



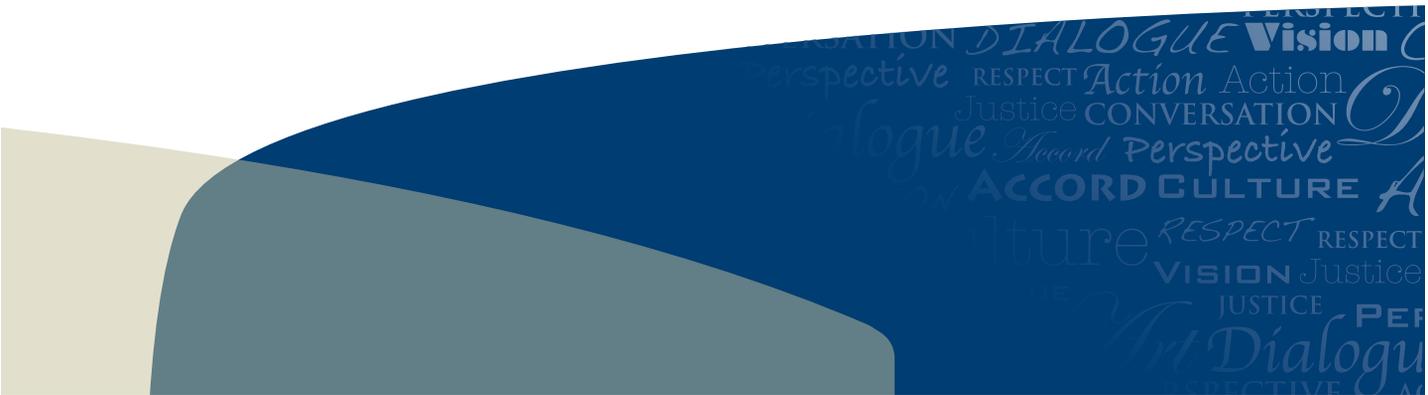
Office of the  
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Commissariat  
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# LANGUAGE RIGHTS

2007–2009



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## FOREWORD

It has been 40 years since the enactment of the original *Official Languages Act*, which makes it an appropriate time to reflect on the development and evolution of language rights in Canada. The courts, like Parliament and the provinces and territories, have played a key role in the evolution of language rights in our country, and serve as an important indicator as to what has been achieved and what remains to be done in order to reach the objective of linguistic equality.

Canada's linguistic duality was recognized by the *Constitution Act, 1867*, but the language guarantees that the *Act* provides are limited to the right to use English and French in the Parliament of Canada and in the Quebec legislature, as well as before federal and Quebec courts. Apart from these guarantees and a few examples that were by and large symbolic (such as the presence of both official languages on postage stamps and bank notes as well as the simultaneous interpretation of parliamentary debates), the predominant language of the Canadian state was English.

To remedy this situation, the Royal Commission on Bilingualism and Biculturalism (the Laurendeau-Dunton Commission) recommended, among other things, that English and French be formally declared the official languages of the Parliament of Canada, as well as the federal administration and federal courts. The Commission's vision of linguistic duality was based on the notion of two founding peoples, with a view to ensuring equality across the country. In the wake of the Commission's recommendations, the Parliament of Canada adopted the first *Official Languages Act* in July 1969, giving English and French the status of official languages of Canada.

In 1974, the Supreme Court of Canada confirmed the constitutionality of the *Official Languages Act* in response to an objection raised by the mayor of Moncton, Leonard Jones. In the *Jones* case, the highest court in the country established that the language guarantees set forth in the Constitution represented a minimum protection and did not stop Parliament or the provincial legislatures from adopting more generous language regimes. In doing so, the Court introduced the notion of advancement of the equality of the official languages of Canada. The notion of advancement would later be entrenched with the adoption of section 16 of the *Canadian Charter of Rights and Freedoms* in 1982, which formally recognizes the principle of equality of the two official languages.

In 1999, the Supreme Court of Canada issued its ruling in the *Beaulac* case in what was to become a turning point in the interpretation of language rights. In a decision written by Justice Bastarache, the Court confirmed that language rights should always be interpreted in light of their purpose and in a manner compatible with the maintenance and development of official language minority communities in Canada. The Court held that equality does not have a lesser meaning in matters of language, and that substantive equality, the correct norm to be applied in Canadian law, requires the government to take positive measures to ensure the implementation of language rights.

More recently, the objective of linguistic equality has taken an important step forward with the Supreme Court of Canada decision in the *DesRochers* case. The Court established that substantive equality with respect to the delivery of services may require distinct content if this is necessary

for meeting the needs of minority-language communities. As stated by Justice Charron, “[i]t is possible that substantive equality will not result from the development and implementation of identical services for each language community. The content of the principle of linguistic equality in government services is not necessarily uniform. It must be defined in light of the nature and purpose of the service in question.” What ultimately matters, according to the Supreme Court, “is that the services provided be of equal quality in both languages.”<sup>1</sup>

Arguably, the role of the courts in the progression towards the objective of linguistic equality has been most remarkable in the area of minority-language education rights. In 1982, the right of parents from official language minority communities to have their children educated in their language was entrenched in section 23 of the *Charter*. This was an important advance in achieving linguistic duality: education is at the very heart of the development and self-identification of official language communities. The courts have not hesitated to breathe life into the express purpose of that section, nor to implement the possibly novel remedies needed to achieve that purpose.

In 1990, the Supreme Court of Canada determined in the *Mahe* case that the general purpose of section 23 of the *Charter* is to preserve and promote the two official languages of Canada, and their respective cultures, and that section 23 is “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.”<sup>2</sup> In order to achieve this purpose, the Court held that it is essential that parents belonging to a minority-language community have a certain amount of management and control over the educational facilities in which their children are taught.

In the 2005 *Solski* decision, where the issue was one of access to minority-language instruction in the province of Quebec, the Supreme Court of Canada described section 23 as an example of the means to achieve substantive equality in the specific context of minority-language communities. The implementation of section 23 is therefore contextual: it must take into account the differences between the situations of the minority-language community in Quebec and the minority-language communities of the other provinces and territories. What is important, according to the Court, is that the admission criteria established by the province must be consistent with the purpose of section 23 and “capable of ensuring that the children meant to be protected will actually be admitted to minority language schools.”<sup>3</sup> As such, all of the circumstances of a child must be considered.

More recently, in the *Nguyen and Bindra* cases, the Court of Appeal of Quebec applied the principles enunciated in the *Solski* decision and determined that legislation adopted by the Quebec National Assembly limiting access to English-language instruction was unconstitutional.

1 *DesRochers v. Canada (Industry)*, [2009] 1 S.R.C. 194, 2009 SCC 8 at para. 54.

2 *Mahe v. Alberta*, [1990] 1 S.C.R. 342 at 344.

3 *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 201, 2005 SCC 14 at para. 35.

Whether it be in government services, minority-language education rights or in other areas of Canada's official languages policy, recent case law demonstrates a progression towards the objective of linguistic equality. However, members of minority-language communities all too often have to turn to the courts to have their rights asserted. While the courts have increasingly helped to define the scope of language rights and to clarify their implementation, the equality of English and French cannot depend on them alone. Key progress in language reform over the past 40 years has coincided with periods

of strong leadership, and thanks to the efforts of a great many people (political leaders, representatives from both the majority and the minority communities, educators, federal employees, etc.) and to the investment of resources, significant progress has been made. However, there still remains much to be done before the equality of status of Canada's two official languages is achieved.



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## INTRODUCTION

This report summarizes and analyzes the principal decisions on language rights rendered by the courts in the 2007–2008 and 2008–2009 fiscal years. While not exhaustive, it is intended as a reference tool for people directly or indirectly interested in these rights.

The cases considered in this report illustrate a variety of areas affected by language rights. Judgments have dealt with topics such as minority-language education rights, the use of the two official languages in proceedings of Parliament, language rights in the administration of justice and the right to communicate with and receive services from government institutions in the official language of choice.

The right to minority-language education continues to be an issue before the courts. In the *Nguyen*<sup>4</sup> and *Bindra*<sup>5</sup> judgments, the Court of Appeal of Quebec applied the principles enunciated by the Supreme Court of Canada in the *Solski*<sup>6</sup> decision and determined that legislation further restricting access to English instruction was contrary to section 23(2) of the *Canadian Charter of Rights and Freedoms*.<sup>7</sup> In the Northwest Territories, the Supreme Court of the Northwest Territories made several rulings in an ongoing legal battle between the French-language school board and the territorial government, which will have to decide, *inter alia*, which of the two has the right to determine who has access to minority-language schools.

According to the jurisprudence of the Supreme Court of Canada, language rights and the right to a fair trial are distinct in nature. However, this distinction remains misunderstood. Recently, the Ontario Court

of Appeal applied this principle in the *Belende v. Patel*<sup>8</sup> decision, while the Court of Appeal for the Yukon Territory failed to make the distinction between language rights and the right to a fair trial in *Kilrich Industries Ltd. v. Halotier*.<sup>9</sup>

In *R. v. Caron*,<sup>10</sup> a case that began with a simple traffic violation, the defendant successfully challenged the constitutionality of the Alberta *Languages Act*,<sup>11</sup> which provides that all acts or regulations may be enacted, printed and published solely in the English language. However, the debate on this issue is not over, since the case has been appealed to the Court of Queen’s Bench of Alberta.

Recently, the Supreme Court of Canada rendered two important judgments involving language rights and services to the public. In *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*,<sup>12</sup> the Court determined that members of the Royal Canadian Mounted Police, a federal institution, are required, when performing the duties of provincial police officers, to fulfill the constitutional language obligations imposed on institutions of the New Brunswick government and therefore offer services in both official languages everywhere in the province. In *DesRochers v. Canada (Industry)*,<sup>13</sup> the Court found that substantive equality does not necessarily translate into identical services for each language community. Rather, linguistic equality in government services must be defined in light of the nature and purpose of the service in question. While the first of these two judgments is an important victory for members of New Brunswick’s French-speaking community, the latter is expected to have major repercussions for all official language minority communities throughout the country.

4 *H.N. v. Québec (Ministre de l’Éducation)*, [2007] R.J.Q. 2097, 2007 QCCA 1111.

5 *T.B. v. Québec (Ministre de l’Éducation)*, [2007] R.J.Q. 2150, 2007 QCCA 1112.

6 *Supra* note 3.

7 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

8 (2008) 290 D.L.R. (4th) 490, 2008 ONCA 148.

9 (2007) 246 B.C.A.C. 159, 2007 YKCA 12.

10 2008 ABPC 232.

11 R.S.A. 2000, c. L-6.

12 [2008] 1 S.C.R. 383, 2008 SCC 15.

13 *Supra* note 1.

# 1

## MINORITY-LANGUAGE EDUCATION RIGHTS

Section 23 of the *Canadian Charter of Rights and Freedoms (Charter)*<sup>14</sup> gives parents belonging to English and French minority communities the right to have their children educated in the minority language. In addition to this right, section 23 also guarantees the right to facilities and the right to manage and control such facilities. Each province and territory is responsible for the implementation of minority-language education rights. Section 23 reads as follows:

### 23. (1) Citizens of Canada

*a)* whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

*b)* who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

*a)* applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

*b)* includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

The rights conferred by section 23 are both collective and individual. They are individual in the sense that they apply to parents belonging to one of the three categories of rights holders:<sup>15</sup> persons whose first language learned and still understood is that of the minority of the province in which they reside, those who have received their primary school education in Canada in the minority language of the province in which they reside, and those who have a child that has received or is receiving primary or secondary school education in the minority language of the province in which they reside. The collective aspect is expressed in the purpose of the provision, which is to protect and preserve both official languages and their respective cultures throughout Canada. The scope and nature of the provincial and territorial governments' obligation to provide facilities and minority-language education programs vary according to the number of students likely to make use of such services.<sup>16</sup>

<sup>14</sup> *Supra* note 7.

<sup>15</sup> *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839 at 862.

<sup>16</sup> *Supra* note 2 at 366–367.

Over the years, the courts have developed various principles to guide the interpretation of section 23. First, as the Supreme Court of Canada explained in *Mahe*, section 23 must be interpreted in accordance with its purpose. What is essential to satisfy that purpose is that the minority community has control over “those aspects of education which pertain to or have an effect upon their language and culture.”<sup>17</sup> The Court later added that the remedial nature of section 23 should also be taken into account in its interpretation, and that such an interpretation “is based on the true purpose of redressing past injustices and providing the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced.”<sup>18</sup> Finally, the implementation of section 23 is contextual, meaning that it depends on the unique situation of the linguistic minority in each province.<sup>19</sup>

Most court actions seeking to enforce section 23 of the *Charter* have dealt with the right to facilities and the right to management and control. In *Mahe*, the Supreme Court of Canada held that it is essential for minority-language parents to have a degree of management and control over the educational facilities in which their children are taught, in order to ensure that the language and culture of the linguistic minority in each province survives and flourishes.<sup>20</sup> The content of the right to facilities and the right to management and control depends largely on the number of eligible children who may make use of the facilities. For example, in some cases, the right to facilities may require the establishment of separate classes for the minority within

a majority school, while in other cases the number of students might warrant the creation of a minority school entirely separate from that of the majority.<sup>21</sup> As for the right to management and control, this could mean representation of the minority on a majority school board, while in other cases it could require the existence of a minority school board.<sup>22</sup>

The guarantees provided by section 23 also include the right to an education of equivalent quality as that provided to members of the linguistic majority:

Section 23 is premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority.<sup>23</sup>

Finally, to ensure respect for minority-language education rights, the courts have had recourse to “specific remedial measures” to correct situations created by government inaction. This was the case in *Doucet-Boudreau*,<sup>24</sup> where the province was found to be in violation of section 23 of the *Charter* and was ordered to provide French-language teaching facilities within specified deadlines. As part of the remedy in this case, the trial judge retained jurisdiction to receive updates on the implementation of the order issued to the province. The Supreme Court of Canada held that such remedial measures had proven necessary, since the risk of assimilation would continue to increase as long as the government did not fulfill its obligations under section 23 of the *Charter*.<sup>25</sup>

17 *Ibid.* at 375.

18 *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3; 2000 SCC 1 at para. 27.

19 *Supra* note 15 at 851.

20 *Supra* note 2 at 371–372.

21 *Ibid.* at 377.

22 *Ibid.* at 374.

23 *Supra* note 18 at para. 31.

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

25 *Ibid.* at para. 29.

Over the two-year period covered by this report, the issue of access to English-language instruction was the subject of two decisions by the Quebec Court of Appeal; the Northwest Territories Supreme Court made several rulings in an ongoing legal battle between the French-language school board and the territorial government; and the Court of Queen’s Bench of New Brunswick had to consider whether the language rights provisions of the *Charter* offered any protection to French immersion programs in that province.

### 1.1 Access to English-language education in Quebec

In Quebec, access to English-language schools is protected by section 23(1) (b) and section 23(2) of the *Charter*.<sup>26</sup> Sections 73(1) and (2) of the *Charter of the French Language*<sup>27</sup> (*CFL*) implement the constitutional right to receive an English-language education in that province:

- (1) [...] 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) [...] 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. [Emphasis added]

In *Solski*,<sup>28</sup> the Supreme Court considered whether section 73(2) of the *CFL*, which requires that children have completed the “major part” of their education in English in order to obtain certificates of eligibility to attend English-language public schools, was consistent with section 23(2) of the *Charter*. The Supreme Court determined that the “major part” requirement was consistent with section 23(2) so long as it required a qualitative assessment (rather than a quantitative or strictly mathematical approach) of the child’s overall educational experience. The purpose of a qualitative assessment is to identify the existence or absence of a genuine commitment by the child to pursue a minority-language education. This assessment involves reviewing the child’s situation as a whole, including the time spent in each program, at what stage of education the choice of language of instruction was made, what programs are or were available, and whether learning disabilities or other difficulties exist. The assessment is both subjective and objective. It is subjective in the sense that it requires a review of the child’s particular situation, and objective because the Minister, the Administrative Tribunal of Quebec and the courts must determine if a child’s admission is consistent with the general objectives of section 23(2).<sup>29</sup>

In 2002, the Quebec legislature adopted Bill 104, *An Act to Amend the Charter of the French Language*.<sup>30</sup> The Act amended, among other things, section 73 of the *CFL*. This amendment was, in part, a response to the growing trend (although the numbers remained relatively small) of mostly allophone parents enrolling their children in English-language private

26 S. 23(1)(a) of the *Charter* was never proclaimed in force in Quebec: see s. 59 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

27 R.S.Q. c. C-11.

28 *Supra* note 3.

29 *Ibid.*

30 2nd Sess., 36th Leg., Quebec, 2002 (which came into force October 1, 2002), S.Q. 2002, c. 28.

schools for a brief period of time to gain access to the English public system. The effect of the amendment was to disregard English instruction received by Canadian citizens in unsubsidized schools in Quebec for the purposes of determining their admissibility to English-language public schools. Similarly, English instruction received pursuant to a special authorization was also excluded. Prior to the amendment, English instruction received in an unsubsidized school or pursuant to a special authorization was considered in the calculation of the “major part” requirement.

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***H.N. v. Québec (Ministre de l'Éducation)*<sup>31</sup> [Nguyen]**

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The issue in the *Nguyen* appeal was whether the exclusion of English instruction received in an unsubsidized school from the calculation of the “major part” requirement violates the appellants’ rights under section 23(2) of the *Charter*.

In a majority judgment (Hilton J.A. and Dalphond J.A.), the Court of Appeal of Quebec declared the exclusion of English instruction received in an unsubsidized school unconstitutional, and ordered that the requests by the appellants to attend English public school be reconsidered by the competent authorities in accordance with the criteria established in the *Solski*<sup>32</sup> case. Giroux J.A. was dissident. All three judges wrote separate reasons.

### **A. The majority judgment**

In Hilton J.A.’s opinion, insofar as the children of the appellants have received or are receiving English instruction in Canada, it was necessary for the authorities at the Ministry of Education to conduct the qualitative assessment described in the *Solski* case. According to him, the nature of the instruction received by a child (whether in a subsidized or unsubsidized school) is not a relevant consideration in determining whether a child is eligible for minority-language instruction as guaranteed by section 23(2) of the *Charter*. Hilton J.A. agreed with the reasoning of Abella J.A., as she was then, in the *Abbey*<sup>33</sup> case, “that it is the fact of receiving the instruction relied on, ‘however it originated,’ that is of importance.”<sup>34</sup>

Hilton J.A. rejected the argument made by the Attorney General of Quebec that the recognition of instruction received in an unsubsidized school would amount to giving citizens of Quebec the freedom to choose the language of instruction for their children. Given that the *Solski* case has defined the “major part” criterion as requiring the demonstration of a genuine commitment on the part of the child to pursue a minority-language education, Hilton J.A. concluded that attending an English private school for a brief period of time would not necessarily meet the “major part” requirement. Thus, recognizing instruction received in an unsubsidized school does not imply a return to the freedom to choose the language of instruction.

31 *Supra* note 4.

32 *Supra* note 3.

33 *Abbey v. Essex County Board of Education* [1999], 42 O.R. (3d) 481.

34 *Supra* note 4 at para. 128.

Hilton J.A. also rejected the argument made by the Attorney General of Quebec that a “contextual” approach to section 23 of the *Charter* (in particular, the fact that section 23(1)(a) of the *Charter* does not apply in the province of Quebec) would allow section 23(2) to be interpreted as granting rights only to children who received English instruction outside of Quebec. Hilton J.A. found that such an interpretation would “represent a departure from the generous judicial history of section 23, especially in light of the broad and purposive interpretative approach the Supreme Court has consistently mandated, ‘watered down considerably’ though it may be in Quebec.”<sup>35</sup>

Having determined that the exclusion of English instruction received in an unsubsidized school from the calculation of the “major part” requirement was incompatible with section 23(2) of the *Charter*, Hilton J.A. proceeded with a detailed analysis under section 1 of the *Charter* to determine whether the exclusion could be justified in a free and democratic society. He came to the conclusion that it could not. Despite the importance of the objective of the amendment (namely the protection and promotion of the French language in Quebec), the impairment of the right in question was not minimal because the impugned measure requires that any and all English instruction received in an unsubsidized school in Quebec be disregarded completely without consideration of other pertinent factors.

For his part, Dalphond J.A. found the absolute prohibition to consider English instruction received in an unsubsidized school was invalid to the extent that it negated the constitutional right for children of Canadian citizens to continue their education in English, whether in public

or private schools. In Dalphond J.A.’s opinion, children who receive English instruction in Quebec, whether in a public or private educational institution, “in fact experience the same educational reality.”<sup>36</sup> [Emphasis in original] Thus, legal attendance at an unsubsidized school must give rise to the same constitutional right as attendance at a public school. For Dalphond J.A., this is especially true in Quebec where the Quebec *Charter of Human Rights and Freedoms*<sup>37</sup> guarantees the right of parents to send their children to private educational institutions.

Dalphond J.A. also specified that the rights set out in section 23(2) of the *Charter* not only protected those who are traditionally part of the Anglophone minority because of their British heritage, but also new Canadians who have legally received their instruction in English and who, once in Quebec, wish to pursue their education in that language.

Like Hilton J.A., Dalphond J.A. found that the contested measure could not be justified within the meaning of section 1 of the *Charter*, despite the importance of its objective. According to him, the absolute prohibition to consider English instruction received in an unsubsidized school was not reasonable or proportionate to the objective sought.

## **B. The dissent**

Contrary to Hilton J.A. and Dalphond J.A., Giroux J.A. did not share the opinion that the *Solski* case offered a complete answer to this appeal. Although he recognized that the situation of the appellants, having pursued English instruction in unsubsidized schools in Quebec, is in perfect accordance with a literal interpretation of section 23(2) of the *Charter*, it was necessary to set aside such an interpretation.

<sup>35</sup> *Ibid.* at para. 129.

<sup>36</sup> *Ibid.* at para. 221.

<sup>37</sup> R.S.Q. c. C-12.

According to Giroux J.A., by stating that “[t]he application of s. 23 is contextual”<sup>38</sup> in the *Solski* case, the Supreme Court of Canada recognized that “different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province.”<sup>39</sup> In Giroux J.A.’s opinion, Quebec’s particular context requires that section 23 of the *Charter* be interpreted in such a manner that the latitude given to the province in drafting legislation “must be broad enough to ensure the protection of the French language while satisfying the purposes of s. 23.”<sup>40</sup>

Giroux J.A. stated that the “specific categories of rights holders under section 23 are Canada’s Francophone and Anglophone language groups.”<sup>41</sup> He recognized that Canadian citizens who are members of other language groups might benefit from section 23(2) of the *Charter*. However, in his opinion, this should be limited to situations of interprovincial mobility. The fact that the framers of the Constitution specified which groups would be protected under section 23 is the primary reason Dalphond J.A. did not share the opinion that, once Canadian citizenship was acquired, new Canadians were justified in invoking section 23 to challenge the constitutionality of the amendments brought by Bill 104. For Dalphond J.A., although Canadian citizenship is one of the criteria found in section 23, “protection under that section is nonetheless limited to two language groups: Francophones and Anglophones.”<sup>42</sup>

In the result, the majority of the Court found the amendment brought to section 73 of the *CFL* by Bill 104 to be inconsistent with section 23(2) of the *Charter* and returned the appellants’ applications to the Ministry of Education for a determination of the applications on behalf of their children under section 73(2) of the *CFL* in accordance with the factors outlined in *Solski*.

The Attorney General of Quebec appealed the Court of Appeal decision to the Supreme Court of Canada.<sup>43</sup>

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***T.B. v. Québec (Ministre de l’Éducation)*<sup>44</sup> [Bindra]**

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The issue in this appeal was whether the exclusion of English instruction pursuant to a special authorization violates the appellants’ rights under section 23(2) of the *Charter*. The *CFL* provides that, under certain specific circumstances, a child who does not qualify to attend English public school may be granted special authorization to do so. Those specific circumstances exist when children have serious learning difficulties and instruction in English is required to facilitate the learning process,<sup>45</sup> when children are staying in Quebec temporarily<sup>46</sup> and where warranted by a serious family or humanitarian situation.<sup>47</sup>

The Court of Appeal was unanimous in its decision to declare unconstitutional the exclusion of English instruction received pursuant to a special authorization. All three judges agreed that the exclusion was incompatible with section 23 of the *Charter* and could not be justified within

38 *Supra* note 3 at para. 34.

39 *Supra* note 4 at para. 241.

40 *Supra* note 3 at para. 34.

41 *Supra* note 4 at para. 270.

42 *Ibid.* at para. 274.

43 File N° 32229.

44 *Supra* note 5.

45 *Supra* note 27 at s. 81.

46 *Ibid.* at s. 85.

47 *Ibid.* at s. 85.1.

the meaning of section 1 of the *Charter*. According to Dalphond J.A., in writing for the Court,

[T]he child of a Canadian parent who legally receives his or her public education in English in Quebec in a public or subsidized English-language school, under a certificate of eligibility issued pursuant to section 75(2), 81, 85 or 85.1 CFL, has the same de facto learning experience, regardless of the nature of the exception under section 72 CFL that enables the child to attend that school. The child is entitled under section 23(2) of the *Charter* to continue his or her learning experience in English.<sup>48</sup> [Emphasis in original]

At paragraph 60 of his reasons, Dalphond J.A. wrote the following:

By prohibiting the person designated to ascertain eligibility for instruction in English in a public or subsidized institution from considering the instruction received pursuant to a certificate of eligibility issued under section 81, 85 or 85.1 CFL, the last paragraph of section 73 CFL truncates the subject's real and experienced objective reality, which, in most cases, will mean that the subject is denied access to a right protected by section 23 of the *Charter*. The violation is serious and I conclude that the last paragraph of section 73 CFL violates section 23 of the *Charter*.<sup>49</sup>

In the *Solski* decision, the Supreme Court of Canada had identified the purpose of section 23(2) of the *Charter* as threefold: to provide continuity of minority-language

education rights, to accommodate mobility and to ensure family unity.<sup>50</sup> Given the importance of ensuring the continuity of minority-language education rights and family unity, the Court of Appeal found that the legislator could not grant a ministerial exemption then subsequently disregard the instruction received pursuant to that exemption when it came time to verify the admissibility of a child (or a child's brother or sister) without contravening the purpose of section 23(2) of the *Charter*.

The Court found the last paragraph of section 73 of the *CFL* to be inconsistent with section 23(2) of the *Charter*, and returned the appellants' applications to the Ministry of Education for the immediate delivery of a certificate of eligibility.

The Attorney General of Quebec appealed the Court of Appeal decision to the Supreme Court of Canada.<sup>51</sup>

The Supreme Court held a joint hearing for both the *Nguyen* and *Bindra* appeals on December 15, 2008. The Quebec Association of Independent Schools, the Quebec English School Boards Association, the Quebec Provincial Association of Teachers, the Association franco-ontarienne des conseils scolaires catholiques, the Commission scolaire francophone des Territoires du Nord-Ouest, the Attorney General of Canada and the Office of the Commissioner of Official Languages were all granted intervenor status before the Supreme Court.

48 *Supra* note 5 at para. 54.

49 *Ibid.* at para. 60.

50 *Supra* note 3 at para. 30.

51 File N° 32319.

## 1.2 The scope of the right to management and control in the Northwest Territories

The following three rulings are part of a much broader dispute before the Supreme Court of the Northwest Territories<sup>52</sup> in which the plaintiffs, including the Commission scolaire francophone des Territoires du Nord-Ouest, initiated legal proceedings on May 29, 2008, to compel the Northwest Territories government to considerably expand École Boréale in Hay River. According to the plaintiffs, the services currently available do not result in equal treatment of the school's students when compared to what is available to students attending English-language schools. The extent and scope of the obligations imposed on the defendants by section 23 of the *Charter* is at the heart of the dispute.

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***Commission Scolaire Francophone, Territoires du Nord-Ouest et al v. Attorney General of the Northwest Territories***<sup>53</sup>

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Due to a lack of space and access to certain services at École Boréale in Hay River, the plaintiffs sought an order forcing the government of the Northwest Territories to take immediate measures to address the problems faced by the school. The motion was heard by the Court on July 9, 2008.

The school board's admission policy allows the children of French-speaking immigrants, children of Francophone descent and other children who attend a French pre-kindergarten program to attend its schools, even if their parents are not rights holders under section 23. The government argued that the lack of space, if there is one, results from the fact that too many children of parents who are not rights holders under section 23 of the *Charter*

attend the school, and that the school board has the responsibility of using the existing space for the children of rights holders. The school board argued that section 23 gives minority-language school boards the right to manage their own schools, which includes the right to determine who is admissible to their schools.

The Court found that the scope of the school board's right to management and the extent of the government's powers was a serious issue to be tried, and that irreparable harm would be suffered by the plaintiffs if their application was not granted. Thus, the Court gave reason to the school board, forcing the government to take interim measures, including the use of three classrooms in a nearby school, to address the problems faced by École Boréale before the beginning of the 2008–2009 school year.

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***Commission Scolaire Francophone, Territoires du Nord-Ouest et al v. Attorney General of the Northwest Territories (No. 2)***<sup>54</sup>

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On July 7, 2008, the Minister of Education of the Northwest Territories issued a directive limiting access to the two schools overseen by the school board to the children of parents who are rights holders under section 23. On August 21, 2008, the school board seized the Court again, this time seeking an order suspending the directive issued by the Minister of Education. The Court did not grant the order sought by the school board. It did however allow the school board to amend its original claim to include a challenge of the issued directive.

52 File N° S-0001-CV-2008000133.

53 2008 NWTSC 53.

54 2008 NWTSC 65.

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*Commission Scolaire Francophone,  
Territoires du Nord-Ouest et al v. Attorney  
General of the Northwest Territories (No. 3)*<sup>55</sup>

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In this motion, also heard on August 21, 2008, the government of the Northwest Territories asked the Court to modify the original order compelling the government to take interim measures. The government claimed that it had been taken by surprise by the Court's order, and submitted evidence demonstrating that it was not possible to liberate three classrooms, as was directed by the Court, without significantly disrupting the nearby school's learning program and displacing a part of its student population. Despite this, the government argued that the Court should still favour a solution that used existing infrastructure, and suggested that several schools be used to provide the needed classrooms. For its part, the school board argued that it was not reasonable to force École Boréale to operate on three or four different campuses.

Convinced that the use of existing infrastructure was no longer an appropriate solution, the Court reluctantly modified the interim order to require the defendant to provide the needed space in a nearby highrise, unless another venue could be found more quickly and at a lesser cost. If those solutions became unavailable or inappropriate, the Court stated that the only remaining solution would be for the government to provide the school with portable classrooms, as expensive as that solution might be.

At the time of writing this report, the ongoing dispute between the school board and the government of the Northwest Territories regarding section 23 and the right to management and control has yet to be decided on the merits.

### 1.3 French immersion programs in New Brunswick

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*Small & Ryan v. New Brunswick  
(Minister of Education)*<sup>56</sup>

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In this case, the Court of Queen's Bench of New Brunswick was called upon to consider whether the language rights enshrined in the *Charter* ensure the protection of French immersion programs in the province of New Brunswick, as well as the applicability of the principles of natural justice and procedural fairness.

On March 14, 2008, the Minister of Education of New Brunswick announced the controversial decision to phase out the Early French Immersion (EFI) program for Anglophone elementary students beginning with Grade 1 in September 2008. The Minister's decision followed a review of the French second-language programming for the province, the results of which were released to the public on February 27, 2008. When commissioners had been appointed in July 2007 to conduct the review, their terms of reference anticipated a response to their report by the government and the Minister of Education within two months, suggesting that the results of the review would eventually be the subject of public debate before the beginning of the upcoming school year. Also in July, the Minister himself had told the media that there would be time to "allow for a full debate." On February 29, 2008, the Friday before the March break school vacation, members of the public had been invited to submit their views and comments before any decisions were made by the government. However, the news release issued by the government inviting the public to comment made no mention of the Minister's intention to eliminate the EFI program. Two weeks following the invitation to the public to take part in the debate, the Minister of Education decided to implement the commissioners' recommendations and cut the EFI program in its entirety.

55 2008 NWTSC 66.

56 2008 NBQB 201.

The applicants, Anglophone parents of children registered to begin the EFI program in September 2008, challenged the Minister's decision: first, arguing that the decision infringed their rights under sections 16 (Official Languages), 16.1 (English and French Linguistic Communities in New Brunswick) and 23 (Minority Language Educational Rights) of the *Charter*; and second, that the Minister's decision was contrary to the common law principles of natural justice and procedural fairness.

### A. The *Charter* challenge

With little or no analysis, the Court rejected the applicants' *Charter* arguments. Citing the Supreme Court of Canada's most recent pronouncements concerning section 23 of the *Charter*, that "it would be contrary to the purpose of the provision to equate immersion with minority language education,"<sup>57</sup> McLellan J. found that EFI for Anglophones, the linguistic majority of the province of New Brunswick, is not protected by the minority-language education rights provision of the *Charter*. In regards to the applicants' arguments under sections 16 and 16.1 of the *Charter*, he simply stated "I am not convinced that the general words regarding bilingualism and linguistic communities [...] provide any legal basis to challenge the decision of Minister of Education regarding Early French Immersion."<sup>58</sup>

### B. The common law challenge

As parents of children registered to begin the EFI program in the upcoming school year, the applicants argued that they had legitimate expectations that the EFI

program would not be cancelled before they had a reasonable opportunity to make representations.

In rendering his decision, McLellan J. highlighted the importance of fairness by public decision makers when affecting the rights, privileges and interests of individuals. Citing the Supreme Court of Canada decision in *Baker*,<sup>59</sup> the Court reminded "that the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision makers, and that **it will generally be unfair for them to act in contravention of representations as to procedure**, or to backtrack on substantive promises without according significant procedural rights."<sup>60</sup> [Emphasis in original]

McLellan J. concluded that the Minister's decision to cut the EFI program was in contravention of his own representation that the decision process would "allow for a full debate," and that the applicant parents had a reasonable and legitimate expectation that the program would not be cut without a real opportunity for them to be heard by the Minister. Furthermore, the circumstances in which the public was invited to comment did not satisfy the requirements of the promised consultation. As such, McLellan J. found that the Minister's decision was unfair and unreasonable, and remitted the matter back to the Minister for reconsideration "in accordance with the principles of fairness after an appropriate opportunity for interested citizens and organized groups to be heard."<sup>61</sup>

Following the Court's decision and public consultations, the government announced modifications to the French immersion program on August 5, 2008.

57 *Supra* note 3 at para. 50; see also *Gosselin (Tutor of) v. Quebec (A.G.)*, [2005] 1 S.C.R. 238, 2005 SCC 15 at paras. 28–34.

58 *Supra* note 56 at para. 5.

59 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

60 *Supra* note 56 at para. 22, citing *Ibid.* at para. 26.

61 *Supra* note 56 at para. 28.

## 2 LANGUAGE RIGHTS AND PROCEEDINGS OF PARLIAMENT

Section 133 of the *Constitution Act, 1867*<sup>62</sup> and section 17(1) of the *Charter* guarantee everyone the right to use either official language in the debates and proceedings of Parliament. This right is further implemented by Part I of the *Official Languages Act (OLA)*, making English and French the official languages of Parliament. This part of the *OLA* also provides for the simultaneous interpretation of debates or other proceedings of Parliament from one official language into the other. Furthermore, everything reported in official reports of debates or other proceedings of Parliament must be in the official language in which it was said, accompanied by a translation in the other official language.

These rights and duties, which are rarely the subject of court actions, are intended to give English and French equal rights and privileges as to their use in parliamentary proceedings, such as the debates of the House of Commons and Senate, and the work of their various committees. During the period covered by this report, only one decision considered the rights covered by Part I of the *OLA*, the *Knopf* case. Similar rights contained in the Northwest Territories *Official Languages Act* were considered in the *Northwest Territories (Attorney General) v. Fédération Franco-ténoise* Court of Appeal decision, covered in Chapter 4 of this report.

### 2.1 The language rights of witnesses appearing before a House of Commons Committee

#### *Knopf v. Canada (Speaker of the House of Commons) (F.C.A.)*<sup>63</sup>

In this case, the Federal Court of Appeal was asked to determine whether a parliamentary committee's refusal to

distribute unilingual documents to its members, tendered by a witness in support of his appearance before the committee, was an infringement of the witness's language rights pursuant to section 4 of the *OLA*. Section 4(1) reads as follows:

4. (1) English and French are the official languages of Parliament, and everyone has the right to use either of those languages in any debates and other proceedings of Parliament.

The applicant, Mr. Knopf, had testified in English, the language of his choice, before the House of Commons Standing Committee on Canadian Heritage in April 2004. The Clerk of the Committee accepted the unilingual English documents tendered in support of Mr. Knopf's appearance; however, the Chair of the Committee refused to distribute the documents to Committee members. According to Committee procedure, only documents in both official languages can be distributed to Committee members.

Mr. Knopf filed a complaint with the Office of the Commissioner of Official Languages about the Chair's refusal to distribute the documents. The Commissioner concluded that the Committee's decision was not in breach of the *OLA* and was entirely consistent with its spirit and intent.

Mr. Knopf subsequently filed an action in Federal Court pursuant to section 77 of the *OLA*. He asked the Court, among other things, to declare that his language rights under sections 16 and 17 of the *Charter* and section 4 of the *OLA* had been breached by the Committee. He also sought an order from the Court compelling all committees of the House of Commons to accept, distribute and consider relevant documents submitted by witnesses in either official language, without the need for prior translation.

62 30 & 31 Vict., c. 3 (U.K.), as reprinted in R.S.C., 1985, Appendix II, No. 5.

63 [2008] 2 F.C.R. 327, 2007 FCA 308.

### **A. The Federal Court judgment**

Layden-Stevenson J. of the Federal Court found that the Committee did not infringe on Mr. Knopf's language rights and dismissed the application.<sup>64</sup> She held that while section 4(1) of the *OLA* protects everyone's right, including that of witnesses, to speak in the official language of his or her choice during committee proceedings and debates, it does not confer the same right in regards to the distribution of documents. In her view, Mr. Knopf's request to have unilingual documents distributed to Committee members was not a question of language rights, but rather a challenge to the way in which the Committee conducted its business, which falls within the inherent category of parliamentary privilege regarding the control exercised by the houses of Parliament over their day-to-day procedure. Consequently, it was for Parliament, and not the courts, to determine whether the exercise of that privilege was necessary or appropriate in a particular case.

### **B. The Federal Court of Appeal judgment**

On appeal, Mr. Knopf argued that the Federal Court's interpretation of the word "use" in section 4(1) of the *OLA* was incorrect, that it limited its meaning to oral speech, effectively excluding the right for a witness to make written submissions or present written material in either official language.

Trudel J.A., writing for the Court, explained that a careful reading of the Federal Court decision does not support Mr. Knopf's interpretation, and that Layden-Stevenson J.'s use of the word "speak" in describing the right provided in section 4(1) of the *OLA* was not restricted to the faculty of oral speech. Rather, she stated that section 4(1) of the *OLA* provides the appellant with a right to "address" the House in the language of his choice.

Trudel J.A. agreed with the Federal Court that Mr. Knopf's request that his documents be distributed to Committee members does not fall within the parameters of section 4(1) of the *OLA*. In her reasons, she described how section 4(1) of the *OLA* recognizes the right of any person participating in parliamentary proceedings "to use" English or French, creating "a scheme of unilingualism at the option of the speaker or writer."<sup>65</sup> She explained that this right is unilateral in nature; it provided Mr. Knopf with a right to address the Committee in the language of his choice only. Once this right has been exercised, section 4(1) does not compel the Committee to act in a certain way with the oral or written information provided to it. The decision on how and when to treat the information received from a witness belongs to the Committee. The appeal was therefore dismissed.

Mr. Knopf sought leave to appeal to the Supreme Court of Canada. This request was refused.<sup>66</sup>

64 2006 FC 808.

65 *Supra* note 63 at para. 38.

66 File N° 32416, application for leave to appeal dismissed on March 20, 2008.

## 3 LANGUAGE RIGHTS IN THE ADMINISTRATION OF JUSTICE

The right to use either English or French before the courts is guaranteed by several constitutional instruments, including the *Charter*, the *Constitution Act, 1867* and the *Manitoba Act, 1870*. Several provisions of federal and provincial statutes, such as the *Criminal Code*, Part III of the federal *OLA* and the New Brunswick *Official Languages Act*, complement the bilingualism of federal and in some cases provincial judicial institutions.

The federal and provincial governments regulate various aspects of the use of official languages in the courts within their respective jurisdictions. The federal government is responsible for regulating the use of official languages in criminal proceedings and in federal courts.

In criminal proceedings, the courts' language obligations are set out in Part XVII of the *Criminal Code*. The provisions dealing with the language rights of the accused, namely sections 530 and 530.1, guarantee the right to speak and to be understood by a judge or a judge and jury in the official language of choice. Whereas section 530 provides for the right of an accused to apply for an order to have the trial conducted in his or her official language, section 530.1 describes the practical consequences of such an order. Recently, these rights have been improved and clarified by Parliament with the adoption of Bill C-13,<sup>67</sup> which received royal assent on the May 29, 2008. In addition, section 530, which previously provided that only unrepresented accused were to be advised of the right to a trial

in the official language of choice, now provides that the judge is to ensure that all accused are advised of that right. These provisions apply to all provincial courts that conduct criminal trials. Their purpose is to "provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity."<sup>68</sup> It should be noted that, where the provinces or territories are authorized to handle federal offences, they act on behalf of the federal government and must therefore ensure the respect of the language rights established in federal legislation.<sup>69</sup>

The language obligations of federal courts<sup>70</sup> derive from the Constitution and from the *OLA*. Section 19 of the *Charter* provides that either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.<sup>71</sup> Part III of the *OLA* adds to this fundamental right by providing certain institutional obligations to facilitate access to the federal courts in both official languages. These obligations include the duty to ensure that witnesses appearing before federal courts can be heard in the official language of their choice without suffering any detriment thereby; offer simultaneous interpretation services at the request of any party; ensure that the judge hearing a case understands the official language of the parties without the assistance of an interpreter;<sup>72</sup> and publish decisions in both official languages simultaneously or at the earliest possible time. When a federal institution is a party to the proceedings, its counsel has the obligation to use, in arguments and pleadings, the official language chosen by the civil party.

67 *An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)*, 2nd Sess., 39th Parl., 2008.

68 *R. v. Beaulac*, [1999] 1 S.C.R. 768 at para. 34, citing *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at 749.

69 *Commissioner of Official Languages (Can.) v. Canada (Minister of Justice)*, (2001) 194 F.T.R. 181, 2001 FCT 239.

70 Under s. 3(2) of the *OLA*, a federal court is "any court, tribunal or other body that carries out adjudicative functions and is established by or pursuant to an Act of Parliament." This includes courts of law such as the Federal Courts of Canada and the Tax Court of Canada, as well as quasi-judicial administrative tribunals such as the Canadian Human Rights Tribunal and the Canadian Industrial Relations Board.

71 S. 19 of the *Charter* also applies to any court of New Brunswick.

72 This duty applies to all federal tribunals other than the Supreme Court of Canada: see s. 16 of the *OLA*.

In addition to certain constitutional obligations,<sup>73</sup> the provinces and territories are responsible for regulating the use of official languages in civil proceedings. For example, the *Courts of Justice Act* of Ontario and the *Languages Act* of the Yukon Territory provide for the use of both official languages in civil proceedings before their respective judicial institutions.

It should be noted that language rights in the administration of justice can only be implemented if there is a sufficient number of bilingual judges and staff to put these rights into practice. Recently, in *Belende v. Patel*, the Ontario Court of Appeal commented on the negative impact caused by the shortage of bilingual judges on the language rights of parties appearing before the courts.

In the seminal *Beaulac*<sup>74</sup> judgment, the Supreme Court of Canada held that language rights “must in all cases be interpreted purposively, in a manner that is consistent with the preservation and development of official language communities in Canada”<sup>75</sup> [Emphasis in original]. The judgment in *Beaulac* also recognized that language rights and the right to a fair trial are distinct in nature.<sup>76</sup> The right to a fair trial concerns the right of an accused to understand the proceedings and make him or herself understood,<sup>77</sup> whereas language rights are positive rights that have a completely distinct purpose. As will be seen, the Ontario Court of Appeal applied these principles in the *Belende v. Patel* decision, while the Court of Appeal for the Yukon Territory failed to make the distinction between language rights and the right to a fair trial in the *Kilrich Industries Ltd. v. Halotier* case.

During the two-year period covered by this report, the courts handed down several judgments on the question of official languages in the administration of justice. Language rights in civil proceedings in Ontario, the Yukon Territory and Alberta are among the issues discussed, as are the rights of the accused and witnesses in the criminal context.

### 3.1 The right to a bilingual hearing in Ontario

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#### *Belende v. Patel*<sup>78</sup>

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In this case, the Ontario Court of Appeal considered the nature of the right to a bilingual proceeding pursuant to section 126 of the *Courts of Justice Act*.<sup>79</sup>

The plaintiff, Mr. Belende, initiated a bilingual proceeding in the Ontario Superior Court of Justice against the defendants, Babubhai Patel, CDN Business Investor Corp., Farzana Nabizada and Seena Nasrati. Mr. Belende was seeking an order rescinding the sale of his property and awarding him general damages in the amount of \$1.5 million. Prior to the hearing, Mr. Belende was notified that a bilingual judge would not be available to hear the scheduled motions, which included a motion to dismiss. On the day of the hearing, his lawyer requested that the hearing of the motions be adjourned to a later date when a bilingual judge would be available. The motion judge, who was not bilingual, denied the request for an adjournment. He found that, due to Mr. Belende’s behaviour, in particular his objection to the presence of more than 16 individual judges on the basis of language,

73 S. 19 of the *Charter* (New Brunswick), s. 133 of the *Constitution Act, 1867* (Quebec) and s. 23 of the *Manitoba Act, 1870* (Manitoba).

74 *Supra* note 68.

75 *Ibid.* at para. 25.

76 *Ibid.* at para. 41.

77 *Ibid.* This right is enshrined in s. 14 of the *Charter*, according to which “A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.”

78 *Supra* note 8.

79 R.S.O. 1990, c. C-43.

his request for a bilingual judge was an attempt to further delay the proceedings. The motion judge proceeded with the hearing and granted the motion dismissing Mr. Belende's action.

Mr. Belende appealed the order, arguing that the motion judge's failure to adjourn the proceedings and to refer the matter to a bilingual judge violated his right to a bilingual proceeding conferred by section 126 of the *Courts of Justice Act*. The Ontario Court of Appeal allowed Mr. Belende's appeal, having found that his right to a bilingual proceeding had been violated.

In his analysis, Rouleau J.A. first addressed the decision of the motion judge to refuse the adjournment of the proceedings. He found that there was no evidence to support the conclusion that all bilingual judges in the region were precluded from hearing Mr. Belende's case. He also explained that the Court need not resort to violating a litigant's statutory right to a bilingual trial in order to address a litigant's abuse of process. The Court has other means of doing so. Furthermore, the Court's inherent jurisdiction to control proceedings cannot be exercised in a manner that would conflict with the express provisions of a statute. In the case at bar, the right to a bilingual proceeding provided for in section 126 of the *Courts of Justice Act* is not qualified by any grant of judicial discretion. Rouleau J.A. concluded that the motion judge should have adjourned the proceedings until a bilingual judge was available.

Rouleau J.A. then addressed the respondents' argument that the appeal should be dismissed because Mr. Belende did not suffer any prejudice. Citing the

Supreme Court of Canada decision in *Beaulac*,<sup>80</sup> he held that the right to a bilingual hearing is a particular kind of right: more than a procedural right, it is substantive. Rouleau J.A. described the consequences of this distinction in paragraph 24 of his decision:

English and French are the official languages of the courts in Ontario, and the court has a responsibility to ensure compliance with language rights under s. 126 of the *Courts of Justice Act*. A proper interpretation of this provision is one that is consistent with the preservation and development of official language communities in Canada and with the respect and preservation of their cultures: see *Beaulac*, at paras. 25, 34 and 45. Violation of these rights, which are quasi constitutional in nature, constitutes material prejudice to the linguistic minority. A court would be undermining the importance of these rights if, in circumstances where the decision rendered on the merits was correct, the breach of the right to a bilingual proceeding was tolerated and the breach was not remedied.<sup>81</sup>

Consequently, the Court of Appeal set aside the order of the motion judge, and referred the matter back to the Superior Court to be heard by a bilingual judge.

Following the resolution of this case, Rouleau J.A. added, "it is somewhat troubling that although the motions below were brought as part of a bilingual proceeding with sufficient notice, no bilingual judge was available to hear them." He then referred to the Honourable Coulter A. Osborne, Q.C.'s November 2007 report entitled *Civil Justice Reform Project*<sup>82</sup> in which the author highlights the need for more bilingual judges in Ontario courtrooms, particularly in Toronto.

<sup>80</sup> *Supra* note 68.

<sup>81</sup> *Supra* note 8.

<sup>82</sup> *Ibid.* at para. 27; *Civil Justice Reform Project* at para. 13, online: The Ministry of the Attorney General [www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/).

### 3.2 Language rights in civil proceedings before the Supreme Court of the Yukon Territory

#### *Kilrich Industries Ltd. v. Halotier*<sup>83</sup>

In this case, the Court of Appeal for the Yukon Territory considered the scope of French language rights in civil proceedings before the Supreme Court of the Yukon Territory, particularly, the application of sections 4, 5 and 6 of the *Languages Act*.<sup>84</sup>

The appellant, Mr. Halotier, whose mother tongue is French, was born, raised and educated in France. In April 2000, he moved to the Yukon and began the construction of a bed and breakfast. He purchased building materials and other supplies on credit from the respondent, Kilrich Industries Ltd. After paying most of the cost of the supplies, the appellant refused to pay the final invoice, claiming that some of the materials supplied were deficient and caused damage to the building he was constructing. The respondent instituted legal proceedings against the appellant, and Gower J. of the Supreme Court of the Yukon Territory granted a summary judgment in favour of the respondent.

Mr. Halotier appealed the decision, contesting the procedures leading up to and surrounding the summary trial on the ground that his rights under the *Languages Act* had been violated. The appellant argued that because the *Rules of Court*<sup>85</sup> were not available to him in French, he was not given fair opportunity to present a defence, and “when he finally came to understand the procedure at the summary trial, he was not permitted an adjournment to obtain legal advice.” He also maintained that “he was unable to speak French and be understood by the presiding judge.”<sup>86</sup>

Huddart J.A. of the Court of Appeal began her analysis by reviewing the circumstances leading up to and including the disposition of the case. The appellant was not provided with the forms or any part of the *Rules of Court* in French (at the time, an up-to-date copy of the *Rules of Court* in French did not exist); he therefore required assistance to complete the English forms. The appellant requested the presence of a French-speaking judge or an interpreter at both the settlement conference and at trial. Although the deputy clerk informed him an interpreter would be provided during the settlement conference, no one was made available and the appellant had to rely on the assistance of a friend for translation. In addition, at trial, interpretation was made available, but it was provided by a bilingual volunteer who worked as legislative counsel for the Yukon Department of Justice. Finally, regarding the transcripts of the hearing, the first transcript provided to the appellant included only what was said in English. After further requests, the appellant received a transcript of what was said in both French and English—unfortunately, it contained a number of gaps where much of what was said was “indiscernible.”

Huddart J.A. briefly reviewed the evolution of French-language rights in the Yukon Territory leading up to the enactment of the *Languages Act*, and concluded that its terms “suggest that it was a compromise that sought both to place Canada’s two official languages on a quasi-constitutional footing in the Yukon and to afford protections similar in principle to the language rights contained in the *Canadian Charter of Rights and Freedoms* and s. 133 of the *Constitution Act, 1867*.”<sup>87</sup> Huddart J.A. then proceeded to address the questions at issue, summarized as the following six questions.

83 *Supra* note 9.

84 R.S.Y. 2002, c. 133.

85 *Rules of Court for the Supreme Court of Yukon* pursuant to s. 38 of the *Judicature Act*, R.S.Y. 2002, c. 128.

86 *Supra* note 9 at para. 2.

87 *Ibid.* at para. 32.

**i. Should the *Languages Act* be given a large, liberal and purposive interpretation?**

After reviewing the relevant case law, Huddart J.A. explained that language rights must be given a broad and purposive interpretation, an approach supported by the underlying constitutional principle of the protection of minority rights, and concluded “the purpose of the *Languages Act* is to commit the Yukon to official bilingualism.”<sup>88</sup>

**ii. Are authorities interpreting similar statutory and constitutional provisions applicable to the *Languages Act*?**

Huddart J.A. held that “[t]o the extent the wording of the provisions in the *Languages Act* is similar to language used in the *Charter* and s. 133 of the *Constitution Act, 1867*, it follows naturally from their similar purpose that the interpretation of those constitutional provisions will provide considerable guidance in the interpretation of the *Languages Act*.”<sup>89</sup> However, she stressed that the interpretation of these provisions is not determinative, and it is important that the Court take into account the unique context of the Yukon in its interpretation.

**iii. Do “Acts of the Legislative Assembly and regulations made thereunder” in section 4 include the *Rules of Court*, forms, practice directives and memoranda and notices to the profession?**

Huddart J.A. explained that the *Judicature Act* established the *Rules of Court* by incorporating the *B.C. Rules* directly into the statute, which can be amended by means of practice directives issued by the judges of the Supreme Court. The rules, along with the forms they prescribe and all practice directives issued by the judges of the Supreme Court, have the force of law and are, in effect, delegated legislation.

Thus, the *Rules of Court* must be printed and published in both French and English in order to give meaning and effect to sections 4 and 5 of the *Languages Act*.

**iv. What rights flow from section 5?**

Huddart J.A. explained that it was clear from the language of the provision that section 5 grants such rights as the right to file documents with the Yukon Supreme Court Registry in French, the right to use French in communicating orally or in writing with the registry and the right to have his or her words recorded in the official language used. She stated that it necessarily follows that any transcripts issued from the recordings should include testimony in the language in which it was given. Huddart J.A. reiterated that it is necessary for the Court to make its rules (including forms and practice) available to the public in French in the same way it does in English, in order for the right to use English or French to have any meaning. However, citing *Société des Acadiens*,<sup>90</sup> she rejected an interpretation of section 5 of the *Languages Act* that would impose positive obligations on the Court (i.e. the obligation to provide a bilingual judge, clerk or officer of the court, or an interpreter), opting instead to leave it to the judge’s discretion as part of his or her duty to conduct a fair trial.

**v. Is the Senior Judge required to assign a judge who speaks and understands French?**

Huddart J.A. rejected the argument that the unwritten constitutional principle of the protection of minority rights requires a bilingual judge to preside over a settlement conference or trial when a party expresses the intention to speak French. She explained that this argument is another way of trying to impose an obligation to communicate or be understood in French, which she had previously considered and

<sup>88</sup> *Ibid.* at para. 48.

<sup>89</sup> *Ibid.* at para. 53.

<sup>90</sup> *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents*, [1986] 1 S.C.R. 549.

rejected in her analysis of section 5. She explained that the power to assign judges on behalf of the Court is a function that directly affects adjudication and is an implicit institutional requirement flowing from sections 96 to 100 of the *Constitution Act, 1867*.<sup>91</sup> As such, the Chief Justice or Senior Judge, when exercising this power, is immune from compulsion by Parliament or the Executive (or another court by means of judicial review). She concluded by stating that if the result of a particular assignment is an unfair trial, then the error can be remedied by way of appeal.

#### **vi. Does section 6 apply to the Yukon Supreme Court Registry?**

Section 6(1) of the *Languages Act* states that “[a]ny member of the public in the Yukon has the right to communicate with, and to receive available services from, any head or central office of an institution of the Legislative Assembly or of the Government of the Yukon in English or French [...]”

Huddart J.A. accepted that the Yukon Supreme Court is an “institution” within the meaning of section 6(1) of the *Languages Act* and that the registry office in Whitehorse is the Court’s “central office,” and identified the issue as being “the meaning of ‘the right to communicate with, and to receive available services from’ that office.”<sup>92</sup> Citing the Supreme Court of Canada decision in *Société des Acadiens*, she held that “every person has the right to communicate directly in French with a member of the staff of the registry personally, by telephone, in writing and to receive all the services in French

that are available to the general public in English.”<sup>93</sup> However, she found that the record of this case “does not lend itself to the setting of a precise standard for the provision in French of each administrative service.”<sup>94</sup> She felt that, given “human and financial resources are not unlimited” and that “all service-providing systems will be imperfect in the eyes of someone,” an analysis of the obligations under section 6(1) “can only be by way of comparison to services provided in comparable circumstances.”<sup>95</sup> As such, section 6 requires the registry to provide the same assistance to self-represented French-speaking litigants as it provides to self-represented English-speaking litigants.

Huddart J.A. found that the appellant had established a breach of his language rights and was entitled to a remedy pursuant to section 9 of the *Languages Act*. Consequently, she granted the appeal, set aside the order of Gower J. and remitted the matter back to the Yukon Supreme Court for a new trial. In addition, she declared the *Rules of Court* of no force and effect, but suspended the operation of this declaration for a period of 12 months from the date of the release of the judgment to enable the Yukon Supreme Court and Government to comply with the requirements of section 4 of the *Languages Act*.

The *Rules of Court* have since been made available in French.

91 *Supra* note 62.

92 *Supra* note 9 at para. 91.

93 *Ibid.*

94 *Ibid.* at para. 93.

95 *Ibid.* at paras. 93–94.

### 3.3 Legislative and judicial bilingualism in Alberta

*R. c. Caron*<sup>96</sup>

The defendant, Gilles Caron, was charged with a violation of the Alberta *Traffic Safety Act*.<sup>97</sup> The defendant did not contest the facts surrounding the traffic violation, which Wenden J. of the Provincial Court of Alberta found to be sufficient to prove his guilt beyond a reasonable doubt. Rather, in his defence, Mr. Caron alleged that his constitutional rights had been violated because the statute in question had not been published in the French language. The constitutional challenge launched by Mr. Caron took aim at the Alberta *Languages Act*<sup>98</sup> of 1988, which provides that all acts or regulations may be enacted, printed and published solely in the English language. As such, he was seeking the following remedies:

- A declaration under section 52 of the *Constitution Act, 1982*<sup>99</sup> that the Alberta *Languages Act*, to the extent that it abolishes or diminishes the language rights that were in force prior to its adoption, is incompatible with the Constitution of Canada and is of no force and effect.
- An order under section 24(1) of the *Charter* that the charges against him be dropped.
- A declaration under section 52 that the Legislature of the Province of Alberta adopt and sanction all the laws and regulations of the Province of Alberta in French, starting with

those required by the defendant within the current proceedings: *Traffic Safety Act; Use of Highways and Rules of the Road Regulations*;<sup>100</sup> *Provincial Court Act*;<sup>101</sup> etc.

- A declaration under section 52 that all persons have a constitutional guarantee to court proceedings in French, like in English, in penal and civil matters before all courts of the Province of Alberta, including the right to submit all documents and forms in French and to be heard and understood in French without the use of an interpreter.

Essentially, the defence's theory, which focused on the period from 1846 to 1877, was that language rights (both legislative and before the courts) were a condition of the transfer and admission of Rupert's Land and the North-Western Territory to Canada, and that these rights had been entrenched in the Constitution. The defence's theory was based on the status and use of the French language prior to and after the transfer and admission of these territories to Canada.

#### A. The hearing

After overcoming some initial difficulties experienced by Mr. Caron in obtaining a trial in French, the trial, originally set for five days in October 2005, commenced on March 1, 2006 and lasted a total of 89 days spread over several periods. Eight expert witnesses were heard (five for the defence and three for the province) on the subjects of history, sociology, sociolinguistics and political science, and the testimony of four witnesses (including the defendant) described the difficulties they experienced

96 *Supra* note 10.

97 R.S.A. 2000, c. T-6.

98 *Supra* note 11.

99 Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

100 Alta. Reg. 304/2002.

101 R.S.A. 2000, c. P-31.

in “living in French.” Approximately 80 pages of the 96-page judgment describe and analyze the historical evidence presented during the hearing. In the words of Wenden J., it was a “hearing without precedent.”<sup>102</sup>

## B. Historical context

The vast territory of Rupert’s Land and the Northwest (which today includes the Northwest Territories, the Yukon, most of Manitoba, Saskatchewan and Alberta, northern Ontario, northern Quebec and most of Nunavut) remained under the tutorship of the Hudson’s Bay Company for decades. The majority of the population lived in the Red River Settlement situated in Rupert’s Land (part of what is Manitoba today). There were no other settlements within the territory of similar dimensions. It was not until after the transfer of the territories to Canada that the population started settling further west.

At the time of the transfer, the Red River Settlement was the residence of the Governor General of the colony, the administrative headquarters of the Hudson’s Bay Company, the Council of Assiniboia and the Recorder’s Court. The population of the Red River Settlement was almost evenly split between people of French and Aboriginal descent (Métis) and of English and Aboriginal descent (Sang-Mêlés). The settlement was the start and return point for those who worked for the Hudson’s Bay Company (as hunters, trappers, etc.) throughout the territory to be transferred to Canada. In reality, the population of the Red River Settlement was the population of Rupert’s Land and the Northwest.

In 1868–1869, the Company decided to cede its charter to the British Crown and consented to the transfer of Rupert’s Land and the North-Western Territory to Canada in exchange for financial compensation and the retrocession of certain Arab lands.

However, the conditions and procedures to admit the territories into Canada provided for under section 146 of the *Constitution Act, 1867*<sup>103</sup> required British intervention.

The decision to cede the territory to the British Crown and to subsequently transfer it to Canada had been made by the Hudson’s Bay Company, the British Parliament and the Parliament of Canada. However, the residing population had not been consulted. This omission resulted in the dissatisfaction of a segment of the population, more particularly the Métis community, which was concerned that the transfer would affect its rights, and ultimately led to the Red River Rebellion. Although the transfer had been set for December 1, 1869, the disturbances forced the parties to suspend the transfer procedure and to push back the cession date. In fact, the Canadian government did not want to accept the transfer because of the unstable situation that existed at the Red River Settlement.

Meanwhile, the Métis and Sang-Mêlés held two conventions to establish their demands, and redacted a *List of Rights* (in fact, four lists had been developed in different stages). Representatives of both communities were present at these conventions, as was the representative of the Canadian government, Donald Smith. During the second convention, Mr. Smith rendered public the *Proclamation of the 6th of December 1869*, enacted in Her Majesty’s name by the representative of the British Empire for the region, Governor General Young. The *Proclamation* was issued in response to the population’s demands and sought to re-establish order in the territory. It guaranteed that the inhabitants’ rights would be respected after the territory’s admission into Canada. The transfer finally took place by Order of Her Majesty in Council, adopted on June 23, 1870, and came into force on July 5, 1870.

102 *Supra* note 10 at para. 42.

103 *Supra* note 62.

### C. Language rights in Rupert's Land and the North-Western Territory prior to the transfer to Canada

The defence alleged that the French language had been used by the courts and in the Council for the District of Assiniboia before the transfer of the territories to Canada. In fact, the use of the French language was well established and never contested; judges (recorders) were bilingual, there were Francophone juries and the Council for the District of Assiniboia included Francophone councillors. The defence argued that these facts represented the beginning of official bilingualism in the region. In support of this proposition, the defence relied on three events: the memoranda of the Métis and Sang-Mêlés sent to the Secretary of State for the Colonies in 1846 detailing certain demands, the Sayer trial of 1849 and the use of French by the Council for the District of Assiniboia.

The memorandum of the Métis and the memorandum of the Sang-Mêlés sent to the Secretary of State for the Colonies constituted the beginning of a pact between Francophones and Anglophones that culminated in the adoption of the *List of Rights* in 1869–1870. According to the Court, the two memoranda, when read together, covered the entirety of Rupert's Land and the Northwest (as opposed to the Red River Settlement only), and contained an implicit demand for the presence of Francophone judges. Similarly, during the Sayer trial, demands were made that the hearing be conducted in the French language, confirming that the right to a trial in French existed at that time and in the territory in question. The official status of the French language was further demonstrated by the extent to which it was used by the Council for the District

of Assiniboia: when the council acted as legislature, orders and regulations were issued in French; when the council acted as a tribunal, jury summons were also issued in French.

### D. Language rights in Rupert's Land and the North-Western Territory during and after the transfer to Canada

Having established that language rights (both legislative and before the courts) existed in the territories prior to their transfer to Canada, the Court then had to determine whether their recognition was a condition of the transfer. In order to do so, the Court examined the context in which the transfer was made as well as various constitutional documents surrounding the transfer. Central to the defence's theory were the *List of Rights* developed in 1869–1870, and the *Proclamation of the 6th of December 1869*.

The *List of Rights*, developed in four stages in 1869–1870, explicitly included language guarantees regarding the legislative assembly and the courts. The Court found that the rights mentioned in the list were bona fide rights that emerged from the pact entered into by the Anglophones (Sang-Mêlés) and Francophones (Métis) regarding the conditions for admission into the Union. Furthermore, the Court found that the list also reflected a pact entered into by the delegates of the Métis and Sang-Mêlés and the provisional government. The third list reiterated the demands found in the previous lists, and was written by the provisional government. According to the Court, this pact was continued by the British Parliament with section 23 of the *Manitoba Act, 1870*,<sup>104</sup> and confirmed by the Parliament of Canada

104 (Canada), 33 Vict., c. 3. Section 23: Either the English or the French language may be used by any person in the debates of the Houses of the Legislature and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the *Constitution Act, 1867*, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be Printed and published in both those languages.

in the *North-West Territories Act, 1875*<sup>105</sup> and its subsequent amendment in 1877 with the addition of section 11,<sup>106</sup> which would later be renumbered as section 110.

The purpose of the *Proclamation of 1869* was to resolve the problem caused by the Red River Rebellion and to obtain the peaceful transfer of the territories, taking into account the grievances and demands expressed by the delegates in the *List of Rights*. Therefore, in exchange for a peaceful transfer, the *Proclamation* made certain guarantees: that all civil and religious rights and privileges would be respected. The *Proclamation* originated from the Queen, and the authorities in London believed that it had the force of law. They authorized Governor General Young to issue the *Proclamation*, who in turn asked Donald Smith, the representative of the Canadian government, to read it to the delegates in order to obtain their obedience following the rebellion. By disclosing the contents of the *Proclamation* at that time, that is, during the second convention, the authorities indicated to the population, at that time, that they wanted to obtain their obedience. Thus, the proclamation had the force of law and imposed an obligation on the population to stop the rebellion, while bringing them certain guarantees, namely the respect of their civil and religious rights and privileges. The term “civil rights” was interpreted by the Court to include language rights, as was expressed by the delegates during the conventions and in the *List of Rights*.

The *Order of Her Majesty in Council Admitting Rupert’s Land and the North-Western Territory into the Union, 1870*<sup>107</sup> enacted by Her Majesty on June 23, 1870, contained 15 conditions. The fifteenth condition was very specific: “The Governor in Council is authorized and empowered to arrange any details that may be necessary to carry out the above terms and conditions.” In fact, the fifteenth condition restated, in very similar language, a resolution voted on by the House of Commons on May 28, 1869, setting the conditions for the transfer. According to the Court, the *Proclamation of 1869* was issued by the governor in accordance with the fifteenth condition, and therefore had acquired constitutional status.

#### **E. The Court’s jurisdiction regarding remedy**

Having determined that language rights (both legislative and before the courts) were a condition of the transfer and admission of Rupert’s Land and the North-Western Territory into Canada, Wenden J. found that the *Languages Act* violated Mr. Caron’s language rights, but that the Court lacked the jurisdiction under section 52 of the *Constitution Act, 1982* to declare the Act unconstitutional. Instead, he declared the *Traffic Safety Act* and its regulations of no force and effect in relation to the specific charges against Mr. Caron, due to the fact they were enacted solely in the English language. As such, Mr. Caron was found not guilty.

The Province of Alberta has appealed the decision to the Court of Queen’s Bench. The appeal was heard in January 2009.<sup>108</sup>

105 S.C. 1875, c. 49.

106 38 Vict., c. 49. Section 11: Either the English or the French language may be used by any person in the debates of the said Council, and in the proceedings before the Courts, and both those languages shall be used in the records and journals of the said Council, and the ordinances of the said Council shall be printed in both those languages.

107 Pursuant to s. 146 of the *Constitution Act, 1867* and *Rupert’s Land Act, 1868*, 31-32 Vict., c. 105 (U.K.).

108 Docket N° 040241291S4.

### 3.4 Language rights of the accused

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#### *Denver-Lambert c. R.*<sup>109</sup>

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In this case, the Court of Appeal of Quebec examined the right of an accused to be tried before a judge and jury in his or her official language pursuant to section 530(4) of the *Criminal Code*.<sup>110</sup>

Mr. Denver-Lambert and Mr. Lévesque were accused of murdering two individuals. On April 24, 2004, Mr. Denver-Lambert's preliminary inquiry took place, and was conducted in French. The pre-hearing conference, held October 4, 2004, was also conducted in French. His trial was scheduled for October 26, 2004. When Mr. Denver-Lambert met with his lawyer in early October 2004, he informed his lawyer that he had difficulty following the debates during the pre-hearing conference. At this point, Mr. Denver-Lambert's lawyer informed him of his right to be tried in the official language of his choice. Mr. Denver-Lambert's lawyer filed a motion requesting that his client be tried in English. The trial judge denied the motion on the grounds that Mr. Denver-Lambert's request was submitted late in the trial process and that the reasons for the delay were not genuine, given his knowledge of the French language and the fact that since his first appearance all of the proceedings had been conducted in French. Mr. Denver-Lambert was subsequently found guilty on two counts of first-degree murder.

Mr. Denver-Lambert appealed the guilty verdicts on several grounds, including that the trial judge erred in rejecting his application to be tried in English, contrary to the requirements of section 530(4) of the *Criminal Code*. The Court of Appeal began its analysis by outlining the application of section 530(4), as determined by the Supreme Court of Canada in *R. v.*

*Beaulac*.<sup>111</sup> The Court explained that the first step in the application of section 530(4) is to determine the language of the accused. To this end, the only applicable criterion is whether the accused has sufficient knowledge of his chosen official language in order to instruct counsel and to follow the proceedings. Other factors, such as the accused's linguistic abilities in the other official language or the language of the proceedings conducted thus far are not relevant in this determination, nor should the Court seek to examine the personal linguistic preferences of the accused or to identify a dominant cultural identity. The Court explained that the Crown may challenge the assertion made by the accused, but the Crown would then have the burden of demonstrating that the assertion is unfounded.

The Court of Appeal then explained that the right provided in section 530(4) is discretionary, and that, as a second stage in the analysis, the Court must determine whether the best interests of justice will be served by granting the application. It explained that there is a presumption that the application should be granted, and that any denial of the application is exceptional and needs to be justified. In this determination, the reasons for the delay in the application, including the moment when the accused first became aware of his or her rights, are of foremost importance. Once the reasons for the delay have been examined, the trial judge must consider a number of factors related to the trial process (i.e. what are the difficulties that could arise as a result of granting a request under section 530(4)).

The Court of Appeal found that the trial judge had erred in the application of section 530(4) of the *Criminal Code*. With regard to the first stage of the analysis, which involves the determination of the language of Mr. Denver-Lambert, the trial

109 2007 QCCA 1301.

110 R.S.C. 1985, c. C-46.

111 *Supra* note 68.

judge applied the wrong criteria. Factors such as Mr. Denver-Lambert’s abilities in French, the language of the proceedings conducted thus far, personal linguistic preferences and dominant cultural identity should not have been considered. In regards to the second stage—whether the interests of justice would be served by granting the application—the Court of Appeal found that the trial judge should have taken into account the moment when Mr. Denver-Lambert became aware of his right under section 530(4). Furthermore, it is the Crown that has the burden of proving that granting the application would not be in the best interests of justice, and in the absence of any specific proof to that effect, the trial judge should have granted the application.

The Court of Appeal allowed the appeal, set aside the guilty verdicts and ordered a new trial.

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***Dow v. R.***<sup>112</sup>

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In this case, the Quebec Court of Appeal had to determine whether the appellant was deprived of his right to an English-language jury trial, as provided for in sections 530 and 530.1 of the *Criminal Code*,<sup>113</sup> and whether his right to an interpreter under section 14<sup>114</sup> of the *Charter* had been violated.

Bertram Dow, the appellant, a unilingual Anglophone, was tried for second-degree murder before a Superior Court judge and jury composed solely of English-speaking persons. The jury found him guilty of second-degree murder, and the appellant was sentenced accordingly. The verdict was appealed on several grounds, including that the appellant was deprived of his right to an English-language trial and of his

right to have the entirety of the transcript of the trial in English, as provided for in sections 530 and 530.1 of the *Criminal Code* and section 14 of the *Charter*. The Crown argued that neither section 530 nor 530.1 of the *Criminal Code* applied since counsel for the appellant never made an application on his behalf as contemplated by section 530(1) of the *Criminal Code*. In the alternative, the Crown argued that even if section 530.1 of the *Criminal Code* was applicable, the appellant had waived any such rights.

**A. Infringement of rights pursuant to the *Criminal Code* and the *Charter***

Hilton J.A., writing for the Court of Appeal, first considered whether the conduct of the trial before the Superior Court respected the appellant’s rights as provided for in section 530.1 of the *Criminal Code* and section 14 of the *Charter*.

He noted that the indictment was drafted in English, and the appellant elected to be tried before a jury composed exclusively of English-speaking persons. He then described his findings regarding the conduct of the trial, both in the presence of the jury and outside the presence of the jury. When in the presence of the jury, the trial was conducted as an English-language trial, with the exception of three instances involving discussion between the trial judge and counsel. During these instances, interpretation was not provided for the appellant, and consequently the transcript of what was said was in French. Outside the presence of the jury, the conduct of the trial was quite different. There were several exchanges between the trial judge and counsel that took place in French only, with simultaneous rather than consecutive

112 2009 QCCA 478.

113 *Supra* note 110.

114 *Supra* note 77.

interpretation, and sometimes with no interpretation at all.<sup>115</sup> During the *voir dire*s, both counsel asked questions of the witnesses in French, and these questions and any answers of witnesses who testified in French were also translated using simultaneous interpretation. The trial judge rendered several interlocutory judgments in French, again with simultaneous interpretation for the appellant. On some occasions, counsel for the appellant addressed the trial judge in French, with the Crown and trial judge initially participating in English, but then switching to French. In such instances, there was no consecutive interpretation when French was used.

Hilton J.A. explained that such circumstances show that some aspects of section 530.1 of the *Criminal Code* were not respected. Moreover, Hilton J.A. pointed out that the absence of any interpretation at all would necessarily engage consideration of section 14 of the *Charter*.

### **B. Requirement of an application pursuant to section 530(1) of the *Criminal Code***

Hilton J.A. rejected the Crown's first argument according to which sections 530(1) and 530.1 did not apply to the appellant's trial because his counsel never made an application.

He stated that Quebec had a "long, rich and salutary tradition of providing English language criminal jury trials to Anglophones that pre-dates the adoption and coming into force of sections 530 and

530.1."<sup>116</sup> He added that section 530(1) of the *Criminal Code* does not have any practical effect in Quebec in this regard and reiterated that "whatever may be the practice outside Quebec, it has never been necessary to make such an application in Quebec for the trial of an Anglophone to take place before an English-speaking jury with a trial judge and Crown prosecutor able to fully participate by using the English language."<sup>117</sup>

Furthermore, he explained that, in light of the objective of substantive equality, the proposition that a criminal trial should take place in the official language of the province's linguistic majority, absent an application and an order granting such an application, cannot be seriously entertained.

Finally, Hilton J.A. explained that, to the extent that section 530(1) of the *Criminal Code* speaks of an "application," this requirement is satisfied once the Sheriff is instructed to summon English-speaking jurors. In this case, although the record did not contain a specific indication of a direction to the Sheriff to summon an array of English-speaking jury candidates, at some point the Sheriff would have been so instructed and this would have been done with the knowledge of the Crown and the appellant's counsel. He concluded that the appellant was thus entitled to the rights provided for under section 530.1 of the *Criminal Code*.

115 Hilton J.A. explained that, with consecutive translation, the interpreter listens to what is said in one language and then provides an appropriate translation in another language, and that this translation can be heard by the accused, the trial judge, both counsel and the jury, if one is present. With simultaneous translation, only the appellant can hear the interpreter, through an earpiece. No one else in the courtroom can hear the interpreter, and there is no record of what the interpreter said and thus no transcript of what the interpreter said. Hilton J.A. noted that the fulfillment of the language guarantee available to an accused is better served by consecutive rather than simultaneous interpretation.

116 *Supra* note 112 at para. 62.

117 *Ibid.* at para. 71.

### C. Waiver of rights under section 530.1 of the *Criminal Code*

Hilton J.A. also rejected Crown counsel's argument that the appellant had waived his rights under section 530.1 of the *Criminal Code*.

The Crown's argument was largely based on the answers given by the appellant to the trial judge on two occasions, both in response to a question by the trial judge as to whether the appellant minded if the trial judge and counsel had certain discussions in French. On both occasions, the appellant answered that he did not mind. Referring to the test set out in *R. v. Tran*,<sup>118</sup> Hilton J.A. explained that, in order for an accused to validly waive his or her language rights at a criminal trial, assuming it is possible to do so, the accused must know and understand what rights are being waived, as well as the consequences of such waiver. Furthermore, regarding the right to the assistance of an interpreter found in section 14 of the *Charter*, the Supreme Court of Canada in *R. v. Tran* held that any waiver should be made personally by the accused, and if necessary following an inquiry by the Court through an interpreter to ensure that the accused truly understands what it is he or she is doing.

Hilton J.A. explained that in this case there was nothing in the record to suggest that this test had been met, or that the appellant's answer to the trial judge's questions constituted a valid waiver of his rights under section 530.1 of the *Criminal Code* and section 14 of the *Charter*. He also stressed that the issue of convenience for the trial judge and counsel is not a valid reason for asking an accused to waive his or her rights, and stated the following: "[t]he presence of an interpreter is for the benefit of French-speaking witnesses, the accused and the jury, but not for that of

the trial judge and Crown counsel, who must conduct themselves as if there was no interpreter present in the courtroom."<sup>119</sup>

Finally, Hilton J.A. commented on the Crown's argument that the conduct of defence counsel in speaking French, knowing there was no consecutive interpretation and failing to insist on the appellant's rights in a timely manner, amounted to a waiver. He explained that defence counsel had conceded they were unaware of the extent of the appellant's language guarantees, and therefore could not have knowingly waived the appellant's rights by their conduct. He also added that, given the intrinsically personal nature of language rights, in order for defence counsel's conduct to constitute a waiver of the appellant's rights, some indication is required that counsel were acting as they did with the full knowledge and understanding by the appellant of the consequences of such conduct. He pointed out that in the present case there was no such evidence on record.

As such, the Court found that the appellant's rights under section 530.1 of the *Criminal Code* and section 14 of the *Charter* had been violated, and that the violation could not be remedied. Consequently, the Court allowed the appeal, set aside the conviction, and ordered that a new trial be held. Hilton J.A. also noted that this was the third time since 2005 that the Court allowed an appeal and ordered a new trial because of a failure to respect the language rights of an accused, and stated that trial judges and the Crown "have every interest in being alert to the existence of these rights by acting to protect them to avoid orders for new trials, even if [...] defence counsel do not fully assert them."<sup>120</sup>

118 [1994] 2 S.C.R. 951.

119 *Supra* note 112 at para. 89.

120 *Ibid.* at para. 107.

### 3.5 The right to testify in the official language of one's choice

*R. v. T.D.M.*<sup>121</sup>

In this appeal, the Court of Appeal for the Yukon Territory had to determine whether a witness at a criminal trial in that territory had the right to testify in the official language of his or her choice.

In this case, G.A. reported to the police that he had seen T.D.M. engaging in sexual activity with T.D.M.'s infant daughter. Following an investigation, T.D.M. was charged with sexual touching and sexual assault of his infant child. G.A. made a statement to the police in English and testified in English at the preliminary inquiry, although his mother tongue was French. The judge who presided over the preliminary inquiry commented that G.A. appeared to have "a problem understanding the more nuanced questioning of the lawyers and making himself clearly understood in his answers."<sup>122</sup>

At the beginning of the trial, the Crown indicated that G.A. would be testifying with the use of an interpreter, meaning that he would be giving his evidence in French and would be cross-examined through the interpreter. Counsel for the accused objected, arguing that cross-examining through an interpreter would impair his ability to confront the witness. The trial judge held that, where there is some proficiency in the English language, the witness should attempt to communicate in English with the assistance of the interpreter when required, and directed the witness to testify in English. Although G.A. did not require the assistance of the interpreter during the Crown's examination-in-chief and re-examination, he did however require assistance eight

times during the cross-examination. Once the trial was over, the trial judge acquitted the accused, stating that he was not prepared to accept the Crown witness's testimony.

The Crown appealed the acquittal, arguing that the trial judge erred in not permitting G.A. to testify in French, as is provided for under section 5 of the *Languages Act*.<sup>123</sup> The Crown argued that a new trial should be ordered given that G.A.'s credibility was the critical factor during the trial and that there was a real possibility that, had G.A. testified in French, the verdict would not have been the same.

The Court of Appeal consulted both the French and English versions of section 5 and considered the language of similar legislation before determining that any person has the right to testify in either official language in courts established by Yukon's Legislative Assembly. The Court then considered whether section 5 of the *Languages Act*, a territorial law, could apply to proceedings relating to a federal offence. Relying on the Supreme Court of Canada's decision in *Jones v. Attorney General of New Brunswick*,<sup>124</sup> the Court held that the Yukon Territory has the authority to enact legislation in relation to the administration of justice, including legislation giving a witness the right to use either French or English in a criminal proceeding, subject to the doctrine of paramountcy: "when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility."<sup>125</sup> The Court concluded that the trial judge had erred in denying G.A. his right to testify in French, and found that the right of a witness to testify in the official language of his or her choice pursuant to section 5 of the

121 2008 YKCA 16.

122 *Ibid.* at para. 4.

123 *Supra* note 84.

124 *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182.

125 *Ibid.* at para. 36, citing *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 69.

*Languages Act* does not conflict or is not incompatible with the right of the accused to choose the language of his or her trial pursuant to Part XVII of the *Criminal Code*.

The Court then considered whether a new trial should be ordered pursuant to section 686(4)(b)(i) of the *Criminal Code*. Referring to the Supreme Court of Canada's decision in *R. v. Sutton*,<sup>126</sup> the Court explained that, in order to overturn an acquittal, the Crown must satisfy the Court that the verdict would not necessarily have been the same had the errors not occurred. In this case, the Court of Appeal did not believe the outcome of the trial was affected by the fact that G.A. was directed to testify in English. The trial judge's concerns with respect to the veracity of G.A.'s testimony were grounded in the substance of his testimony, and not his linguistic abilities. Consequently, the appeal was dismissed.

## 4 LANGUAGE RIGHTS AND SERVICES TO THE PUBLIC

Section 20 of the *Charter* grants members of the public two fundamental rights: the right to receive services from federal institutions and the institutions of New Brunswick in either official language and the right to communicate with these institutions in either official language. While the obligations imposed on New Brunswick apply to all of the province's institutions, wherever they may be, the obligations on federal institutions depend on certain criteria: whether the communication or service originates from the head or central office of the institution concerned, the office is located in an area where there is significant demand for the use of English or French or, because of its nature, the office is required to provide services in both official languages.

The rights and obligations imposed by the *Charter* on federal institutions are implemented and clarified in Part IV of the *OLA*. This part stipulates, among other things, that federal institutions must ensure that services offered to the public by third parties, on their behalf, are available in both official languages when the institution itself is subject to such a requirement. The *OLA* also requires federal institutions to make an active offer of service, informing members of the public that they have the option to be served in either English or French.

The *Official Languages (Communications with and Services to the Public) Regulations* further clarify the situations in which communications and services

must be offered in both official languages, particularly in regards to the concepts of “significant demand” and “nature of the office” used in Part IV of the *OLA*.

Recently, the Supreme Court of Canada rendered two important judgments in relation to language rights and services to the public. In *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, the Court determined that members of the Royal Canadian Mounted Police (RCMP), a federal institution, are required, when performing the duties of provincial police officers, to fulfill the language obligations imposed on institutions of the New Brunswick government. In *DesRochers v. Canada (Industry)*, the Court found that substantive equality does not necessarily translate into identical services for each language community. Rather, linguistic equality in government services must be defined in light of the nature and purpose of the service in question. While the first of these two judgments is an important victory for members of New Brunswick's French-speaking community, the latter is expected to have important repercussions for all official language minority communities throughout the country.

Several other judgments rendered in the period covered by this report considered the public's right to be served by and communicate with government institutions in the official language of choice. While some dealt with rights conferred by the *Charter* and federal legislation, others explored the obligations imposed on government institutions at the provincial or territorial level.

#### 4.1 Constitutional language obligations of the Royal Canadian Mounted Police when acting as a provincial police force in New Brunswick

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##### *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*<sup>127</sup>

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In this case, the Supreme Court of Canada formulated the following constitutional question:

Does section 20(2) of the *Charter* require the RCMP to provide services in both official languages when acting as a provincial police force pursuant to an agreement between the governments of New Brunswick and Canada?

Under an agreement between Canada and New Brunswick, the RCMP, a federal institution, acts as the provincial police force for that province. Section 20(2) of the *Charter* provides that any member of the public has the right to communicate with and receive available services from New Brunswick institutions in English or French, whereas under section 20(1), the right is dependent upon the presence of a “significant demand” or based on the nature of the office in question. Both the New Brunswick<sup>128</sup> and federal<sup>129</sup> official languages acts further detail the right to communicate with and receive available services in the language of choice within their respective jurisdictions. The issue in this appeal was whether the RCMP is bound by the more generous rules respecting language in New Brunswick or is required to meet only the federal official languages standards.

#### A. Federal Court judgment<sup>130</sup>

The Federal Court held that serving as a provincial police force makes the RCMP a New Brunswick institution for the purposes of section 20(2) of the *Charter* and is therefore required to provide services in accordance with the province’s language requirements. In the Court’s opinion, although the RCMP is a federal institution, it is subject to the control of the Attorney General or the minister responsible for policing services when providing provincial policing services under the agreement. Furthermore, in enforcing the New Brunswick *Motor Vehicle Act*,<sup>131</sup> the RCMP is performing a provincial government function. Accordingly, when the RCMP is acting under provincial legislation, it has to be bound by the specific constitutional obligations of the province provided for in section 20(2) of the *Charter*.

#### B. Federal Court of Appeal judgment<sup>132</sup>

In a unanimous decision, the Federal Court of Appeal granted the appeal and set aside the Federal Court judgment. Essentially, the Court of Appeal concluded that the language obligations contained in section 20(2) of the *Charter* applied only to the province of New Brunswick. As a federal institution, the RCMP’s statutory language obligations were limited to section 20(1) and the federal *OLA*, even when it was acting on behalf of the province. The court clearly indicated that it is the province that remains responsible for the obligations imposed by section 20(2) and the New Brunswick *Official Languages Act* (NB *OLA*), emphasizing the distinction between the linguistic obligations governing the RCMP as a federal institution and the additional language obligations that the province might impose under the terms of an agreement.

127 *Supra* note 12.

128 S.N.B. 2002, c. CO-0.5.

129 R.S.C. 1985, c. 31 (4th Supp.).

130 *Société des Acadiens et Acadiennes du Nouveau-Brunswick v. Canada* (F.C.), [2006] 1 F.C.R. 490, 2005 FC 1172.

131 R.S.N.B. 1973, c. M-17.

132 *Société des Acadiens et Acadiennes du Nouveau-Brunswick v. Canada* (F.C.A.), [2007] 2 F.C.R. 177, 2006 FCA 196.

### C. Supreme Court of Canada judgment

In a decision written by Bastarache J., the Supreme Court of Canada examined the provincial and federal legislation surrounding the agreement between Canada and the province of New Brunswick regarding the provision of police services, as well as the content of that agreement, in arriving at its conclusion that the RCMP is subject to the specific constitutional obligations found in section 20(2) of the *Charter*.

The agreement is authorized by both provincial statute (section 2 of the *Police Act*<sup>133</sup>) and by federal statute (section 20 of the *Royal Canadian Mounted Police Act*<sup>134</sup> [RCMPA]). In addition to the RCMP's role as a federal institution, the *RCMPA* provides that it may also be given the responsibility for the administration of justice and law enforcement in provincial or municipal jurisdictions. In the words of Bastarache J., "[p]rovincial laws must, of course, be enforced in a manner consistent with the Constitution."<sup>135</sup> The provincial nature of the RCMP's role in the administration of justice is reinforced by the fact that section 2(2) of the *Police Act* gives every member of the RCMP all the attributes of a New Brunswick peace officer. Given that the *Police Act* authorizes members of the RCMP to administer justice in the province, the Supreme Court found that the RCMP is performing the role of an "institution of the legislature or government"<sup>136</sup> of New Brunswick, and must therefore comply with the obligations contained in section 20(2) of the *Charter*.

As for the agreement itself, the Supreme Court found that there was no transfer of responsibility for the administration of justice in the province; the New Brunswick Minister of Justice is responsible for setting "the objectives, priorities and goals of the Provincial Police Service (art. 3.3)," thus retaining "control over the RCMP's policing activities," and "[t]he RCMP remains responsible for internal management only (art. 3.1(a))."<sup>137</sup> Much like the Federal Court, the situation described in the agreement led the Supreme Court to conclude that "the institution in question is an institution of the New Brunswick government, that is, its Minister of Justice, and that the Minister discharges his or her constitutional obligations through the RCMP members designated as New Brunswick peace officers by the provincial legislation."<sup>138</sup> As such, the provision of policing services must be consistent with the obligations provided for under section 20(2) of the *Charter*.

In short, the RCMP assumes by way of contract the obligations associated with the policing function. The content of that function is set out in both provincial and federal legislation, and is subject to specific constitutional obligations. As such, the Supreme Court found that "[t]he RCMP may not take on such functions without assuming the obligations associated with them."<sup>139</sup>

The appeal was therefore allowed.

133 S.N.B. 1977, c. P-9.2.

134 R.S.C. 1985, c. R-10.

135 *Supra* note 12 at para. 15.

136 *Ibid.* at para. 16.

137 *Ibid.* at para. 18.

138 *Ibid.*

139 *Ibid.* at para. 20.

## 4.2 Principle of active offer with respect to police services in New Brunswick

### *R. v. McGraw*<sup>140</sup>

In this case, the New Brunswick Court of Appeal had to determine whether the lower courts had jurisdiction to address a breach of section 31 of the NB *OLA* and, in the event of such a breach, to decide on the appropriate remedy.

Section 31 of the NB *OLA* reads as follows:

31(1) Members of the public have the right, when communicating with a peace officer, to receive service in the official language of their choice and must be informed of that right.

31(2) If a peace officer is unable to provide service in the language chosen under subsection (1), the peace officer shall take whatever measures are necessary, within a reasonable time, to ensure compliance with the choice made under subsection (1).

31(3) A police force or agency, as the case may be, shall ensure the availability of the means necessary to respond to the choice made by a member of the public under subsection (1) and to support the obligation placed on a peace officer under subsection (2).

The facts of this case are as follows. Mr. McGraw was stopped by an RCMP officer in the village of Tracadie-Sheila, a predominantly Francophone community on the Acadian Peninsula, and received two tickets pursuant to the New Brunswick *Motor Vehicle Act*.<sup>141</sup> Both tickets were

written in French and the communication between the RCMP officer and Mr. McGraw was entirely in French.

During the trial in Provincial Court, Mr. McGraw moved for a dismissal of the charges on the grounds that the RCMP officer had not given him the choice of the language in which he wanted to communicate and be served. In his testimony, the officer indicated that he took Mr. McGraw's choice for granted.

The evidence at trial disclosed that the officer initiated communication with Mr. McGraw in French. The latter responded in French and at no time requested that the communications be in English. In his testimony, Mr. McGraw said that he was "perfectly bilingual" and that he had understood everything the officer said to him. However, he argued that the NB *OLA* imposes a duty on New Brunswick police officers to inform members of the public of their right to receive service in the official language of their choice.

Since Mr. McGraw understood the police officer, the Provincial Court concluded there had been no infringement of his language rights and found him guilty on both charges. Mr. McGraw appealed the decision to the Court of Queen's Bench.

On appeal, McIntyre J. held that the right to be informed of one's right to choose the language of communication and service is essential for the exercise of that right. The judge went on to note that the right to choose belongs to the member of the public and not the police officer. Thus, even if the member of the public responds in the language in which the communication was initiated, the police officer cannot assume that this reflects the individual's choice of language. Consequently, McIntyre J. concluded that there had been an infringement of the accused's right to be informed of his right to choose

140 277 D.L.R. (4th) 621, 2007 NBCA 11.

141 *Supra* note 131.

under section 31(1) of the NB *OLA*. He overturned the Provincial Court’s decision, quashed the information and declared both charges a nullity. He went on to quash the verdicts rendered at trial and ordered a verdict of acquittal on both charges.

The Crown appealed, arguing that neither of the courts below had the jurisdiction to address a violation of the NB *OLA*, that only the New Brunswick Commissioner of Official Languages has original jurisdiction to deal with a complaint of a breach of section 31(1) and that such a violation is inconsequential in prosecutions governed by the *Provincial Offences Procedure Act (POPA)*.<sup>142</sup> Alternatively, the Crown argued that an acquittal is not an appropriate remedy in such a case.

Drapeau C.J. of the New Brunswick Court of Appeal considered both the significance of a violation of section 31(1) of the NB *OLA*, as well as whether the Provincial Court had jurisdiction to address an alleged breach of the NB *OLA*. He explained that the violation of Mr. McGraw’s rights under section 31(1) of the NB *OLA* resulted in the inaccurate recording of Mr. McGraw’s choice of language in the Notices of Prosecution, as well as a discrepancy between the choice of language in the notice and the record at trial. He considered the discrepancies to be a “defect in a document” within the meaning of the *POPA*, and therefore could not be corrected by judicial intervention. Consequently, in accordance with section 106(7) of the *POPA*, the trial judge is required to order that the Notices of Prosecution be withdrawn. Drapeau C.J. refrained from commenting on whether section 106 of the *POPA* was the only source of the Provincial Court’s remedial jurisdiction in the case, explaining that such an analysis was not necessary to decide the question of jurisdiction.

Finally, with regard to the issue of the appropriate remedy, Drapeau C.J. held that, although the summary appeal court judge was correct in concluding that the Notices of Prosecution were defective, he erred by ordering verdicts of acquittal instead of ordering their withdrawal pursuant to section 106(7) of the *POPA*. He explained that the proper remedy would be to order a new trial and to direct the trial judge to make a withdrawal order, with respect to the Notices of Prosecution, if necessary. Consequently, the Court of Appeal upheld the decision rendered in the Court of Queen’s Bench to vacate the convictions, but set aside the verdicts of acquittal, ordered a new trial on both Notices of Prosecution and directed the trial judge to order their withdrawal pursuant to section 106(7) of the *POPA*, in the event that Mr. McGraw is called upon to answer the charges once again.

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#### *R. v. LeBlanc*<sup>143</sup>

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In this appeal, the Provincial Court of New Brunswick had to determine the applicability of the principle of the active offer of service stated in section 31 of the NB *OLA*.

Ms. LeBlanc, the defendant, was intercepted on Route 8 near Upper Blackville, which along with the neighbouring villages of Doaktown and Boistown is considered an English-speaking community. The officer approached the defendant, greeted her and explained to her in English the reason why he had stopped her. When the defendant began speaking to him in French, he explained that he could not speak French but could summon a bilingual officer if desired. When asked how long this would take, he explained that it would take “approximately 20 minutes.” Although the defendant expressed that this was unacceptable, she told the officer that she was willing to communicate with him in English given the delay. The officer

142 S.N.B. 1987, c. P-22.1.

143 (2007) 321 N.B.R. (2d) 234, 2007 NBPC 30.

returned to his patrol car and wrote up the Notice of Prosecution in English and provided it to the defendant.

A Notice of Prosecution was filed in the Provincial Court on August 2, 2006. The defendant appeared on that date, pleaded not guilty, and requested that the trial be conducted in French. The trial was set for October 2006. At trial, the defendant, who was not represented by counsel, raised several points in her defence, which were summarized by LeBlanc J. as follows: first, the defendant contended that, at first contact, she was not immediately informed of her right to receive service in the official language of her choice—a violation of section 31 of the NB *OLA*; second, that the 20-minute wait for a bilingual officer was unacceptable; and third, that the Notice of Prosecution should be withdrawn because the officer did not ask her in which language she wished to receive the Notice of Prosecution.

With respect to the issue of immediate notification, LeBlanc J. held that there was no violation of section 31(1) of the NB *OLA*. Although the officer began speaking to the defendant in English, as soon as she had asked to speak French, he immediately notified her that he did not speak French, but that a bilingual officer was available to serve her in her language. LeBlanc J. noted that, as the officer could not speak French, there was no error in continuing to speak to the defendant in English. He also noted that section 31(1) of the NB *OLA* did not include the word “immediately.”

Regarding the 20-minute delay in receiving service in French, LeBlanc J. held that such a delay is reasonable and that it did not violate section 31(2) of the NB *OLA*. Section 31(2) requires that “if a peace

officer is unable to provide service in the language chosen under subsection (1), the peace officer shall take whatever measures are necessary, within a reasonable time, to ensure compliance with the choice made under subsection (1).” LeBlanc J. held that the determination of what is reasonable is case-specific, and that in this case, given the fact that the detachment consisted of six officers (three of whom were bilingual and two of whom were on duty responding to other calls), that the officers were serving a rural area in which the communities are far apart, and finally that the neighbouring villages of Doaktown, Boistown and Blackville were considered English-speaking communities, a 20-minute wait was reasonable. LeBlanc J. further held that, in rural areas, given the geographic constraints, a 30-minute wait would also be considered reasonable.

Finally, LeBlanc J. addressed the argument that the Notice of Prosecution should be withdrawn given that the officer did not ask the defendant in which language she wanted it to be written. LeBlanc J. held that the officer was required to ask the defendant in which language she wished to receive her Notice of Prosecution and could not infer from the defendant’s choice to receive service from him that she also chose to receive her Notice of Prosecution in English. LeBlanc J. found that in this instance the officer had the capability of drafting the Notice of Prosecution in French. Very few words are added to the notice (the form is in both official languages) and the officer had a card with him that provided a translation of key words. Consequently, given that the officer had not asked the defendant in which language she wished to receive the Notice of Prosecution, and effectively made the decision for her by providing it in English, LeBlanc J. held that the Notice of Prosecution contained an incurable defect and ordered its withdrawal.

In this case, the Provincial Court of New Brunswick was asked to determine whether it had jurisdiction to address a violation of the NB *OLA*,<sup>145</sup> whether or not the accused's language rights had been violated and the appropriate remedy in such a case.

Mr. Gaudet, the accused, was driving a motor vehicle in the region of Ste-Rose, New Brunswick, when he was intercepted by a police officer. At that time, the police officer spoke with the accused in French, and began assessing the blood alcohol level of the accused. Over an hour later, while preparing the requisite documentation, the police officer asked the accused in which official language he would like to be served. At that point, the accused requested that the documents be drafted in English.

The accused was charged with operating a motor vehicle with a blood alcohol level in excess of the legal limit, in violation of section 253(1)(b) of the *Criminal Code*. At trial, counsel for the accused indicated that his client recognized and accepted the essential elements of the infraction, but wished to put forward a defence based on the violation of his language rights. The Crown argued that the Provincial Court does not have jurisdiction to deal with a question of a violation of the NB *OLA*, relying on the *Provincial Court Act*<sup>146</sup> and on the fact that the NB *OLA* does not grant jurisdiction to the Provincial Court to address the violation of any of its provisions.

Finn J. first considered the issue of whether the Provincial Court has the jurisdiction to address the violation of language rights. She explained that, in her opinion,

the principles of interpretation of the federal *OLA*<sup>147</sup> should also apply to the NB *OLA*. Consequently, interpretation of the NB *OLA* must follow the rules of interpretation of the *Charter*. After citing the Supreme Court of Canada decision in *Mills v. R.*,<sup>148</sup> Finn J. concluded "when there is an allegation of an infringement of the *Official Languages Act* and that a remedy is requested in the context of criminal proceedings over which the Provincial Court has jurisdiction, the Court also has incidental jurisdiction to deal with such an infringement."<sup>149</sup>

Finn J. then addressed the question of whether or not there had been an infringement of the language rights of the accused. She explained that section 31(1) of the NB *OLA* requires that a police officer must, upon first contact, inform the person with whom he or she is dealing of that person's right to be served in the official language of his or her choice, and then inquire as to the choice of language required. In this case, she found the behaviour of the police officer did not meet the requirements of section 31(1) of the NB *OLA*. Finn J. also concluded that the police officer's behaviour violated section 20(2) of the *Charter*—although 20(2) is silent as to the right to inform a person of the right to receive service in either official language, it would be wrong to find that 20(2) does not implicitly impose such an obligation. She explained that the intended effects of 20(2) can be determined by considering section 31(1) of the NB *OLA*.

Finally, Finn J. considered the appropriate remedy. She pointed out that section 24(1) of the *Charter* provides that a court of competent jurisdiction may grant a remedy it considers appropriate and just in the circumstances. She then explained that, in the present case, the Crown must

144 2009 NBCP 8.

145 *Supra* note 128.

146 R.S.N.B. 1973, c. P-21.

147 *Supra* note 129.

148 [1986] 1 S.C.R. 863.

149 *Supra* note 144 at para. 15 [translated by author].

show several elements of the charge, including that a request for a breath sample was made, that the accused understood both this request and the consequences of a refusal and that he was informed of his right to consult an attorney. Such evidence will come from communications between the police officer, the qualified technician and the accused. Instructions must also be provided to the accused during the use of the instrument or test in question. Given that the police officer had not informed the accused of his right to be served in either official language or asked in which language he wished to be served, one cannot conclude that the above elements were complied with and that any instructions were understood. She stated that “[t]here is prejudice, and to permit the admission of the evidence obtained through these means, would, in my opinion, bring the administration of justice into disrepute.”<sup>150</sup>

Finn J. explained that, in the present case, given that the accused had recognized and accepted the essential elements of the infraction, she could not set aside the evidence. However, given the nature and the extent of the infringement, she found that the appropriate remedy was to order a halt to the proceedings against Mr. Gaudet.

#### **4.3 Police services “within a reasonable time” under the New Brunswick *Official Languages Act***

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##### ***R. v. Mazerolle***<sup>151</sup>

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In this case, the New Brunswick Provincial Court had to determine whether a delay in the administration of roadside testing for alcohol consumption pursuant to section

254(2) of the *Criminal Code*<sup>152</sup> could be justified by the peace officer’s recognition of the detainee’s language rights under section 31 of the NB *OLA*.

The accused, Mr. Mazerolle, was stopped by Officer Arbeau, after the police officer noticed the accused driving over the centre line several times. Officer Arbeau, a unilingual Anglophone, asked the accused in English to hand over his documents. The officer noticed that the accused fumbled with his documents, detected the smell of alcohol on the accused’s breath and saw an open bottle of liquor in the vehicle. He then asked the accused to accompany him to his police vehicle to provide a breath sample for analysis. Once the accused was in the back of the police vehicle, Officer Arbeau noticed that he spoke with a French accent and asked him in which language he wished to be served. The accused answered that his choice of language was French, but stated “[...] if you’re English it’s fine with me.”<sup>153</sup>

Officer Arbeau decided to call in a bilingual peace officer. The second officer, Officer Goodfellow, arrived 11 minutes later. Officer Goodfellow explained to the accused in French the reason why he had been stopped and asked that he confirm that his chosen language was French. The accused confirmed that he chose French, but that English was fine. Five minutes after arriving (and 17 minutes after Officer Arbeau decided to obtain a breath sample by means of an approved screening device), Officer Goodfellow read the breath sample demand to the accused in French and the accused provided a breath sample. The screening device registered a fail and the accused was placed under arrest for drinking and driving.

150 *Ibid.* at para. 31 [translated by author].

151 2008 NBPC 31.

152 *Supra* note 110.

153 *Supra* note 151 at para. 4.

At trial, the accused's counsel argued that the 17-minute delay that elapsed between the moment when Officer Arbeau decided to request a breath sample and the moment when Officer Goodfellow read the demand to the accused constituted a breach of the accused's rights to retain and instruct counsel without delay and to be informed of that right pursuant to section 10(b) of the *Charter*. The defence also argued that the demand was made illegally, contrary to section 254(2) of the *Criminal Code* and in violation of the accused's right to be secure against unreasonable search or seizure pursuant to section 8 of the *Charter*.

LeBlanc J. held that both grounds arise from the same issue of whether the breath sample was legally obtained pursuant to section 254(2) of the *Criminal Code*. He explained that section 254(2) authorizes roadside testing for alcohol consumption where such testing takes place "forthwith" and that, without this requirement of immediacy, section 254(2) would be unconstitutional.<sup>154</sup> He also explained that the word "forthwith" can be given a flexible interpretation and that the justification for a delay in making a demand for a breath sample depends on the circumstances of each case.

LeBlanc J. determined that the question to be examined is whether the delay in obtaining the breath sample from the accused can be justified by the police officer's recognition of the accused's language rights. LeBlanc J. explained that in the case at bar the accused had the right to communicate with an officer who spoke the language of his choice and that Officer Arbeau was required to inform the accused of this right pursuant to section 31 of the NB *OLA*. LeBlanc J. mentioned that

although Officer Arbeau did not inform the accused of this right, he intended to respect it and for this reason inquired as to the accused's choice of language. LeBlanc J. also held that Officer Arbeau correctly interpreted the accused's answer to mean that he preferred French, but was ready to accommodate the English-speaking officer and speak to him in English. Officer Arbeau was unable to personally provide service in the language chosen. Therefore, he was obligated to ensure that Mr. Mazerolle was provided service in French by another officer. As such, LeBlanc J. held that the 17-minute delay was reasonable, because it was required to respect the linguistic choice of the accused. Citing the importance of language rights as articulated in the Supreme Court decision *R. v. Beaulac*,<sup>155</sup> LeBlanc J. found that the requirement of immediacy of section 254(2) of the *Criminal Code* does not take precedence over the accused's language rights.

LeBlanc J. concluded that there was no violation of sections 8, 9 or 10 of the *Charter* and that the demand read by Officer Goodfellow was legal, valid and consistent with the requirements of section 254(2) of the *Criminal Code*.

154 *Ibid.* at para. 12, citing *R. v. Woods*, 2005 SCC 42.

155 *Supra* note 68.

#### 4.4 Language of choice in communications with the Canada Revenue Agency

##### *R. v. Brewer*<sup>156</sup>

In this judgment, the Provincial Court of New Brunswick was asked to rule on a motion for a declaration that the Canada Revenue Agency (CRA) violated the defendant's rights pursuant to sections 16, 16.1 and 20 of the *Charter*.

Mr. Brewer, the defendant, was charged in his capacity as director of a company with five counts of failing to comply with a notice to file a corporate tax return contrary to sections 238(1) and 242 of the *Income Tax Act (ITA)*.<sup>157</sup> Mid-trial, the defendant brought a motion to have the abovementioned notices excluded pursuant to section 24 of the *Charter* or, alternatively, a ruling that the notices were inadequate, since they were not provided in both official languages.

Brien J. described the relevant facts as follows. In 2001, the defendant acquired Reggies Food Service Limited, a company that operates a restaurant business in Saint John, and became the sole director of the company. The company had not filed income tax returns since 2001. A CRA officer served the defendant with notices under section 231.2(1)(a) of the *ITA*, one for each of the five corporate tax years from 2002 to 2006. These notices were drafted in English. He explained that the CRA officer made the choice to draft the notices in English after considering a number of factors, in particular, the fact that the language elected in the last two corporate income tax returns filed by the company (for the year ending October 31, 2001) was English and that the defendant had elected English as his choice of language for correspondence in the last

personal income tax return that he filed (in 1991). Brien J. also mentioned that the CRA officer testified that she visited the restaurant operated by the company and noted that all the signs and written materials were in English. The CRA officer also testified that, on her first visit to the restaurant to serve the defendant, she spoke with the defendant in English and explained the documents that she was serving. She conversed in English with the defendant on that occasion and on two other occasions and explained that the defendant never indicated that he wanted to communicate in French.

Brien J. described the issue as whether the defendant had the right to receive the notices in the language of his choice, or alternatively, a bilingual notice. According to Brien J., the case could be resolved based on the facts, without the need for consideration of broader issues that may arise regarding the CRA's language obligations.

Brien J. found that, in the present case, the CRA was respecting the choice of language made by the defendant and the company of which he was the sole director. He stated that "common sense"<sup>158</sup> dictated that the CRA could refer to the last personal tax return filed by the defendant in deciding the language of communication. Furthermore, the defendant was being notified in his capacity as director of the company. As such, the CRA could rely on the previous choice of language made by the company until any indication to the contrary. Brien J. also explained that no authority had been advanced in support of the notion that the defendant, in his capacity as a director of the company, ought to be treated as a being separate and distinct from the company or his own person. He also stated that this is "contrary to logic when considering the purposes of the official languages legislation."<sup>159</sup>

156 2009 NBPC 5.

157 R.S.C. 1985, c. 1 (5th Supp.).

158 *Supra* note 156 at para. 25.

159 *Ibid.* at para. 31.

Brien J. emphasized that the CRA had an obligation to communicate with the defendant in the language of his choice, and that, if the CRA is unaware of that choice, communication should be bilingual. He explained that the CRA does make an effort to satisfy its obligation by requesting those filing income tax returns to indicate their choice of language for communication.

Brien J. concluded that the defence had failed to establish an infringement of the *Charter*. The motion was therefore denied.

#### 4.5 Services offered by Air Canada subsidiaries

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##### *Air Canada v. Thibodeau*<sup>160</sup>

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In this appeal, the Federal Court of Appeal was asked to determine the nature and intensity of Air Canada's language obligations pursuant to section 10(2) of the *Air Canada Public Participation Act (ACPPA)*.<sup>161</sup>

Section 10(2) of the *ACPPA* provides that Air Canada has the duty to ensure that customers of its subsidiaries can communicate and obtain available services in accordance with Part IV of the *OLA*.

The originating facts occurred when Mr. Thibodeau did not receive service in French on board a Montréal–Ottawa Air Ontario flight, even though there was significant demand for such service. He subsequently filed a complaint with the Commissioner of Official Languages. In its investigation report, the Office of the Commissioner concluded that Air Canada and its subsidiary, Air Ontario, had not fulfilled their obligations under section 10(2) of the *ACPPA* and Part IV of the *OLA*.

Mr. Thibodeau proceeded to file an application for remedy against Air Canada and its subsidiary, Air Canada Regional Inc., in the Federal Court pursuant to section 77 of the *OLA*. The Federal Court allowed Mr. Thibodeau's application, having found that Air Canada did not provide service in French on the flight in question, contrary to its statutory obligation to do so.<sup>162</sup> More particularly, Beaudry J. found that the obligation imposed on Air Canada by section 10 of the *ACPPA* and by Part IV of the *OLA* is an obligation of result, a concept applied in Quebec civil law. Consequently, in order for it to prove that it is not liable, it is not enough that Air Canada show absence of fault, but rather, it must establish that its non-performance resulted from force majeure. Air Canada presented no evidence that force majeure prevented it from fulfilling its statutory obligation. As a result, Beaudry J. dismissed Air Canada's argument that liability should be avoided given the steps it had taken in an attempt to comply with its obligations.

Air Canada appealed on several grounds, including Beaudry J.'s finding as to the absolute nature of the obligation imposed by section 10 of the *ACPPA*. Specifically, Air Canada argued that the obligation under section 10 of the *ACPPA* is not absolute and that it was entitled to raise a due diligence defence to explain and justify its failure to comply with section 10. The Commissioner of Official Languages intervened in the appeal, and submitted arguments on the approach to be taken in assessing the intensity of Air Canada's obligation pursuant to section 10(2) of the *ACPPA*. The Commissioner argued that section 10(2) of the *ACPPA* should not be assessed in accordance with the Quebec civil law model, but rather on the basis of the statutory framework established under

160 (2007) 375 N.R. 175, 2007 FCA 115.

161 *Supra* note 129.

162 [2006] 2 F.C.R. 70, 292 F.T.R. 67, 2005 FC 1156.

Part IV of the *OLA* and section 20 of the *Charter*. Mr. Thibodeau cross-appealed with respect to the monetary award granted by Beaudry J.

In resolving the appeal, the Federal Court of Appeal did not take position on the nature and intensity of the obligation under section 10(2) of the *ACPPA*. Rather, Létourneau J. A. explained that, regardless of the nature and intensity of the obligation under section 10(2) of the *ACPPA*, and assuming, without deciding, that Air Canada is entitled to a due diligence defence, Air Canada would have the burden of proving its due diligence. Létourneau J. A. pointed out that, in the case at bar, there was no evidence on record in support of such a defence and that consequently Air Canada did not meet its burden of proof.

The court dismissed both the appeal and cross-appeal, and awarded costs on a solicitor and client basis to the respondent, who was self-represented.

#### 4.6 Language rights in the Northwest Territories

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##### *Northwest Territories (Attorney General) v. Fédération Franco-ténoise*<sup>163</sup>

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This appeal and cross-appeal concerned the scope of language rights in the Northwest Territories arising from the Northwest Territories' *Official Languages Act* (NWT *OLA*).<sup>164</sup> The case, on appeal from the judgment of the Supreme Court of the Northwest Territories,<sup>165</sup> was the first occasion for judicial interpretation of the NWT *OLA*, and raised important issues about the nature and extent of the rights provided.

The plaintiffs (respondents and cross-appellants) were the community-based Fédération franco-ténoise (FFT), Éditions Franco-ténoises/L' Aquilon (a French-language newspaper) and five individual members of the Francophone community. They sought a declaration, damages and other specified relief arising from alleged breaches of their language rights against the Attorney General of the Northwest Territories, the Commissioner of the Northwest Territories, the Speaker of the Legislative Assembly of the Northwest Territories and the Languages Commissioner of the Northwest Territories (collectively, the appellants), as well as the Attorney General of Canada (AGC).

The Commissioner of Official Languages of Canada was granted intervener status in the appeal, which was heard in November 2007.

##### A. The order granted at trial

The first ground of appeal concerned some of the remedies granted by the trial judge. The trial judge found that the alleged breaches of the *OLA* were not isolated incidents, but represented examples of systemic deficiencies resulting from a persistent refusal by the Government of the Northwest Territories (GNWT) to adopt an overall implementation plan and centralize the application of the NWT *OLA*. This conclusion underpinned the relief granted by the Court. As such, the Court made four declaratory orders, and six mandatory orders, including a requirement that the GNWT ensure the implementation of the NWT *OLA* and the drafting of a comprehensive plan to implement its obligations pertaining to communications with and services to the public by government institutions.

163 2008 NWTCA 06.

164 R.S.N.W.T. 1988, c. O-1.

165 *Fédération Franco-ténoise v. Canada (Attorney General)*, 2006 NWTSC 20.

First, the appellants argued that the trial should have been limited to specific failures to comply with the NWT *OLA*, adding that the trial judge allowed evidence pertaining to breaches that were not pleaded and then subsequently relied on those breaches in formulating the remedies granted. Second, they argued that the remedies granted by the trial judge went beyond what was contemplated in the pleadings, that the trial became a sort of inquiry into the implementation of the NWT *OLA*. They contended that only declaratory relief should have been granted as opposed to the structural remedy that was ordered. Declaratory relief identifies a breach and directs that it be remedied, whereas a structural remedy details how the breach should be remedied. The appellants argued that, by ordering a structural remedy, the trial judge intruded unduly on the role of the legislature.

Responding to the appellants' first argument, the Court of Appeal stated that trial courts are entitled to entertain constitutional challenges of systemic violations, and found that the pleadings in this case raised the issue of systemic violations regarding the respondents' quasi-constitutional language rights, and the trial did not exceed the scope of those pleadings. Similarly, the Court of Appeal found that the remedies granted by the trial judge were contemplated by the pleadings. In regards to the appellants' arguments as to the structural component of the relief granted, the Court of Appeal found that the trial judge committed no error of law or principle. She properly applied the five factors to be considered in granting

a just and appropriate remedy as outlined in *Doucet-Boudreau*,<sup>166</sup> and her order was well supported by the evidence. In short, she determined that the GNWT was unwilling to provide the services required by the NWT *OLA*; therefore, relief in the form of a declaration would inevitably require follow-up relief before the courts. The first ground of appeal was therefore dismissed.

### **B. The interpretation and application of the Northwest Territories *Official Languages Act***

The second ground of appeal concerned the interpretation of the NWT *OLA*, more particularly, how the concept of substantive equality (the applicable norm in language rights) applies given the unique demographic and geographical context of the Northwest Territories. The appellants argued that, while the trial judge claimed to apply substantive equality, she erroneously imposed a requirement of absolute equality.

The Court of Appeal found that the trial judge correctly concluded that the NWT *OLA* intended to create substantive equality with respect to the official languages of the Northwest Territories. She applied the principles established in *Beaulac*,<sup>167</sup> and the language of the NWT *OLA* also supported that conclusion. However, the Court of Appeal favoured a more contextual approach in its interpretation of the concept of substantive equality, stating “[a]lthough the trial judge’s consideration of the context was thorough, in our view she gave inadequate weight to the overall context of the NWT and failed to take proper

166 *Supra* note 24 at paras. 55–59: First, the remedy must meaningfully vindicate the rights and freedoms of the claimant, taking into consideration the nature of the violated right, the situation of the claimant, and the experience of the claimant in attempting to enforce the right. Second, the remedy must strive to respect the relationship with and the separation of functions between the executive and judiciary. While a remedy may touch on the function of the executive, courts should not unduly or unnecessarily depart from their roles of adjudicating disputes and granting remedies that address the matter of those disputes. Third, the remedy must vindicate the right at issue while invoking the court’s powers. Courts should not leap into decisions and functions for which they are unsuited. Fourth, remedies must be fair to the party against whom they are ordered and should not impose substantial hardships that are unrelated to securing the right. Finally, an appropriate and just remedy is one that is “flexible and responsive to the needs of a given case.”

Para. 59: *Charter* rights are evolving and may require novel and creative features.

167 *Supra* note 68 at para. 24 that “the exercise of language rights must not be considered as exceptional or as something in the nature of a request for an accommodation” and such rights “require government action for their implementation and therefore create obligations for the State.”

account of how the nature of the service being sought might affect the way in which the service is provided.”<sup>168</sup> As such, the Court of Appeal found that the trial judge had made certain errors as to how the GNWT could meet its obligations under the NWT *OLA* generally, and whether individual rights had been breached. According to the Court of Appeal, given the broad spectrum of services offered by the GNWT, the nature of the service must be factored into an assessment as to how the obligations under the NWT *OLA* can be met. For instance, in services where the health and safety of the public is concerned (for example, at hospitals), if the service involves urgent or confidential matters, members of the public are entitled to immediate service in their language. If on the other hand urgency and confidentiality are not immediate concerns (for example, the issuance of a birth certificate or driver’s licence), the GNWT has greater flexibility in determining how to provide the services. The Court of Appeal applied a similar reasoning to the obligation to provide an active offer: “in those contexts where urgent or highly confidential matters are likely to arise, the person who seeks such services in French cannot easily access it or know it is available without an active offer.”<sup>169</sup>

#### **C. The exhaustion of remedies under the Northwest Territories *Official Languages Act***

Under the third ground of appeal, the appellants argued that the respondents should have exhausted their remedies under the NWT *OLA* before initiating litigation. They argued that the trial judge should have encouraged recourse to the administrative complaint system to preserve the integrity of that system. The trial judge concluded that the NWT *OLA* does not require the filing of a complaint as a precondition to initiating litigation.

The Court of Appeal found that, unlike the federal *OLA*, the NWT *OLA* does not require a party to file a complaint with the Languages Commissioner before initiating legal action. The NWT *OLA* does not contain a privative clause circumscribing judicial review, nor does it contain a mechanism of appeal to challenge the Language Commissioner’s findings or recommendations. As such, the Court of Appeal found that the trial judge was entitled to assess the adequacies of the remedies made available under the NWT *OLA*, and there was no reason to interfere with her finding that they did not provide an adequate alternative in this case. The third ground of appeal was therefore dismissed.

#### **D. The broadcasting of Legislative Assembly debates and the publication of *Hansard***

Section 11(1) of the NWT *OLA* provides that “[a]ny member of the public in the Northwest Territories has the right to communicate with, and to receive available services from, any head or central office of a government institution in English or French [...]” The trial judge found that the Assembly is the head office of a government institution for the purposes of that provision. As such, the broadcasting of debates is a service or communication offered by the Assembly and must therefore be offered in both English and French. Similarly, the trial judge found that *Hansard* was an official record of the work of the Legislative Assembly and is therefore covered by the expression “records and journals” in section 7 of the NWT *OLA*. She rejected the appellants’ arguments that the decision to broadcast the debates and the publication of *Hansard* fell within the Assembly’s privilege, stating that, if it did, that privilege was circumscribed with the adoption of the NWT *OLA*.

168 *Supra* note 163 at para. 133.

169 *Ibid.* at para. 144.

The Court of Appeal agreed with the trial judge that the language of the NWT *OLA* required that debates be broadcast and *Hansard* be published in both English and French. However, the Court of Appeal concluded that the Assembly's decisions not to broadcast the debates in French with the same frequency as in English and not to publish *Hansard* in French were protected by privilege. According to the Court of Appeal, the language of the NWT *OLA* was not sufficiently explicit to abrogate that privilege. As such, the Court of Appeal found the courts could not review the Assembly's decisions about language use.

### E. Solicitor-client costs

The appellants argued that the trial judge improperly exercised her discretion in awarding solicitor-client costs. Relying on *Arsenault-Cameron*,<sup>170</sup> the trial judge noted that the award of solicitor-client costs could be part of a "just and appropriate remedy."

The Court of Appeal found the trial judge made no error in law or principle by awarding costs as part of the remedy. She properly considered the appropriate factors in fashioning the remedy, which included the FFT's attempts to find a political solution before litigating and the GNWT's failure to adopt a global implementation plan or to otherwise implement the NWT *OLA* despite the numerous recommendations to that effect. As such, the Court of Appeal found no reason to interfere with the trial judge's cost award. The fifth ground of appeal was therefore dismissed.

### F. The cross-appeal

The appellants and the AGC are cross-respondents in the cross-appeal, which concerns the applicability of parts of the *Charter* in the Northwest Territories and the availability of damages and punitive damages against the cross-respondents.

At trial, the cross-appellants sought damages under the *Charter* against both the cross-respondents and the AGC. The Court of Appeal agreed with the trial judge's findings that the NWT *OLA* provided similar guarantees as those provided by the *Charter* and that nonetheless the remedy granted under the *Charter* would have been the same. The trial judge also found the evidence did not establish any breaches at the federal level. The Court of Appeal therefore agreed that it was unnecessary to consider the application of the *Charter*.

Regarding the availability of damages and punitive damages against the cross-respondents, the Court of Appeal concluded that the trial judge properly applied the principles governing the crafting of an "appropriate and just remedy." The remedy awarded included remedial measures to redress the issues raised, and these matters were further considered in her decision to award solicitor-client costs. Furthermore, the Court of Appeal found the trial judge's decision not to award punitive damages was justifiable, given her findings that there was no abusive, contemptuous or malicious behaviour on the part of the GNWT, nor any bad faith.

The cross-appeal was therefore dismissed.

It should be noted that both the appellants and respondents in this case had filed an application for leave to appeal to the Supreme Court of Canada, which was refused.<sup>171</sup>

170 *Supra* note 18.

171 File N° 32924, application for leave to appeal dismissed on March 5, 2009.

#### 4.7 Standing under section 20(1) of the *Canadian Charter of Rights and Freedoms*

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##### *R. c. Boudreau*<sup>172</sup>

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In this case, the Provincial Court of Nova Scotia ruled on the question of standing to seek a stay of proceedings for an alleged infringement of section 20(1) of the *Charter*.

Gordon Boudreau, the defendant, was charged with three offences under the *Fisheries Act*:<sup>173</sup> fishing within a closed area contrary to the terms of a communal fishing licence, fishing for snow crab and possession of snow crab. The fishing licence in question was issued to the Millbrook First Nation, and the licence conditions were written in English only. The Millbrook First Nation had designated Mr. Boudreau to fish the licence for the Band. Mr. Boudreau's first language is French.

The defendant pleaded not guilty and sought a stay of proceedings (pursuant to section 24(1) of the *Charter*) on the grounds that the provision of Fishing Licences and Conditions of Fishing Licences by the Department of Fisheries and Oceans (DFO) in English only violated his right to communicate with and receive service from the Government of Canada under section 20(1) of the *Charter*. The Crown argued that the defendant's language rights were not implicated in the issuance of a fishing licence to the Millbrook First Nation and that consequently Mr. Boudreau did not have standing to apply for a stay of proceedings.

Derrick J. explained that in order for the defendant to obtain a remedy under section 24(1) of the *Charter*—a stay of proceedings of the charges against him—“he has to demonstrate that his

constitutionally-protected language rights have been infringed.”<sup>174</sup> She held that in this case there was no connection between the issuance of the licence and the defendant's language rights. She pointed out that there was no evidence the defendant had any dealings with the DFO concerning the licence or the language in which it was issued, nor was there any evidence that the DFO knew that Mr. Boudreau had been designated by the Millbrook First Nation to fish the licence. She also rejected the defendant's argument that the fact he was compelled to court by the charges against him gave him automatic standing to claim a section 24(1) remedy.

Derrick J. concluded that the defendant did not have standing to advance a language rights claim in the case at bar.

#### 4.8 Access to services of equal quality

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##### *DesRochers v. Canada (Industry)*<sup>175</sup>

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In this appeal, the Supreme Court of Canada had to determine the nature and scope of the requirement for linguistic equality in communications and the provision of services as provided in Part IV of the *OLA*.

The provisions of Part IV of the *OLA* implement the constitutional right of any member of the public to be served in the official language of his or her choice, as set out in section 20(1) of the *Charter*. Section 16(1) of the *Charter* provides that English and French “have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.” The parties having agreed that such provisions create a constitutional duty to make services of equal quality in both official languages

172 2008 NSPC 78.

173 R.S.C. 1985, c. F-14.

174 *Supra* note 172 at para. 10.

175 *Supra* note 1.

available to the public, at issue in this appeal was the scope of the concept of “services of equal quality.”

### **A. Background**

The services in question, community economic development services, are provided by the Department of Industry Canada and are implemented by various community futures development corporations (CFDCs). The North Simcoe CFDC (North Simcoe) is responsible for implementing Industry Canada’s economic development program (the Community Futures Program) in Huronia, a region of Ontario where there is a “significant demand” for communications and services in the minority official language within the meaning of section 22 of the *OLA*.

In 1995, the appellant, the Centre d’avancement et de leadership en développement économique communautaire de la Huronie (CALDECH), was created by Francophone community organizations to address the perceived shortcomings in the provision of community economic development services by North Simcoe to the French-speaking population of Huronia. CALDECH was able to implement more than 50 projects intended to benefit the French-speaking community before it stopped providing services in 2004. It did not receive support from Industry Canada’s Community Futures Program.

In 2000, the appellant, Raymond DesRochers, CALDECH’s executive director, filed a complaint with the Commissioner of Official Languages alleging that North Simcoe was unable to provide services in French. The Commissioner investigated the complaint and found that Industry Canada had

breached its duties under Parts IV and VII of the *OLA*. The investigation report recommended that Industry Canada take measures to ensure that services provided by North Simcoe to the French-speaking community were equal in quality to those provided to the English-speaking community, and that adequate measures be taken to respond to the economic development needs of the French-speaking community in the area.

Following the Commissioner’s investigation, Industry Canada temporarily provided funding to CALDECH so the community could immediately receive economic development services in French. Between March 2001 and August 2002, CALDECH received a monthly grant of \$25,000. Meanwhile, Industry Canada took various corrective measures to ensure equality in the provision of services by North Simcoe in both languages.

Despite the efforts of Industry Canada and North Simcoe, the Commissioner concluded in two follow-up reports that Industry Canada was still not in full compliance with Parts IV and VII of the *OLA*. Following the second report, Mr. DesRochers and CALDECH applied to the Federal Court for remedy under section 77(1) of the *OLA*, seeking, among other things, a declaration that Industry Canada was in violation of Parts IV and VII of the *OLA* and sections 16(1) and 20(1) of the *Charter*, an order compelling Industry Canada to comply with those provisions, and an order granting CALDECH permanent and stable funding. The Commissioner intervened in the proceedings in the courts below and was granted leave to participate in the appeal before the Supreme Court of Canada as co-appellant.

## B. The Federal Court judgment<sup>176</sup>

In Federal Court, Industry Canada argued that the *OLA* does not apply in this case because North Simcoe is not a “federal institution” within the meaning of Part IV. Harrington J. rejected this argument and found that under section 25 of the *OLA* Industry Canada had a duty to ensure that North Simcoe provided equal service in English and French. However, he concluded that much of what was alleged by CALDECH and Mr. DesRochers fell under Part VII of the *OLA* (as opposed to Part IV), which was simply declaratory at the time and could not serve as a basis for an application for remedy under section 77(1) of the *OLA*.

Harrington J. acknowledged that, when the complaint was filed with the Commissioner in 2000, North Simcoe was unable to provide equal services in both official languages. However, he found that by the time the applicants filed for remedy in 2004 corrective measures had been taken and North Simcoe was able to provide equal services in both languages.

Harrington J. therefore dismissed the application without costs.

## C. The Federal Court of Appeal judgment<sup>177</sup>

The Federal Court of Appeal defined the issue by specifying that Part IV of the *OLA* provides only for a right to communicate with and receive available services from the federal institutions in French. Létourneau J.A., writing for the court, recognized that the applicable standard of equality in the use and status of the two official languages was that of substantive equality (as opposed to formal equality), but rejected the argument that this standard required North Simcoe to

consider the special needs of the French-speaking community in the development and implementation of its programs. He explained:

[P]art IV of the *OLA* provides for equal linguistic access to regional economic development services in Ontario, and not access to equal regional economic development services.

[...]

However, in my humble opinion, the intervenor’s counsel was mistaken when she argued that, based on this principle of linguistic equality, the respondents had a duty under the *OLA* to take the necessary steps to ensure that Francophones are considered equal partners with Anglophones in regional economic development, as per a definition of the services that reflect the needs of the minority, and in the provision of equal economic development services. In my view, this is to confuse the rights that may be provided for in, and the duties that may be imposed by, the *DIA* [*Department of Industry Act*] with the rights and duties that flow from the *OLA*.<sup>178</sup>

The Court concluded that, if there were any inadequacies in the provision of services, they resulted from a breach of the duties imposed by the *DIA*, and not those imposed by the *OLA*.

Nevertheless, the Court allowed the appeal because the Federal Court had erred in determining the merits of the application at the time the application for remedy was filed in 2004, as opposed to when the complaint was filed with the Commissioner in 2000. Since the evidence demonstrated that North Simcoe was unable to provide services in French in 2000, the application

176 *DesRochers v. Canada (Industry) (F.C.)*, [2005] 4 F.C.R. 3, 2005 FC 987.

177 *DesRochers v. Canada (Industry) (F.C.A.)*, [2007] 3 F.C.R. 3, 2006 FCA 374.

178 *Supra* note 177 at paras. 33 and 38.

should have been allowed. However, given that corrective measures had been taken between 2000 and 2004, the Court concluded that no remedy other than costs was appropriate.

#### D. The Supreme Court of Canada judgment

Stating that the “question was resolved long ago,”<sup>179</sup> Charron J., writing for the court, explained that the merits of the complaint were to be assessed in light of the facts that existed at the time the complaint was filed with the Commissioner. Accordingly, Charron J. defined the issue in this appeal as “whether the Federal Court of Appeal erred in holding that no remedy other than costs should be granted because, in light of the evidence, it was open to the trial judge to find that the principle of linguistic equality implemented in Part IV of the *OLA* was being adhered to at the time the application was heard.”<sup>180</sup> The parties agreed that the principle of linguistic equality provided for in section 20(1) of the *Charter* and implemented by Part IV of the *OLA* entails an obligation to make services “of equal quality in both official languages” available to the public. What was disputed was the meaning of “equal quality.”

The appellants conceded that equality of rights and privileges as to the *use* of the two official languages had been achieved through the corrective measures that were taken by Industry Canada following the Commissioner’s recommendations. They also acknowledged that in most cases it would suffice for the government to communicate and deliver the same services equally in both official languages in order to achieve equality of *status*. However, the appellants argued that in some cases and depending on the nature

of the service in question it is necessary to go further and take into account the particular needs of the language community receiving the service. The appellants submitted that Industry Canada is required to provide economic development services that are not only delivered in the language chosen by the user, but that are adapted to the particular needs and cultural reality of the region’s French-speaking community. According to the appellants, community economic development services tailored to the majority and simply offered to the minority in its language amounts at best to accommodation.

The respondents argued that, depending on the nature of the service, the government might be required to change its *method* of providing the service, but not the *content* of the service itself. They argued that such a requirement would in a way “amount to giving official language minority communities, *via* subsection 20(1) of the *Charter* and Part IV of the *OLA*, a right to participate in defining the content of programs, which even a generous reading of those provisions, having regard to subsection 16(1) of the *Charter*, does not authorize.”<sup>181</sup> According to the respondents, linguistic equality does not have such a broad scope, but is instead achieved “by guaranteeing equal linguistic access to the services offered, not by access to distinct services.”<sup>182</sup>

The Court agreed with the respondent’s assertion that the principle of linguistic equality found in section 20(1) of the *Charter* and Part IV of the *OLA* involves a guarantee in relation to the services *provided* by federal institutions. However, the Court disagreed with the proposition that linguistic equality in the provision of services cannot include access to services *with distinct content*. Charron J. explained:

179 *Supra* note 1 at para. 42.

180 *Ibid.* at para. 44.

181 *Ibid.* at para. 48.

182 *Ibid.* at para. 49.

Depending on the nature of the service in question, it is possible that substantive equality will not result from the development and implementation of identical services for each language community. The content of the principle of linguistic equality in government services is not necessarily uniform. It must be defined in light of the nature and purpose of the service in question.<sup>183</sup>

Applying the principle of linguistic equality in government services to the case at bar, the Court examined the nature and purpose of community economic development services as described by Industry Canada at the relevant time. Citing passages from Industry Canada's Web site, such as "communities take charge of their own economic futures and decide the direction they will take to attain their goals," and "[t]hese [community economic development activities and projects] will vary greatly from one community to another, depending on priorities established in the local strategic planning process."<sup>184</sup> [Emphasis in original] Charron J. stated that "[i]t is difficult to imagine how the federal institution could provide the community economic development services mentioned in this description without the participation of the targeted communities in both the development and the implementation of programs."<sup>185</sup> The Court found that given the nature of the services in question the communities could expect to have *distinct* content depending on the priorities established by the communities themselves.

Having considered the nature of the service in question, the Court disagreed with the Federal Court of Appeal's view that the principle of linguistic equality does not entail a right to "access to equal regional

economic services' [...], or that the respondents did not have a duty under Part IV of the *OLA* to 'take the necessary steps to ensure that Francophones are considered equal partners with Anglophones' [...] in the definition and provision of economic development services."<sup>186</sup> Charron J. explained:

What matters is that the services provided be of equal quality in both languages. The analysis is necessarily comparative. Thus, insofar as North Simcoe, in accordance with the programs' objectives, made efforts to reach the linguistic majority community and involve that community in program development and implementation, it had a duty to do the same for the linguistic minority community.<sup>187</sup>

However, the Court found it necessary to clarify two points regarding the scope of the principle of linguistic equality in the provision of services. First, the Court explained, the duties under Part IV of the *OLA* do not require that government services achieve a minimum level of quality or actually meet the needs of each official language community. In other words, services can be inadequate or of poor quality, but of equal quality in both official languages. As the Court pointed out, inadequacies in this regard could result from a breach of the duties imposed by the *DIA*, or a breach of the duties under Part VII of the *OLA*. Second, the principle of linguistic equality does not require equal results. Although inequality of results may be an indication that the quality of services provided is unequal, the results of a community economic development program for either official language may depend on a large number of factors that are difficult to identify.

183 *Ibid.* at para. 51.

184 *Ibid.* at para. 52.

185 *Ibid.* at para. 53.

186 *Ibid.* at para. 54.

187 *Ibid.* at para. 54.

188 *Ibid.* at para. 59.

In light of the foregoing, the Court considered the evidence in the case at bar. It found the evidence clearly showed that at the time the complaint was filed with the Commissioner the services provided in French by North Simcoe were far from equal in quality to the services provided in English. However, this deficiency had since been remedied. Citing the Commissioner's 2004 follow-up report, the Court listed some of the remedial measures taken by the North Simcoe CFDC: "it has advertised in newspapers of the French-speaking community and on the French-language radio station; it has personal contacts with key representatives of the French-language minority community to inform them of its services; its Francophone volunteers have also promoted its services in the context of their contacts with the community; and it has published a new bilingual newsletter that has been presented to representatives of the French-speaking community and mailed to 92 Francophone businesses."<sup>188</sup>

In the words of Charron J., "[t]he crux of the problem is that, despite these efforts, North Simcoe still seems incapable of reaching the French-speaking minority community and actually involving that community in its program."<sup>189</sup> The Court found that CALDECH's ability to reach the linguistic minority community and involve it in community economic development

projects showed a real need for such services in the region and the possibility of meeting those needs. But North Simcoe's inability to reach the French-speaking community was not a violation of the principle of linguistic equality in the provision of services as implemented by Part IV of the *OLA*. The Court concluded that the deficiencies at issue clearly exceed the scope of Part IV of the *OLA*, and that the appellants' arguments pertain to alleged violations of Part VII.

In a unanimous decision, the Court dismissed the appeal but awarded costs to the appellants Mr. DesRochers and CALDECH.

189 *Ibid.* at para. 60.