify them. This provision transcends the geographical boundaries of school boards. One example of inconsistency can be seen from considering a situation where parents who qualify for minority language instruction for their children under s. 23 of the *Charter* live relatively close to each other but within two distinct school board districts designated by the *Education Act*. Those parents could be denied the rights guaranteed them by the *Charter* as a result of their residing in different school board districts. Once again, minority language education rights should not be left to the unfettered and undirected discretion of local school boards no matter how competent and well-meaning they may be.

325 Id. at 531. The Court of Appeal quoted with approval the following passage from the 1982 Report of the Joint Committee of French Language Elementary and Secondary Schools:

[T]he existing legislation... entrusts the governance of French language schools to school boards of whom the majority of trustees are anglophones. Since the early '70s, this situation has given rise to many problems and conflicts. These difficulties are due to the fact that in many instances, anglophone trustees have great difficulty in understanding the education needs and aspirations of the Franco-Ontarians, and consequently in meeting these needs and aspirations in an appropriate manner.

326 Id. at 533.

327 *Marchand v. Simcoe County Board of Education et al.* (1986), 55 O.R. (2d) 638.

328 Ibid. at 660.

329 *Conseil des écoles séparées catholiques romaines de Dufferin et Peel et al. v. Ontario (Ministre de l'Éducation et de la Formation)* (1996), 30 O.R. (3d) 681 (Ont. Ct. (Gen. Div.)).

330 Ibid. at 684.

331 *Conseil des écoles séparées catholiques romaines de Dufferin et Peel et al. v. Ontario (Ministre de l'Éducation et de la Formation)* (1996), 30 O.R. (3d) 681, at 686-687 (Ont. C.A.) (8 July 1996).

332 Ibid.

333 This cause of action is known as *J. Séguin, N. Bourgeois, J.-C. Landry et al. v. The Queen in Right of Ontario et al.* (filed 13 November 1992) Cornwall 3831/92 (Ont. Ct. (Gen. Div.)). The original claim was filed in November 1992; statement of defense February 1994; factum of the plaintiffs, August 1996. Both legislative provisions then in existence and administrative practices related to them (regarding property taxes and how one became a supporter of a particular school board) were placed in question by this action.

334 This was done by *Establishment and Areas of Jurisdiction of District School Boards*, supra, note 289 at s. 12.7 which established the area of jurisdiction of French-language Separate District School Board 65.

335 *Ontario English Catholic Teachers' Association et al. v. Attorney General of Ontario* (filed 9 December 1997), Toronto 97CV137668 (Ont.Ct. (Gen. Div.)) and *Ontario Public School Boards' Association et al. v. Attorney General of Ontario* (4 August 1997), Toronto 97CV125173 (Ont.Ct. (Gen. Div.)). See also *ibid.* (filed 9 January 1998), Toronto 98CV139317 (Ont.Ct. (Gen. Div.)).

336 *A. Berthelot, J. Cayouette, K. Burke, C. Blanchard, C. Rail, la Section de langue française du Conseil des écoles séparées (C.R.) du district de la Rive-Nord, la Section française du Conseil des écoles séparées (C.R.) du district de Chapleau, la Section française du Conseil des écoles séparées de Sault Ste-Marie, la Section française du Conseil des écoles séparées catholiques du district de Michipicoten v. La Commission d'amélioration de l'éducation, le Ministre de l'Éducation et de la Formation, le Secrétaire de la ville de Sudbury, le Secrétaire de la ville d'Elliot Lake et le Secrétaire de la ville de Sault Ste-Marie* (22 October 1997), Sault Ste-Marie 17431/97 (Ont.Ct. (Gen. Div.)) still pending.

337 A. Martel, *supra*, note 56 at 115.

338 The history of French-language schools in Manitoba is set out in a Manitoba Court of Appeal decision (Reference Re *Manitoba Public Schools Act*, s. 79(3), (4) & (7), [1990] 2 W.W.R. 289 (Man. C.A.)) which ultimately went to the Supreme Court of Canada (reviewed in Chapter 2 of this study). Referring to the situation as it stood in the 1970s, Mr. Justice Twaddle of the Court of Appeal remarked at p. 357 of the judgment:

The legislation did not require school boards to provide separate school buildings or facilities for the accommodation of French-language classes. Nonetheless, in some divisions, where the number of French-language classes warranted the creation of separate school, boards did provide a separate building. The minister was empowered to decide in which of the two languages of education a school should be administered and operated. In consequence, a few schools in the province became functionally French.

339 Martel, *supra*, note 56 at 116.

340 By the late 1980s the majority of Francophone students were enrolled in "Total français" programs. A review of the changes in French-language education can be found in a report submitted to the Minister of Education in 1988: *A Report on Major Developments in French-language education in Manitoba from 1970 to 1987*, Nicholls and Roy. Extracts of the report are found in the judgement of the Manitoba Court of Appeal.

341 Mr. Justice Twaddle of the Manitoba Court of Appeal (*supra*, note 338 at 358 of the judgment) pointed out that the "Partial français" program was delivered in two different types of schools: "the French bilingual school and the school in which both francophone and anglophone pupils are taught, but in different classes." With respect to a bilingual school, he described it as "one in which the pupils generally came from homes in which French is spoken as a first language. It is call "bilingual" because some subjects other than English itself are taught in English to a least some of the pupils."

342 Demographic realities did result in the Red River school board being controlled by French-speaking school trustees, thus creating a *de facto* Francophone school board before legislation specifically provided for Francophone school governance: A. Martel, *supra*, note 56 at 120.

343 *Ibid.* at 121.

344 Reference Re *Public Schools Act (Man)*, [1993] 1 S.C.R. 839.

345 Changes were introduced by the *Public Schools Amendment Act*, S.M. 1993, c. 33.

346 *Public Schools Act*, R.S.M. 1987, c. P250, C.C.S.M. c. P250, as amended to February 12, 1998. As mentioned in the previous footnote, important amendments to the Act were made in 1993. The Francophone School Division is established under Part I.1; definitions are found in s. 21.1.

347 *Canadian Charter of Rights and Freedoms*, *supra*, note 7 at para. 23(1)(b).

348 *Ibid.* at subsection 23(2).

349 *Public Schools Act*, *supra*, note 346 at s. 21.1.

350 *Francophone Schools Governance Regulation*, Man. Reg. 202/93, s. 41.

351 *Public Schools Act*, *supra*, note 346 at subsection 21.15(3).

352 *Ibid.* at subsection 21.15(4).

353 *Id.* at subsection 21.15(5) and s. 21.16.

354 The right of appeal applies to decisions regarding the admission of children of parents who meet the definition of "entitled person" and regarding the admission of children attending Francophone programs transferred to the jurisdiction of the Francophone board. *Id.* at s. 21.17.

355 *Id.* at para. 21.15(1)(b).

356 *Id.* at subsections 21.5(1) and (2).

357 Id. at subsection 21.5(2).

358 Id. at s. 21.29.

359 Id. at s. 21.1.

360 Id. at subsection 21.15(2). A programme d'accueil is defined at s. 21.1 as "a program designed to improve the French language skills of pupils whose French language skills do not meet the language requirements of the francophone programs."

361 Id. at s. 21.31.

362 Id. at subsection 21.31(3).

363 Id. at para. 21.5(1)(a).

364 Id. at ss 21.18 to 21.24 for extensive statutory provisions governing the initial transfer of programs and schools. See also Man. Reg. 202/93, *supra*, note 350.

365 *Public Schools Act*, *supra*, note 346 at s. 21.20.

366 Essentially three options were available in the case of shared facilities then managed by a majority language board: (i) the school would be transferred to the Francophone board for its exclusive use; (ii) the school would be transferred to the Francophone board but subject to the right of the other board to share its use; or (iii) the school would be retained by the board already exercising jurisdiction but subject to the right of the francophone board to share its use. Id. at subsections 21.21(1) and (2).

367 Id. at subsection 21.21(4).

368 Id. at s. 21.24.

369 Id. at ss 21.25 to 21.28.

370 Id. at subsection 21.25(2).

371 Id. at subsection 21.25(3) regarding referral: ss 8-9 regarding the establishment of the Board of Reference; *Francophone Schools Governance Regulation*, *supra*, note 350 at s.42 concerning general guidelines for decisions of the Board.

372 *Public Schools Act*, *supra*, note 346 at subsection 21.26(1).

373 Man. Reg. 202/93, *supra*, note 350. The boundaries of the division are set out in Schedule A to the *Regulation*; the names and boundaries of wards are found in Schedules C and D.

374 *Public Schools Act*, *supra*, note 346 at ss 21.4 to 21.8.

375 Man. Reg. 202/93, *supra*, note 350 at s. 7.

376 *Public Schools Act*, *supra*, note 346 at subsection 21.36(2).

377 By virtue of subsection 14(1) of the *Francophone Schools Governance Regulation*, *supra*, note 350, a person could only vote in one ward and, if qualified to vote in more than one, had to choose one or the other.

378 *Public Schools Act*, *supra*, note 346 at subsection 21.36(3).

379 *Ibid.* at subsection 21.36(1). Subsection 21.36(5) allows a person to vote in elections for a regional committee as well as a majority language school board.

380 Id. at subsection 21.37(1). Categories of persons disqualified from running (such as employees of the Francophone School Division) are set out in subsection 21.37(2). In addition, no person may be a regional committee member of the Francophone school board and a trustee (i.e. a board member) of another board at the same time: subsection 21.40(7).

381 Man. Reg., *supra*, note 350 at para. 25(1)(a).

382 *Public Schools Act*, supra, note 346 at subsection 21.9(2) for the committee responsibilities.

383 *Ibid.* at s. 21.10.

384 *Francophone Schools Governance Regulation*, supra, note 350 at s. 6 which provides that there shall be a total of 11 trustees: two from each of the Southern and Western Regions, three from the Eastern Region, and four from the Urban Region.

385 *Public Schools Act*, supra, note 346 at subsection 21.5(1).

386 *Ibid.* at s. 1. The same section defines "resident" to be a person living in a particular school division or district and who has his or her chief place of abode or dwelling in that school division or district.

387 *Id.* at subsections 21.6(1) and (2).

388 *Id.* at subsection 21.15(1).

389 *Id.* at ss 41-47.

390 *Id.* at ss 48-90.

391 *Education Administration Act*, R.S.M. 1987, c. E10, C.C.S.M. c. E10.

392 *Public Schools Act*, supra, note 346 at para. 48(1)(e) and (v).

393 *Education Administration Act*, supra, note 391 at subsection 3(1).

394 *Ibid.* at s. 9.

395 *Id.* at ss 10-19 for the creation and operation of the Advisory Board.

396 *Public Schools Act*, supra, note 346 at subsection 41(1).

397 *Ibid.* at ss 51 and 53.

398 *Id.* at para. 41(1)(o).

399 *Id.* at s. 74.

400 *Public Schools Finance Board Act*, R.S.M. 1987, c.P260, C.C.S.M. c. P260, s.2.

401 *Ibid.* at ss 3 and 8; *Public Schools Act*, supra, note 346 at subsection 174(1).

402 *Public Schools Act*, *ibid.* at s. 21.33 for the Francophone board and s. 178 for other boards.

403 *Id.* at subsection 179(1).

404 *Id.* at subsections 179(1) and (1.1) for Finance Board estimates; subsection 173(6) for ministerial authority.

405 *Id.* at subsection 181(1).

406 *Id.* at subsection 173(4) for regulatory power; ss 181-186 for power of Lieutenant-Governor in Council, Finance Board and role of municipalities.

407 *Id.* at subsections 21.34(c) and 21.34(d).

408 *Id.* at subsection 21.34(a).

409 *Id.* at para. 21.5(1)(b).

410 *Id.* at s. 21.7.

411 *Schools Finance Program Regulation*, Man. Reg. 221/96.

412 *Public Schools Act*, supra, note 346 at s. 197.

413 *Id.* at subsection 21.22(3).

414 Id. at subsection 186.2(1).

415 Id. at s. 190.1 and subsection 21.34(b).

416 Id. at subsections 213(1) to (7).

417 Id. at ss 220-221.

418 Reference Re *Manitoba Public Schools Act*, s. 79(3), (4) & (7), [1990] 2 W.W.R. 289 (Man. C.A.). This reference to the Manitoba Court of Appeal originated in litigation commenced in 1986 by the Fédération provinciale des comités de parents inc. before the Court of Queen's Bench. The judgment of the Supreme Court of Canada in this case can be found at: Reference Re *Public Schools Act (Man.)*, [1993] 1 S.C.R. 839.

419 *Public Schools Act*, supra, note 346 at subsection 79(3).

420 Ibid. at subsection 79(4).

421 Under subsection 21.18(1) of the *Public Schools Act*, supra, note 346, such consultations were mandatory:

Before the first election of regional committees, the minister shall consult with parents who are entitled persons about their wishes to have francophone programs transferred from provider school boards to the francophone school board.

422 Ibid. at subsection 21.6(1) which provides that the francophone school board "may enter into agreements with other school boards or the minister, or both, regarding (a) the provision by the francophone school board of programs outside its boundaries or in schools it does not operate; and (b) the payment or sharing of costs respecting the delivery of those programs." Such agreements may be ordered by the minister under subsection 21.6(2):

If the minister considers it advisable to do so or necessary under section 23 of the *Charter*, the minister may direct the francophone school board and another school board to enter into an agreement under subsection (1), and in that case the minister may set some or all of the terms of the agreement.

423 *Maurice Hince, Donald Gauthier, Lilian Sorin, Richard Fay, Alain Toupin and La Fédération provinciale des Comités de parents inc. v. Government of Manitoba* (action filed 9 June 1997), Winnipeg C197-01-02808 (Man. Q.B.).

424 *Education Act, 1995*, R.S.S. 1995, c. E-O.2

425 Ibid. at subsection 143(1) on eligibility.

426 Id. at s. 2 (Interpretation).

427 Id.

428 Id.

429 These nine areas and their corresponding conseils scolaires are: l'école St-Isidore, l'école Providence, la Vieille, Bellegarde, Battlefords, Saskatoon, Regina (two schools), Prince Albert, and Zenon Park; the school in Ferland and in Pointeix are represented by a parents' committee. With the exception of Zenon Park, elections to these conseils scolaires took place in June of 1994: Conseil général des écoles fransaskoises: *The Fransaskois Education Component at a glance*, Regina (8 February 1998) 7.

430 *Education Act, 1995*, supra, note 424, at subsection 180(4) which specifically states that "French is the language of instruction in fransaskois schools and in minority language instruction programs".

431 Ibid. at s. 181.

432 Id. at s. 43.

433 Id. at para. 44(3)(d).

434 Id. at s. 2 (Fransaskois school).

435 Id. at s. 2 (Minority language instruction program).

436 Id. at s. 2.

437 Members of a conseil scolaire are elected by Francophone residents of the Francophone education area over which the conseil has jurisdiction, the details and procedures of such elections being set out in regulations. Eligibility rules to be a candidate are set out in s. 65 of the *Education Act, 1995*, id. Regulations governing elections are provided for in s. 64. In this regard see: *Conseils Scolaires Election Regulations*, Sask. Reg. 16/93.

438 *Education Act, 1995*, supra, note 424 at subsection 43(1).

439 Ibid. at subsection 44(3).

440 Id. at s. 47.

441 Id. at s. 181.

442 Id. at ss 46-47.

443 Id. at subsection 180(3).

444 Id. at subsection 3(2).

445 Id. at subsections 4(1) to (5).

446 Id. at s. 32.

447 Id. at para. 31(1)(e).

448 Conseil général des écoles fransaskoises, [Trans.] *Recommendations on a new administrative structure for the fransaskoise education component presented to Mrs. Pat Atkinson, Minister of Education*, October 22, 1997.

449 *Education Act, 1995*, supra, note 424 at ss 277-295.

450 Ibid. at subsection 278(4).

451 Id. at ss 284-295.

452 Id. at subsection 313(1).

453 Id. at subsection 313(4).

454 Id. at subsection 313(3) and s. 314.

455 Id. at subsection 315(4).

456 Id. at ss 316-317.

457 *1997 School Grant Regulations*, Sask. Reg. 3/97.

458 Ibid. at s. 8.

459 Id. at ss 9-16.

460 Id. at subsections 8(3) and (4).

461 Id. at para. 2(1)(o).

462 Id. at Appendix, Table 9.

463 Id. at Part III, ss 17-23.

464 *Commission des Écoles Fransaskoises Inc. v. Government of Saskatchewan*, [1988] 3 W.W.R. 354; (1988), 48 D.L.R. (4th) 315.

465 Ibid. at 333. As the court pointed out:

...there may be areas where there are not 15 or more pupils eligible for enrolment in an individual school division but where those in two or more adjoining divisions would greatly exceed that number. In such a

circumstance there would be no way for the parents or guardians of such children to compel a board of education to follow the procedure set out in the regulation. Thus, the regulation could have the effect of limiting or denying the right to school instruction in the French language even though there are, in a given area, sufficient number of children to warrant the provision of such instruction.

466 Id. at p. 334. The court felt that these conditions unjustifiably limited the rights set out in s. 23: "The rights created by s. 23 cannot be made to depend upon the length of time that a programme might be viable or upon the prior accommodation of the balance of the student population in the area."

467 Id. at p. 329. The Court of Queen's Bench took the view that:

[w]here there is a sufficient number of children of eligible parents to warrant the provision of minority language instruction as guaranteed by s. 23(3)(a), but not a sufficient number to warrant the provision of separate facility as contemplated by s. 23(3)(b), there is no concurrent right of governance. In that situation the system of parents' advisory councils presently in place is compatible with the *Charter*. On the other hand, where the number of eligible children is sufficient to warrant the provision of a separate facility, then the system of parents' advisory councils does not meet the requirements of the *Charter* because the legislative scheme fails to recognize, in that event, the right of the minority group to manage and control.

This reasoning has now been replaced with the sliding scale of requirements and corresponding levels of management and control, as articulated by the Supreme Court of Canada.

468 A. Martel, *supra*, note 56 at 97-98.

469 *School Act*, R.S.A. 1980, c. S-3.

470 *School Act*, S.A. 1988, c. S-3.1.

471 *School Amendment Act, 1993*, S.A. 1993 c. 24, given royal assent in May 1994.

472 *School Act*, *supra*, note 470 at subsection 5(1) as am. to June 18, 1997. Section 4 also recognizes that "every student is entitled to receive school instruction in English".

473 *Ibid.* at para. 1(1)(f.1).

474 Id. at subsection 5(2):

The Lieutenant-Governor in Council may make regulations

(a) respecting the education generally of students whose parents are Francophones;

(b) respecting co-ordinating councils;

(c) notwithstanding any other provisions of this Act, respecting any matter required to give effect to subsection (1).

475 Id. at subsections 5(3) and (4) for reference to students and Regional authorities:

(3) A student who is enrolled in a school operated by a Regional authority is entitled to receive school instruction in French.

(4) A Regional authority shall provide to each student enrolled in a school operated by it an education program consistent with the requirements of this Act and the regulations.

476 Id. at para. 1(1)(q).

477 Id. at s. 223.1 which empowers the Minister to establish such regions and determine their boundaries. It is found in Part 8.1 called Establishment and Dissolution of Francophone Education Regions (enacted in 1993: *School Amendment Act, 1993*, *supra*, note 471).

478 *School Act*, *id.* at ss 223.3 and 223.6.

479 Id. at subsection 2.1(1) which identifies the parts of the Act which apply to Francophone Regional authorities as if they were school boards. These include provisions dealing with operation and management powers of school boards, employment of teachers and other staff, and acquisition and control over property.

480 Id. at subsection 223.3(2).

481 Id. at s. 223.4. To be an elector one does not have to be resident within the geographical limits of the region in question; it is sufficient to have a child registered in a school operated by the authority.

482 Id. at subsection 223.4(4).

483 Id. at subsection 223.4(1) and s. 27 of the *Local Authorities Election Act*, S.A. 1983, c. L-27.5. A regional authority may choose to have nominations done according to wards.

484 In addition, a candidate must not be otherwise ineligible under the *Local Authorities Election Act*, *ibid.* This Act disqualifies certain persons who may have a conflict of interest.

485 *School Act*, *supra*, note 470 at subsection 223.4(5).

486 *Ibid.* at subsection 44(2) which applies to Regional authorities. The same section stipulates that this power is subject to s. 25 (Ministerial powers) and the regulations.

487 Id. at Parts 4 and 5.

488 Id. at ss 94-96.

489 Id. at s. 95 and *Superintendent of Schools Regulation*, Alta Reg. 41/89.

490 *School Act*, *supra*, note 470 at s. 97.

491 Id., generally at Part 7. With respect to the acquisition of property, subsection 183(1) specifically authorizes a board (hence a Regional authority) "to acquire by gift, lease or purchase and hold any real or personal property..." and to "acquire, build, furnish or rent buildings or portions of buildings."

492 *Disposition of Property Regulation*, Alta Reg. 69/89.

493 *School Act*, *supra*, note 470 at ss 189-193 which set out procedures and establish the School Buildings Board. The latter reviews plans for the construction of school buildings or additions to existing school buildings with a view to assess their necessity and their nature and suitability. See also the *School Buildings and Tendering Regulation*, Alta Reg. 383/88. Section 185 of the Act also establishes a special procedure for the construction of non-school buildings.

494 *School Act*, *ibid.* at subsections 223.3(4) and (5). When no agreement is entered into within a reasonable time the Minister may "make an order respecting any matter the Minister considers necessary."

495 Id. at s. 6. The Minister is given the power to make regulations governing the provision of instruction in any language so authorized.

496 Id. at ss 223.6 and 223.7.

497 *School Grants Regulation*, Alta Reg. 72/95, as am. by Alta Reg. 167/97.

498 Department of Education of Alberta, *Alberta Education Framework Funding: School Boards in the 195-96 School Year; A Guide for School Boards, Administrators, Staff Members and School Councils* (1996), 24 pages (revised March 1998: only rates have changed for 1996, 1997 and 1998).

499 *School Act*, *supra*, note 470 at Divisions 2 and 4 of Part 6.

500 *Special School Tax Levy Plebiscite Regulation*, Alta Reg. 78/95 and *School Act*, *ibid.* at Division 7 of Part 6.

501 *Mahé v. Alberta*, [1990] 1 R.C.S. 342 (S.C.C.); (1987), 42 D.L.R. (4th) 514 (Alta C.A.); (1985), 22 D.L.R. (4th) 24 (Alta Q.B.). The decision of the Supreme Court of Canada is discussed in detail in Chapter 2 of the present study.

502 Factual findings by the trial and appeal courts were not always consistent. However, the trial judge pointed out that the school division in question intended to move its French immersion program out of the school (Maurice-Lavallée)

classed as a French language school. This suggests that the homogeneous French-language nature of the school was far from proven at the time of trial. *Ibid.*, (1985), 22 D.L.R. (4th) 24 (Alta Q.B.) at 29. The trial judge also found that "under the present system of French language instruction...French language courses have become known as "immersion courses", and evidence would indicate that the emphasis is on the French language as a second language." (Id. at 37-38). He also found that "for the most part, the existing French instruction schools in Alberta are 'Immersion Schools'". (Id. at 38).

503 *School Act*, *supra*, note 469.

504 These statutory provisions are reproduced in the trial judge's decision, *Mahé v. Alberta*, *supra*, note 501, (1985), 22 D.L.R. (4th) 24 (Alta Q.B.) at 31.

505 *Ibid.*, (1987), 42 D.L.R. (4th) 514 (Alta C.A.) at 544.

506 In speaking of French-language instruction, as opposed to facilities, the Court of Appeal declared: "Because...institutional arrangements for the implementation of s. 23(3)(a) rights fall within the jurisdiction of Alberta, I will not order Alberta's compliance." (Id. at 544) When it came to the issue of legislative silence regarding the right to minority language educational facilities, the Court remarked: "Of course, the other attack is that the Act fails to establish any machinery for the creation of s. 23(3)(b) facilities. It is correct that it does not, but I cannot say that it must because I do not know, as already stated, that these are needed in Alberta." (Id. at 545) The Court took the view that insufficient evidence had been produced by the plaintiff to prove the proposition.

507 *Id.*, [1990] 1 S.C.R. 342 at 365.

508 *Id.*, (1987), 42 D.L.R. (4th) 514 (Alta C.A.) at 537.

509 Regarding numbers and costs, the Court of Appeal found: "Even on the basis of the plaintiffs' evidence, their case fails. They have not proven that numbers in Edmonton could provide, at reasonable cost, a new system equal to that offered now." *Id.* at 543.

510 For greater detail see A. Martel, *supra*, note 56 at 91 and following.

511 *School Act*, S.B.C. 1989, c. 61.

512 *Francophone Education Regulation*, B.C. Reg. 457/97.

513 *School Amendment Act, 1997*, S.B.C. 1997, c. 52 (Bill 45).

514 *School Act*, R.S.B.C. 1996, c. 412, s. 166 as am. by the *School Amendment Act, 1997*, *ibid.*

515 *Ibid.* at subsection 5(2). Subsection 5(1) provides:

Every student is entitled to receive an educational program that is provided in the English language.

516 *Id.* at subsection 1(1) (eligible child, eligible parent).

517 *Id.* at subsection 5(4) which reads:

The Lieutenant-Governor in Council may make regulations

(a) respecting the provision of educational programs in languages other than English,

(b) to give effect to section 23 of the *Canadian Charter of Rights and Freedoms*, and

(c) determining the manner in which a power, duty or function of a board may be performed or exercised under this Act with respect to students referred to in subsection (2).

518 *Id.* at subsection 166.24(1):

An eligible child of school age who is resident in a francophone school district, on application to the francophone educational authority for that district, is entitled to enroll in a francophone educational program provided by the authority.

519 This was the result of s. 166.24 of the *School Act*, *id.* In effect, para. (3) of that section stipulates that a non-

resident eligible child may only be enrolled with the consent of the parent involved and the consent of "the francophone education authority for the area in which the child resides or, if there is no francophone education authority for the area, the board of the school district in which the child resides." However, regulatory changes have been introduced which extend the territorial jurisdiction of the Francophone authority in two stages. By July 1, 1999, it will extend to cover the entire province.

520 Order in Council, O.C. 0341/98 (25 March 1998) amended the *Conseil Scolaire Francophone de la Colombie-Britannique Regulation*, B.C. Reg. 287/97. It provides for the two-stage extension of the territorial jurisdiction of the Conseil, to be completed on July 1, 1999 when the Conseil's territorial jurisdiction will extend to the entire province.

521 *School Act*, supra, note 514 at subsection 1(1). A child of an immigrant is referred to in the Act as an "immigrant child". An "immigrant" is defined as a person who has been granted landing under the *Immigration Act*, has not ceased to be a permanent resident of Canada, and has not become a Canadian citizen. An "immigrant parent" is defined as an immigrant "who, under s. 23 of the *Canadian Charter of Rights and Freedoms*, would, if the person were a citizen of Canada, have the right to have his or her children receive primary and secondary instruction in French in British Columbia". A Francophone educational authority is given the discretion to enrol an immigrant child under subsection 166.24(2) of the Act.

522 Ibid. at subsection 166.24(4).

523 Id. at s. 73.

524 Id. at subsection 1(1).

525 Id. at subsection 1(1). A "francophone administrative officer" is defined as "a person who is employed by, or has a service contract with, a francophone education authority as a director of instruction, a principal or a vice principal."

526 Id. at para. 13(1)(a.1) and (a.2).

527 Id. at s. 166.12. A number of other matters which can be dealt with by way of regulation, and pertaining to a francophone education authority, are set out in this section as well.

528 Id. at subsection 166.12(4). While the statute capitalizes all first letters of the name, changes have been made to conform to French grammatical rules.

529 B.C. Reg. 287/97, supra, note 520. Bill 45, supra, note 513, also confirmed and validated the older regulation (B.C. Reg. 457/95), in order to ensure that resolutions, bylaws and other actions taken pursuant to it continued to have effect.

530 For a precise description of the districts in question see Schedule A to B.C. Reg. 287/97, as am. by O.C. 0341/98.

531 *School Act*, supra, note 514 at subsection 166.25(3) which provides as follows:

A francophone education authority may provide the francophone educational program... in one or more of the following ways:

(a) all or any part of the francophone educational program is provided directly by the francophone education authority;

(b) with the agreement of another francophone education authority, all or any part of the francophone educational program is provided by that other francophone education authority;

(c) with the agreement of a board of a school district, all or any part of the francophone educational program is provided by that board.

532 Ibid. at subsection 166.12(5).

533 Id. at subsection 166.13(1) and (2):

(1) Any eligible person, and any immigrant parent, who is resident in an area prescribed by regulation of the Lieutenant Governor in Council may apply to become a member of a francophone education authority by providing to the authority an affirmation in the prescribed form.

(2) A francophone education authority

(a) must admit as a member an eligible person who applies under subsection (1), and

(b) may admit as a member an immigrant parent who applies under subsection (1).

534 B.C. Reg. 287/97, *supra*, note 520.

535 *School Act*, *supra*, note 514 at subsection 166.14(3). In addition, para. 166.14(2)(d) of the Act makes further reference to disqualifying factors (which would include conflict of interest).

536 *Ibid.* at subsection 166.14(2).

537 *Id.* at s. 166.17. The Act directs the Lieutenant-Governor in Council to appoint as first directors those he considers represent the interests of eligible persons.

538 *Id.* at subsection 166.21(2).

539 By virtue of Bill 45, *supra*, note 513, various provisions in the *School Act*, *supra*, note 514 regarding school boards are made to apply to the Conseil scolaire francophone. With respect to school personnel, ss 15-21 and 25-29 of the Act apply to the Conseil (see new s. 166.28); with respect to establishment and closure of schools and the management of schools and school property, ss 73, 74 and 85 of the Act apply (see new subsection 166.4(1)); with respect to the acquisition and disposal of land, subsections 96(1), (2), and (3) of the Act apply (see new s. 166.29).

540 The Conseil does not have the authority to expropriate land or improvements within its school district (as may majority language school boards). The term "improvement" is defined in s. 1 of the *Assessment Act*, R.S.B.C. 1996, c. 20.

541 *School Act*, *supra*, note 514 at subsection 166.28(2).

542 *Ibid.* at s. 166.27. The chief executive officer also performs the function of the corporate financial officer (analogous to the secretary treasurer of majority language boards).

543 *Id.* at s. 166.14.

544 *Id.* at ss 166.15 and 166.16. The delegate members must meet at least once per year, although the Board of Directors may convene additional meetings. Procedures to be followed at delegate member meetings may be determined by the Board of Directors.

545 Required Areas of Study in an Educational Program Order, M.O. M295/95 and Local Programs Order, M. O. M147/89.

546 Educational Program Guide Order, M.O. M165/93.

547 *School Act*, *supra*, note 514 at s. 166.31 which identifies s. 110 (financial information), subsections 111(1), (2) and (4) and 113(1) and (3) (preparation and adoption of budgets) as applying to the Conseil scolaire francophone.

548 The *School Act*, *ibid.*, allows the government to raise revenues to finance the grants through school taxes levied on property on school districts throughout the province, including in the area of jurisdiction of a Francophone Education Authority. Rates of taxation are set by the government but these taxes are collected by municipalities. All revenues collected through taxation go into one fund, which is used to pay grants. See Part 8, Division 4 of the Act.

549 *Id.* at s. 112, which does not apply to the Conseil scolaire francophone.

550 *Id.* at s. 108.

551 *Id.* at s. 115.

552 *Id.* at Part 8, Divisions 5 and 6. Sections 166.34 and 166.35 of the Act apply relevant provisions of these divisions to the Conseil scolaire francophone, in particular ss 139, 140 and 141 to 146.

553 *L'Association des parents francophones de la Colombie-Britannique, et al. v. A.G. British Columbia et al.*, [1997] 27 B.C.L.R. (3d) 83. The Commissioner of Official Languages had been granted intervenor status in this case.

554 *School Act*, *supra*, note 511.

555 B.C. Reg. 457/97, *supra*, note 512.

556 The Francophone Education Authority was given jurisdiction within the regions known as Vancouver Island South, Greater Vancouver, and Fraser Valley. Two other regions were excluded from its jurisdiction: Vancouver Island North and Okanagan-Columbia-Interior. These five regions, known as wards, had been set out in the *Francophone Education Regulation*, *supra*, note 512, pursuant to s. 5 of the 1989 *School Act*, *supra*, note 511.

557 *L'Association des parents francophones de la Colombie-Britannique et al. v. A.G. British Columbia et al.*, *supra*, note 553 at 95-96. Mr. Justice Vickers concluded:

.... in my view the specific provisions of the *School Act*, establishing school boards with specific geographic boundaries, making it impossible to have overlapping jurisdiction, requiring educational programs to be delivered by boards and requiring persons to attend such programs cannot be altered by regulation.

558 *Ibid.* at 100.

559 *Id.* at 102.

560 *Id.* at 105.

561 *School Amendment Act, 1997*, *supra*, note 513.

562 *L'Association des parents francophones de la Colombie-Britannique et al. v. Queen in Right of the Province of British Columbia et al.* (11 December 1997), Vancouver A970287 (B.C.S.C.).

563 *Public Sector Employers Act*, R.S.B.C. 1996, c. 384; *Public Education Labour Relations Act*, R.S.B.C. 1996, c. 382.

564 *School Act*, *supra*, note 514.

565 *L'Association des parents francophones de la Colombie-Britannique et al. v. Queen in Right of the Province of British Columbia et al.*, *supra*, note 562, Order of Mr. Justice Vickers, December 18, 1997. To assist the court in considering the constitutional principles at issue and certain demolingistic realities, the Commissioner of Official Languages has been granted intervenor status. By order of the court, counsel for the Commissioner will be allowed to adduce evidence and present argument with respect to the following issues:

(a) the relationship between assimilation of Francophone students and the availability of French-language educational facilities, and the governance of such facilities;

(b) the effects generally of linguistic and cultural assimilation;

(c) the constitutionality of applicable legislation, having regard to s. 23 of the *Charter*;

(d) whether the numbers of students having section 23 rights in the Vancouver Island North and Okanagan-Columbia-Interior wards warrant the full range of educational facilities and governance under s. 23; and

(e) the implementation generally of section 23 entitlements in other provinces.

566 *Education Act*, S.Y. 1990, c. 25.

567 *French Language Instruction Regulation*, Yukon O.I.C. 1996/099 replacing the *French Language Instruction Regulation*, Yukon O.I.C. 1991/217.

568 *Education Act*, *supra*, note 566 at s. 56.

569 *French Language Instruction Regulation*, *supra*, note 567 at s. 2 (definition of eligible student).

570 The requirements for residency are found in s. 5 of the Regulation, *ibid.*, which provides that citizens of Canada resident in the Yukon and who are s. 23 rights holders are eligible to be residents of Education Area #23. In addition, citizens who are resident in the Yukon and are (i) parents of a child who is receiving French language instruction, or (ii) eligible to have a child receive French language instruction, or (iii) would be eligible to have a child receive French language instruction if the person had a child, are also eligible to be residents of Education Area #23. The requirement

of citizenship is hard to reconcile with the definition of eligible student, which definition explicitly declares that a parent does not have to be a citizen.

571 *Id.* at subsection 6(4) regarding the filing of declarations.

572 *Id.* at s. 16.

573 *Id.* at s. 15. A regulation of general application to kindergartens (*Kindergarten Regulations*, Yukon O.I.C. 1991/068 at subsection 1(1)) does provide that "the Department or a School Board shall offer a program of kindergarten instruction in at least one school in each community where there are 7 or more eligible students". Where there are less than seven eligible students, the provision of kindergarten classes is a matter of discretionary powers (*Id.* at s. 1(2)).

574 Yukon O.I.C. 1996/099, *id.* at s. 2.

575 *Id.* at para. 14(2)(b) and (c).

576 *Id.* at subsection 14(3).

577 *Id.* at para. 16(2)(a) and (b).

578 *Id.* at subsection 16(3).

579 *Education Act*, *supra*, note 566 at ss 58-59 and 64-65.

580 *Ibid.* at s. 113 (Duties and powers of a Council).

581 *Id.* at s. 72, which also provides for a similar request to be made by way of petition by 20% of the electors in the Attendance Area of the Council. A similar request can be made by two or more Councils or 20% of their electors, under s. 73.

582 *Education Act*, M.O. 1996/06 (8 July 1996), establishing the number of trustees on the Yukon Francophone School Board at five. This Order replaced the *Education Act*, M.O. 1995/06 which had established the number of trustees for École Émilie-Tremblay School Board.

583 *Education Act*, *supra*, note 566 at s. 82 and specifically 82(4) (qualifications of electors); and s. 86 (qualifications of candidates).

584 *Ibid.* at s. 114 sets out the general powers of the Minister in the absence of a school board having jurisdiction.

585 *Id.* at s. 116. With respect to staff, it should be underscored that it is the Minister who "shall employ teachers" and administrative staff necessary for the proper functioning of a school [*Id.* at para. 171(1)(c)], although a school board "shall be empowered to select for appointment" teachers and other staff [*Id.* at subsection 171(2)]. With respect to its employees, a school is said to act as an agent of the Government of the Yukon; and staff employed in schools operated by School Boards are considered employees of the Government of the Yukon [*Id.* at subsections 171(2) and (4)].

586 *French Language Instruction Regulation*, *supra*, note 567 at s. 19.

587 *Education Act*, *supra*, note 566 at subsections 116(c) and (f).

588 *Ibid.* at ss 5-6 (Minister's duties and powers).

589 *Id.* at para. 6(1)(c).

590 *Id.* at s. 44.

591 *Id.* at para. 6(1)(a). In contrast to ministerial authority, a school board is authorized only "to advise the Minister respecting school closures..." [*Id.* at para. 116(2)(a)].

592 *Id.* at subsections 124(1) and (2). The duties of the director are set out generally in subsection 124(4).

593 *Id.* at s. 124.

594 *Id.* at s. 126.

595 *Id.* at ss 295-299.

596 Id. at s. 303.

597 Yukon O.I.C. 1996/099, *supra*, note 567 at s. 13.

598 A. Martel, *supra*, note 56 at 180.

599 The Act which applied at the time can be found at: *Education Act*, R.S.N.W.T. 1988, c. E.-1. Provisions related to language of instruction were found in ss 89-91.

600 *Official Languages Act*, R.S.N.W.T. 1988, c. O-1. Amendments made to the Act in 1988 can be found at: *An Act to Amend the Official Languages Act*, R.S.N.W.T. 1988, c. 56 (Supp.).

601 *An Act to Amend the Official Languages Act*, *ibid.* at s. 4. The Slavey language is defined as including North Slavey and South Slavey; and Inuktitut as including Inuvialuktun and Inuinnaqtun, thus making linguistic realities even more complex.

602 For a more detailed discussion see: Canadian Heritage, *Status Report: Minority-Language Educational Rights* 1996 by J.-C. Ducharme at 36-37. The regulations adopted were: *Access to French First Language*, Regulation B1A of Yellowknife School District No. 1, January 20, 1994; and *French First Language Charter Rights (Governance)*, Regulation B1B of Yellowknife School District No. 1, January 20, 1994.

603 *Education Act*, S.N.W.T. 1995, c. 28.

604 *Ibid.* at s. 72.

605 Id. at para. 151(1)(h), (i), (j).

606 *French First Language Education Regulations*, N.W.T. Reg. 166-96, subsection 2(1) provides:

Where the Minister determines that the right under section 23 of the *Canadian Charter of Rights and Freedoms* of French first language instruction applies in an education district, the Minister shall direct the District Education Authority for that education district to establish a program of French first language instruction.

607 *Ibid.* at para. 2(2)(b), (c), and (d).

608 Id. at s. 3.

609 Id. at s. 1 (French-first-language instruction).

610 Id. at s. 4.

611 Id. at para. 7(1)(f).

612 *Education Act*, *supra*, note 603 at subsection 73(1). Subsections 73(2) and (3) set out the rules regarding the mandatory teaching of English or another official language (depending on the circumstances) as a subject of study.

613 *Ibid.* at subsection 73(2).

614 Id. at subsection 71(4):

A District Education Authority may choose a language as the language of instruction if

(a) there is a significant demand for the language in the education district;

(b) there are sufficient number of teachers who are fluent in the language available to teach in the language in the education district; and

(c) there are sufficient and suitable school program materials available in the language.

615 Id. at s. 75.

616 Id. at s. 1 (education body).

617 Id. at ss 79 and 81.

618 Id. at subsection 81(4).

619 Id. at s. 63.

620 *Education Staff Regulations*, N.W.T. Reg. 170-96.

621 *Education Act*, supra, note 603 at para. 117(1)(m) and (n) and subsection 78(2) for the Superintendent's statutory powers and duties.

622 Ibid. at subsection 78(1).

623 Id. at s. 56.

624 *Colville Lake Education and Colville Lake District Education Authority Regulations*, N.W.T. Reg. 093-96, para. 7(1)(h); *Déline Education District and Déline District Education Authority Regulations*, N.W.T. Reg. 094-96, para. 8(1)(h).

625 *Education Act*, supra, note 603 at s. 102.

626 Ibid. at para. 117(1)(v) for the statutory provision upon which this is based. N.W.T. Reg. 166-96, supra, note 606 at s. 4 also governs the creation of such committees.

627 N.W.T. Reg. 166-96, *ibid.* at subsection 4(4).

628 Id. at ss 5-6 for the creation, composition and election of a conseil scolaire francophone.

629 *Local Authorities Elections Act*, R.S.N.W.T. 1988, c. L-10.

630 N.W.T. Reg. 166-96, supra, note 606 at para. 7(1)(c), (d) and (f).

631 *Education Act*, supra, note 603 at s. 126.

632 These are set out in detail in N.W.T. Reg. 166-96, supra, note 606 at subsection 7(1)(k).

633 Ibid. at para 7(2)(a) and (b).

634 Id. at para. 7(2)(c).

635 Id. at para. 7(2)(f), (g), (i), and (j) for budgetary and expenditure matters.

636 Id. at s. 8.

637 Id. at subsection 8(h).

638 *Education Act*, supra, note 603 at s. 84, am. by *An Act to amend the Education Act*, S.N.W.T. 1995, c. 28, s. 27.

639 N.W.T. Reg. 166-96, supra, note 606 at subsection 9(1).

640 Ibid. at para. 9(3)(a).

641 Id. at s. 11.

642 Id. at para. 9(3)(b). *Education Act*, supra, note 603 at subsection 84(2), establishes the duty of the Minister to establish by regulation the territorial jurisdiction of a proposed Commission scolaire francophone de division.

643 N.W.T. Reg. 166-96, supra, note 606 at para. 7(2)(i) and (j).

644 *Education Act*, supra, note 603 at para. 117(1)(k) and (l) and 117(2)(k) and (l).

645 Ibid. at s. 135.

646 Id. at subsection 136(5).

647 Id. at s. 128 for authorization. In addition, grants and contributions are made available according to the *Financial Administration Act*.

648 *Association des parents francophones de Yellowknife c. Government of the Northwest Territories et al.* (1990), Northwest Territories CV-02651 (N.W.T.S.C.) [currently suspended].

649 *Mahé v. Alberta*, supra, note 1 at p. 376. The Court also ruled (at 393) that "[s]ection 23 of the *Charter* imposes on provincial legislatures the positive obligation of enacting precise legislative schemes providing for minority language instruction and educational facilities where numbers warrant."

650 Ibid. at 365.

651 Reference Re *Public Schools Act (Man.)*, supra, note 13 at 863.

652 *Charter of the French Language*, supra, note 195.

653 *Mahé v. Alberta*, supra, note 1 at 384.

654 It was said in the *Mahé* decision (Ibid. at 385):

In my view, the phrase "where numbers warrant" does not provide an explicit standard which courts can use to determine the appropriate instruction and facilities... in every given situation. The standard will have to be worked out over time by examining the particular facts of each situation which comes before the courts, but, in general, the inquiry must be guided by the purposes of s. 23. In particular, the fact that s. 23 is a remedial section is significant, indicating that the section does not aim at merely guaranteeing the status quo.

655 Id at 362.

656 Id. at 372. In analyzing the need to accord management and control to members of the minority community, the Supreme Court remarked:

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 and 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.

657 For a complete review of this program see: Canadian Heritage, Corporate Review Branch, *Evaluation of Federal-Provincial Agreements as Mechanisms for Delivery of the Official Languages Support Programs* (Ottawa, June 1997).



Appendix -- Table of legislation and case law

Canada

Legislation

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being schedule B of the *Canada Act, 1982*, 1982, c. 11 (U.K.), in R.S.C. 1985, App. II, no 44, para. 23(3)(a) and (b).

British North America Act, 1867, now the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, R.S.C. (1985), Appendix II, No. 5.

Newfoundland

Legislation

An Act to Amend the Schools Act, 1991, S.N. 1991, c. 20.

Schools Act, 1996, S.N. 1996, c. S-12.1.

An Act to Amend the Schools Act, 1996, S.N. 1997, c. 8.

Schools Act, 1997, S.N. 1997, c. S-12.2.

Case law

Velma Felix et al. v. Her Majesty the Queen in Right of Newfoundland and the Minister of Education for the Province of

Newfoundland (2 April 1996), St. John's 1081 (Nfld S.C.T.D.).

Nova Scotia

Legislation

School Boards Act, S.N.S. 1991, c. 6.

Education Act, S.N.S. 1995-96, c. 1.

Governor in Council Education Act Regulations, N.S. Reg. 74/97.

Case law

Lavoie et al. v. Nova Scotia (Attorney-General) (1988), 47 D.L.R. (4th) 586 (N.S.S.C.T.D.); (1989), 58 D.L.R. (4th) 293 (N.S.S.C.A.D.).

Glenda Doucet-Boudreau, Alice Boudreau, Marie-Claire Doucet, Bernadette Cormier-Marchand et la Fédération des parents acadiens de la Nouvelle-Écosse Inc. v. Le Procureur général de la Nouvelle-Écosse représentant en chef de Sa Majesté la Reine en Nouvelle-Écosse et le Conseil scolaire acadien provincial (15 June 1997), Chéticamp H. 137725 (N.S.S.C.) [Notice of intent]; (January 21, 1998) [new Notice].

New Brunswick

Legislation

Official Languages of New Brunswick Act, R.S.N.B. 1973, c. 0-1.

An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick, R.S.N.B. 1981, c. O-1.1.

Schools Act, R.S.N.B. 1978, c. S-5.

An Act to Amend the Schools Act, S.N.B. 1981, c. 71.

Schools Act, S.N.B. 1990, c. S-5.1.

School Districts Regulations -- Schools Act, N.B. Reg. 92-27.

Education Act, S.N.B. 1997, c. E-1.12.

Governance Structure Regulation -- Education Act, N.B. Reg. 97-148.

School Districts Regulations -- Education Act, N.B. Reg. 97-149.

School Administration Regulation -- Education Act, N.B. Reg. 97-150.

Case law

Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549; (1984), 8 D.L.R. (4th) 238; (1983), 48 N.B.R. (2d) 361; (clarified (1983), 50 N.B.R. (2d) 41; (1983), 51 N.B.R. (2d) 219).

Comité de sauvegarde de l'École La Découverte de Saint-Sauveur et al. v. Le Ministre de l'Éducation du Nouveau-Brunswick et al. (26 June 1997), Moncton M/M/154/97 (N.B.T.D.), Daigle J.

Prince Edward Island

Legislation

School Act, R.S.P.E.I. 1988, c. S-2.

School Act Regulations (EC674/76).

School Act, S.P.E.I. 1993, c. S-2.1.

School Boards Regulation (EC225/96) as am. by EC242/96.

Real Property Tax Act, R.S.P.E.I. 1988, c. R-5.

Case law

Reference Re *Minority Language Educational Rights* (P.E.I.) (1988), 69 Nfld & P.E.I. R. 236 (P.E.I.S.C.A.D.).

Arsenault-Cameron v. Prince Edward Island (8 January 1997), Charlottetown GSC-14794 (P.E.I.S.C.T.D.) [unreported].

Arsenault-Cameron et al. v. Government of Prince Edward Island (9 June 1997), Charlottetown GSC-14794 (S.C.P.E.I.T.D.).

Government of Prince Edward Island v. Arsenault-Cameron et al. (24 April 1998), Charlottetown AD-0727 (P.E.I.S.C.A.D.) [unreported].

Quebec

Legislation

An Act to Promote the French Language in Québec, S.Q. 1969, c. 9.

Official Language Act, S.Q. 1974, c. 6.

Charter of the French Language, R.S.Q. 1977, c. C-11.

An Act to amend the Education Act, the Act respecting school elections and other legislative provisions, S.Q. 1997, c. 47.

An Act to amend the Education Act and various legislative provisions, S.Q. 1997, c. 96.

Regulation to amend the Regulation respecting construction contracts for immovables of school boards, R.R.Q. 1997, c. I-13.3 r.0.01, s. 452.

Application to English-speaking persons from New Brunswick, R.R.Q. 1997, c. C-11, r.0.1.

Regulation to amend the Regulation respecting the norms, conditions and procedure for disposing of an immovable of a school board, R.R.Q. 1997, c. I-13.1, r.2, s. 452.

Regulation to amend the Basic school regulations for preschool and elementary school education, R.R.Q. 1997, c. I-13.3, r.3, s. 447.

Regulation to amend the Basic school regulation for secondary school education, R.R.Q. 1997, c. I-13.3, r.4, s. 447.

Regulation respecting requests to receive instruction in English, R.R.Q. 1977, c. C-11, r.4.2.

Language of Instruction (Children Residing on Indian Reserves) Regulation, R.R.Q. 1997, c. C-11, r. 6.1.

An Act respecting school elections, R.S.Q. 1997, c. E-2.3.

Case law

Protestant School Board of Greater Montreal et al. v. Minister of Education of Quebec et al., [1976] C.S. 430; (1976) 83 D.L.R. (3d) 645.

Attorney General of Quebec v. Quebec Protestant School Boards, [1984] 2 S.C.R. 66.

Quebec Association of Protestant School Boards v. Attorney General of Quebec, [1985] C.S. 872.

Reference Re *Education Act*, [1990] R.J.Q. 2498 (Que. Sup. Ct); [1993] 2 S.C.R. 511.

Griffin v. Blainville Deux-Montagnes Commission Scolaire Régionale (1990), 63 D.L.R. (4th) 37 (Que. Sup. Ct).

Lakeshore School Board v. Szasz et al. (12 August 1996), Montreal 500-05-020615-967 (Que. Sup. Ct.).

Ontario

Legislation

Education Act, R.S.O. 1990, c. E-2.

Prescott and Russell County Roman Catholic French-Language and English-Language Separate School Boards Regulation, O. Reg. 479/91 as am. by O. Reg. 759/91.

Establishment and Areas of Jurisdiction of District School Boards, O. Reg. 185/97.

Assessment Act, R.S.O. 1990, c. A.31.

Municipality of Metropolitan Toronto Act, R.S.O. 1990, c. M.62.

Ottawa-Carleton French-Language School Board Act, R.S.O. 1990, c. O.44.

An Act to amend certain Acts related to The Regional Municipality of Ottawa-Carleton and to amend the Education Act in respect of French-language School Boards, S.O. 1994, c.1.

Fewer School Boards Act, enacted under the title *An Act to improve the accountability, effectiveness and quality of Ontario's school system by permitting a reduction in the number of school boards, establishing an Educational Improvement Commission to oversee the transition to the new system, providing for certain matters related to elections in 1997 and making other improvements to the Education Act and the Municipal Elections Act, 1996*, S.O. 1997, c. 3.

Education Quality Improvement Act, S.O. 1997, c. 31.

Case law

Reference Re *Education Act of Ontario and Minority Language Education Rights* (1984), 10 D.L.R. (4th) 491 (Ont. C.A.).

Marchand v. Simcoe County Board of Education et al. (1986), 55 O.R. (2d) 638.

J. Séguin, N. Bourgeois, J.-C. Landry et al. v. The Queen in Right of Ontario et al. (13 November 1992) Cornwall 3831/92 (Ont. Ct. Gen. Div.).

Conseil des écoles séparées catholiques romaines de Dufferin et Peel et al. v. Ontario (Ministre de l'Éducation et de la Formation) (1996), 30 O.R. (3d) 681 (Ont. Ct. (Gen. Div.)).

Conseil des écoles séparées catholiques romaines de Dufferin et Peel et al. v. Ontario (Ministre de l'Éducation et de la Formation) (1996), 30 O.R. (3d) 681 (Ont. C.A.).

Ontario Public School Boards' Association et al. v. Attorney General of Ontario (4 August 1997), Toronto 97CV125173 (Ont.Ct. (Gen. Div.)).

A. Berthelot, J. Cayouette, K. Burke, C. Blanchard, C. Rail, la Section de langue française du Conseil des écoles séparées (C.R.) du district de la Rive-Nord, la Section française du Conseil des écoles séparées (C.R.) du district de Chapleau, la Section française du Conseil des écoles séparées de Sault Ste-Marie, la Section française du Conseil des écoles séparées catholiques du district de Michipicoten v. La Commission d'amélioration de l'éducation, le Ministre de l'Éducation et de la Formation, le Secrétaire de la ville de Sudbury, le Secrétaire de la ville d'Elliot Lake et le Secrétaire de la ville de Sault Ste-Marie (22 October 1997), Sault Ste-Marie 17431/97 (Ont.Ct. (Gen. Div.)).

Ontario English Catholic Teachers' Association et al. v. Attorney General of Ontario (9 December 1997), Toronto 97CV137668 (Ont.Ct. (Gen. Div.)).

Ontario Public School Boards' Association et al. v. Attorney General of Ontario (9 January 1998), Toronto 98CV139317 (Ont.Ct. (Gen. Div.)).

Manitoba

Legislation

Public Schools Finance Board Act, R.S.M. 1987, c. P260, C.C.S.M. c. P260.

Education Administration Act, R.S.M. 1987, c. E10, C.C.S.M. c. E10.

Public Schools Act, R.S.M. 1987, c. P250, C.C.S.M. c. P250.

Francophone Schools Governance Regulation, Man. Reg. 202/93.

Schools Finance Program Regulation, Man. Reg. 221/96.

Public Schools Amendment Act, S.M. 1993, c. 33.

Case law

Reference Re *Manitoba Public Schools Act*, s. 79(3), (4) & (7), [1990] 2 W.W.R. 289 (Man. C.A.).

Reference Re *Public Schools Act (Man.)*, [1993] 1 S.C.R. 839.

Maurice Hince, Donald Gauthier, Lilian Sorin, Richard Fay, Alain Toupin and La Fédération provinciale des Comités de parents inc. v. Government of Manitoba (9 June 1997), Winnipeg C197-01-02808 (Man. Q.B.).

Saskatchewan

Legislation

Education Act, 1995, R.S.S. 1995, c. E-O.2

Conseils Scolaires Election Regulations, Sask. Reg. 16/93.

1997 School Grant Regulations, Sask. Reg. 3/97.

Case law

Commission des Écoles Fransaskoises Inc. v. Government of Saskatchewan, [1988] 3 W.W.R. 354; (1988), 48 D.L.R. (4th) 315.

Alberta

Legislation

School Act, R.S.A. 1980, c. S-3.

Local Authorities Election Act, S.A. 1983, c. L-27.5.

School Act, S.A. 1988, c. S-3.1.

School Buildings and Tendering Regulation, Alta Reg. 383/88.

Superintendent of Schools Regulation, Alta Reg. 41/89.

Disposition of Property Regulation, Alta Reg. 69/89.

Special School Tax Levy Plebiscite Regulation, Alta Reg. 78/95.

School Grants Regulation, Alta Reg. 72/95, as am. by Alta Reg. 167/97.

School Amendment Act, 1993, S.A. 1993, c. 24.

Case law

Mahé v. Alberta, [1990] 1 R.C.S. 342 (S.C.C.); (1987), 42 D.L.R. (4th) 514 (Alta C.A.); (1985), 22 D.L.R. (4th) 24 (Alta Q.B.).

British Columbia

Legislation

School Act, S.B.C. 1989, c. 61.

Assessment Act, R.S.B.C. 1996, c. 20.

Public Education Labour Relations Act, R.S.B.C. 1996, c. 382.

Public Sector Employers Act, R.S.B.C. 1996, c. 384.

School Act, R.S.B.C. 1996, c. 412.

Conseil Scolaire Francophone de la Colombie-Britannique Regulation, B.C. Reg. 287/97 as am. by O.C. 0341/98.

Francophone Education Regulation, B.C. Reg. 457/97.

School Amendment Act, 1997, S.B.C. 1997, c. 52.

Case law

L'Association des parents francophones de la Colombie-Britannique et al. v. A.G. British Columbia et al., [1997] 27 B.C.L.R. (3d) 83.

L'Association des parents francophones de la Colombie-Britannique et al. v. Queen in Right of the Province of British Columbia et al. (11 December 1997), Vancouver A970287 (B.C.S.C.).

Yukon

Legislation

Education Act, S.Y. 1990, c. 25.

Kindergarten Regulations, Yukon O.I.C. 1991/068.

French Language Instruction Regulation, Yukon O.I.C. 1991/217.

French Language Instruction Regulation, Yukon O.I.C. 1996/099.

(No case law)

Northwest Territories

Legislation

Education Act, R.S.N.W.T. 1988, c. E.-1.

Local Authorities Elections Act, R.S.N.W.T. 1988, c. L-10.

Official Languages Act, R.S.N.W.T. 1988, c. O-1.

An Act to Amend the Official Languages Act, R.S.N.W.T. 1988, c. 56 (Supp.).

Education Act, S.N.W.T. 1995, c. 28.

Colville Lake Education and Colville Lake District Education Authority Regulations, N.W.T. Reg. 093-96.

Déline Education District and Déline District Education Authority Regulations, N.W.T. Reg. 094-96.

French First Language Education Regulations, N.W.T. Reg. 166-96.

Education Staff Regulations, N.W.T. Reg. 170-96.

An Act to amend the Education Act, S.N.W.T. 1995, c. 28.

Case law

Association des parents francophones de Yellowknife v. Government of the Northwest Territories et al. (1990), Northwest Territories CV-02651 (N.W.T.S.C.).