LANGUAGE RIGHTS

2001 • 2002

Canada

COMMISSIONER OF OFFICIAL LANGUAGES

Acknowledgments

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FOREWORD

Our courts have played an important role in clarifying the meaning and scope of language rights in Canada, some of which date from the time of Confederation. While this process is far from over, we reached a noteworthy moment in 2002, namely the twentieth anniversary of the adoption of the *Canadian Charter of Rights and Freedoms*. I say noteworthy, because within the sweep of those twenty years more language rights cases were heard by our courts than in all the preceding decades leading back to 1867. Indeed, few would contest the proposition that the advent of the *Charter* provided a new and important impetus to the role of the judiciary in both interpreting language rights and ensuring their proper respect and implementation.

The set of interpretive rules that guide our understanding of what language rights mean and how they should be applied owes much to the Supreme Court of Canada. Recent developments in Supreme Court jurisprudence include rulings of the Court that reinforce and elaborate upon the principle of equality of the two official languages. This principle set out explicitly in section 16 of the *Charter*, has been found to underpin the original constitutional language guarantees applicable to various legislatures, statutory enactments and the courts. The Supreme Court has also determined that the principle of linguistic equality has substantive effects giving rise to positive State obligations to provide the institutional means to implement language rights effectively (*Beaulac* decision).

Equality means more of course than just treating everyone exactly the same. In this regard, the Supreme Court has stressed that a proper understanding of official language equality may require differential treatment where factual realities impose unique burdens upon the minority. In the area of education, for example, equality so understood obliges government to provide whatever resources and institutional framework are necessary to ensure that minority language education is substantively equivalent to that of the majority (*Arsenault-Cameron* decision).

The importance of positive government action to implement language rights is clearly reflected in many of the decisions reviewed in this Report. Only by remaining alert to the needs of minority official language communities will governments be able to contribute, as they must, to their development and vitality. At times, significant policy initiatives emerge as an immediate consequence of successful court action, as happened in New Brunswick following a court judgment invalidating the unilingual operation of the city of Moncton (*Charlebois* decision). Not only did the government of New Brunswick accept the decision and effectively waive any right of appeal, it also undertook to review in its entirety the provincial *Official Languages Act*. The resultant changes in the form of a new *Official Languages Act* went far beyond the particulars of the original court decision. To ensure compliance with the new *Act*, the government of New Brunswick has created the position of Commissioner of Official Languages was created, the forth such position in Canada. This is the type of government initiative that seeks to achieve a greater degree substantive equality.

Remaining attentive to the challenges faced by minority official language communities is clearly necessary to fully respect the unwritten constitutional principle of the protection of minorities. The Ontario Court of Appeal decision in *Montfort*, regarding Ontario's only French-speaking community teaching hospital, aptly illustrates that administrative decisions taken without consideration of the impact on minority language communities are constitutionally flawed. Montfort Hospital has an important role to play in sustaining the health and vitality of Franco-Ontarian communities. As the court ruled, that role must be fully assessed and given appropriate weight in decisions relevant to the reorganization of hospitals in the province. In accepting the verdict of the Ontario Court

of Appeal, the government of Ontario acted in an appropriate and responsible manner. It also signaled that the needs of French-speaking communities in the province must be seriously and adequately assessed in determining public policies.

The importance of schools to the vitality of minority official language communities is reflected here, as in past reports, by the number of decisions reviewed. Whether the issues highlighted in the various cases concern administrative rules governing access to minority official language education or the need for effective court remedies to enforce existing rights, it is abundantly clear that barriers to full implementation of section 23 of the *Charter* seriously compromise the continued health and development of minority communities. Our courts have often stressed that section 23 rights are remedial in nature and meant to correct past injustices. They have therefore recognized that innovative remedies should be developed that go beyond a mere declaration that section 23 has been breached. As reviewed in this Report, the role of our courts in supervising the implementation of such remedies is an important issue now in the process of being resolved by the Supreme Court of Canada (*Doucet-Boudreau* case).

The number of decisions reviewed in this Report testifies to the continued importance of our courts in ensuring language rights are better understood and fully implemented. As numerous judgments have stressed, past and current injustices require effective remedies now. But finding solutions to persistent inequalities also involves the active participation of governments, through the allocation of sufficient resources and the maintenance and development of key institutional frameworks. The initiatives of federal, provincial and territorial governments, when combined with the efforts of many associations that promote language rights in areas such as our system of justice, in education, health, economic development and communications, as well as the commitment of individual citizens, provide us with the means to meet our collective responsibility to achieve substantive linguistic equality.

Dyane Adam
Commissioner of Official Languages

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I. INTRODUCTION

Our last report on language rights highlighted the new interpretive framework established by the Supreme Court of Canada in *R.* v. *Beaulac*.[1] The *Beaulac* decision established that language rights must in all cases be interpreted in light of their underlying objectives, and in a manner consistent with the preservation and development of official language communities. They must also be understood as remedial in nature and introduced to correct previous injustices that have gone unredressed. In short, the idea that language rights should be interpreted restrictively because they are based on political compromise, an approach reflected in a growing number of judgments to that time, was rejected in favour of a more liberal and purpose-centred analysis.

[1] LANGUAGE RIGHTS 1999-2000; Commissioner of Official Languages, Minister of Public Works and Government Services Canada 2001; Cat. No. SF31-34\2001; ISBN: 0-662-65868-X; for a more complete analysis of *R.* v. *Beaulac*, [1999] 1 S.C.R. 768, see pages 17-19.

The rules of interpretation found in *Beaulac* have been invoked in numerous cases reviewed in the present report, though not always with success. The sheer diversity of situations, ranging from a minority language hospital in Ontario, unilingual operation of municipalities in New Brunswick, city mergers in Quebec, rules surrounding access to minority language schools, makes it difficult to draw definitive conclusions. What does emerge, however, is a willingness on the part of many courts to use the principles set out in *Beaulac* to "breathe life" into specific statutory or constitutional provisions that protect official linguistic minorities.

The institutional dimension essential to the health and vitality of minority official language communities is aptly illustrated by cases such as that involving the Montfort Hospital in Ontario and that involving the English-speaking cities on the Island of Montreal. Both cases raised a debate surrounding the merits of bilingual institutions versus institutions that can be said to "belong" to a minority, though factual and legal differences between them led to conclusions some may find difficult to reconcile. Despite the difference in result, the cases are noteworthy for the manner in which the unwritten constitutional principle of the protection of minorities has been interpreted and applied. This is also true with respect to the New Brunswick case that placed in question the unilingual operation of the City of Moncton.

The importance of schools to the preservation and enhancement of minority official language communities is unassailable. This is once again reflected in the four cases dealing with section 23 of the *Charter* that are reviewed in the present report, three of which come from the province of Quebec. As will be clear from reading the analysis of each decision, one of the most controversial aspects of minority language public education in Quebec concerns the eligibility rules for gaining access. This contrasts sharply of course with the majority of past cases on section 23, raised by French-speaking minorities in other parts of the country, that deal with the actual establishment of minority language educational programs and the rights of management over them. The fourth case (from Nova Scotia) examines the innovative approach adopted by the court in fashioning a remedy that will be both effective and timely for the minority community concerned.

Language rights as they relate to actual court proceedings are also frequently invoked. The cases reviewed in the present report bear witness to the variety of situations in which language rights are allegedly violated, whether it be in the context of criminal or civil proceedings. The issues touched upon include the language in which charges against an accused are written, the language in which pre-trial disclosure of evidence is produced, the language in which a witness should be examined in chief or cross-examined, and bilingual police services. While criminal law procedure relies on a body of law unique to itself, the issues raised in the cases reviewed underscore the practical considerations that must be addressed to ensure that our courts can function in two official languages.

Litigation involving the application of the *Official Languages Act* has also generated its share of judicial decisions since our last report. Federal government responsibilities to ensure that language requirements for positions in the Public Service are objectively justified and fairly implemented have been reaffirmed in two decisions of the Federal Court. In another case, federal government linguistic obligations were under scrutiny in the context of decisions taken to withdraw from job retraining programs in favour of similar services being offered by the province of Quebec. At issue was access to a wide range of services related to employment initiatives in either official language, even though such initiatives were no longer undertaken by federal agencies. The application of the *Official Languages Act* to the House of Commons was raised in a case dealing with the broadcast of Parliamentary debates in both official languages. It focuses on the responsibilities of the House of Commons to ensure that the ultimate broadcast of those debates be made available in both English and French to cable subscribers across the country.

The range of decisions reviewed in this report, some of which are not mentioned in this short introduction, demonstrate the role our courts continue to play in clarifying the scope of language rights and ensuring their proper implementation. The responsibilities of governments to undertake positive initiatives aimed at enhancing the vitality of minority communities is underscored in numerous cases.

II. INSTITUTIONAL SUPPORT TO MINORITY COMMUNITIES

2.1 Montfort Hospital

Lalonde et al. v. Ontario (Commission de restructuration des services de santé)

The legal struggle to preserve Montfort Hospital as a general community hospital with a full range of medical services won a major victory before the Ontario Court of Appeal in December of 2001.[2] As reviewed in the previous report on language rights,[3] decisions made by the Ontario Hospital Services Restructuring Commission (HSRC) regarding the future of Montfort were originally quashed by the Divisional Court.

A number of arguments were raised by the Attorney General of Ontario to challenge the correctness of the lower court decision.

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[2] Lalonde et al. v. Ontario (Commission de restructuration des services de santé), Court of Appeal of Ontario, December 12, 2001, Docket: C33807.

[3] LANGUAGE RIGHTS 1999-2000, Supra, note 1, at pp. 68-72.

A number of arguments were raised by the Attorney General of Ontario to challenge the correctness of the lower court decision. First, Ontario argued that several factual findings made by the Divisional Court were not supported by the evidence heard. It maintained that medical services in French regarding programs slated to be transferred from Montfort to larger hospitals in the region would in fact be protected because such hospitals were either already designated as bilingual under the *French Language Services Act* (FLSA) or ordered to seek such designation as part of the restructuring process. The Court of Appeal summarily dismissed this argument, pointing out that even designation as a bilingual service provider did not guarantee full-time access to services in French. It emphasized that the HSRC had itself acknowledged that access to medical services in French varied dramatically from one designated facility to another. Furthermore, the HSRC order to various health care providers to seek designation was nothing more than a stated intention: "Good intentions are not a substitute for fact. Four years after the Commission's recommendations, the health care providers directed by the Commission to become designated as offering bilingual services have not yet achieved that designation and may never do so."[4] The Court of Appeal thus had no difficulty in endorsing the lower court finding that access to medical services in French, both in the Ottawa-Carleton region and the rural Francophone communities of eastern Ontario, would have be reduced by implementing the directives of the HSRC.

Ontario also challenged the factual conclusion of the Divisional Court that Montfort's role as a trainer of health care professionals would be jeopardized by the proposed reduction in the range of health services it provided. The province argued that it was purely speculative to draw this conclusion in the absence of unequivocal evidence to support it. The Court of Appeal disagreed, pointing out that ample evidence was placed before the trial court demonstrating that Montfort's training program in family medicine, as well as its current range of clinical experience, would be endangered by the HSRC directives. Moreover, the Court rejected the suggestion that deficiencies in training at a downsized Montfort could be made up at other hospitals designated as bilingual. As the Court of Appeal underscored, clinical experience outside Montfort is in fact available only in English. The HSRC had itself recognized the potential difficulties associated with providing adequate training in French to health care professionals outside Montfort, but had left the problem to be solved by other agencies.

[4] *Supra,* note 2, at paragraph 61.

The final factual conclusion of the Divisional Court with which Ontario disagreed concerned any linkage between the reduction of medical services and training provided for in a fully French-speaking environment and a deterioration of the linguistic and cultural vitality of Franco-Ontarians. Ontario took issue with sociological evidence led by the plaintiffs at trial, characterizing it as abstract, highly speculative, not rooted in fact and essentially political. In its view, hospitals are not institutions that play any significant role in preventing linguistic assimilation due to the short lengths of time individuals spend there and the infrequency of their visits. Again, the Court of Appeal rejected the position put forward by the Attorney General of Ontario and endorsed the conclusions of the Divisional Court: "We agree that Montfort has a broader institutional role than the provision of health care services. Apart from fulfilling the additional practical function of medical training, Montfort's larger institutional role includes maintaining the French language, transmitting Francophone culture, and fostering solidarity in the Franco-Ontarian minority."[5]

Having disposed of alleged factual errors in the trial level decision, the Court of Appeal then turned to various questions of legal interpretation. While it admitted at the outset that no specific language rights protected by the Constitution were directly at issue, it briefly reviewed the historical and political considerations that had led to the entrenchment of the original language and religious guarantees in the *Constitution Act*, 1867. These guarantees reflected the fundamental concern at the time of Confederation that religious and linguistic minorities (Protestant, Catholic, French or English) be adequately protected from potentially hostile majorities.[6] The original guarantees thus provide a context and background that help explain constitutional amendments made in 1982 (set out in sections 16-23 of the *Canadian Charter of Rights and Freedoms*) that significantly added to existing language rights. The Court of Appeal noted that the principle of equality of our official languages found in subsection 16(1) of the *Charter* (and applicable to all institutions of the Parliament and government of Canada as well as New Brunswick) was joined in subsection 16(3) by the explicit recognition of the legislative authority of all legislatures in Canada to advance the objective of official language equality:

> *"16(3) NOTHING IN THIS CHARTER LIMITS THE AUTHORITY OF PARLIAMENT OR A LEGISLATURE TO ADVANCE THE EQUALITY OF STATUS OR USE OF ENGLISH AND FRENCH."*

[5] *Ibid.* at paragraph 71.

[6] The Court of Appeal made reference to section 133, guaranteeing the use of both English and French in the legislative process and enactments of Parliament and the legislature of Quebec and before the courts created by either legislative body, and section 93 protecting minority Catholic and Protestant schools in the provinces of Ontario and Quebec. While the Court acknowledged that Section 93 of the *Constitution Act, 1867* had been judicially interpreted to exclude any linguistic component, it pointed out that this historic grievance had been rectified by the enactment of section 23 of the *Canadian Charter of Rights and Freedoms*. See paragraphs 78-86 of its decision.

While this *Charter* provision clearly applies to the province of Ontario, the Court of Appeal determined that it did not operate in such a way as to constitutionalize measures taken to promote the use of both official languages. In its view, subsection 16(3) was intended to act as a shield to protect efforts made to promote the use of a minority official language from court challenges based on alleged breaches of the general principle of equality found in section 15 of the *Charter*. It did not oblige the government of Ontario to undertake any specific promotional programs, nor did it protect any such promotional programs from being changed or abolished once they were undertaken:

> *"This court has held in another context that in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measure accord with or enhance* Charter *values."*[7]

In the result, subsection 16(3) of the *Charter* could not be relied upon to prevent Ontario from altering the status and operation of Montfort Hospital. Nor could any proposed changes be challenged as a breach of equality rights under section 15 of the *Charter*. The latter rights apply to all individuals and are thus unrelated to specific rights accorded to members of official language minorities. In short, language rights that pertain to the use of English and French cannot be expanded or augmented by reference to a universal principle of individual equality any more than their validity can be placed in question by invoking it.

Having reached these preliminary conclusions, the Court of Appeal then turned to what role unwritten constitutional principles might play in reviewing the validity of government actions. It emphasized that such principles, which include the principle of respect for and protection of minorities, "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based..."[8] With respect to minority protection, the Court of Appeal adopted the words of the Supreme Court of Canada:

> *"The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the* Charter. *Undoubtedly, one of the key considerations motivating the enactment of the* Charter, *and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the* Charter. *Indeed, the protection of minority*

[7] *Supra*, note 2, at paragraph 94.

[8] *Ibid.* at paragraph 104. The words are quoted from the Supreme Court of Canada decision in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

RIGHTS WAS CLEARLY AN ESSENTIAL CONSIDERATION IN THE DESIGN OF OUR CONSTITUTIONAL STRUCTURE EVEN AT THE TIME OF CONFEDERATION. ALTHOUGH CANADA'S RECORD OF UPHOLDING THE RIGHTS OF MINORITIES IS NOT A SPOTLESS ONE, THAT GOAL IS ONE TOWARDS WHICH CANADIANS HAVE BEEN STRIVING SINCE CONFEDERATION, AND THE PROCESS HAS NOT BEEN WITHOUT SUCCESSES. THE PRINCIPLE OF PROTECTING MINORITY RIGHTS CONTINUES TO EXERCISE INFLUENCE IN THE OPERATION AND INTERPRETATION OF OUR CONSTITUTION."[9]

While an unwritten or structural principle can be used as an aid to interpreting constitutional provisions, the Court of Appeal cautioned that such use was not "...an invitation to dispense with the written text of the Constitution."[10] The written text promotes legal certainty and predictability, thus providing a foundation and a touchstone for the exercise of constitutional review.

With these general considerations in mind, the Court of Appeal rejected arguments of the Attorney General of Ontario to the effect that the lower court decision effectively created a free-standing minority language right (where none existed before) capable of impugning the validity of a provincial statute or requiring the province to act in a specific manner. On the facts of Montfort, no legislation was challenged as impinging on a minority language right, nor was the Francophone minority of Ontario claiming that the provincial government was obliged to create an institution that did not then exist. Rather, declared the Court, "we are asked to review the validity of a discretionary decision with respect to the role and function of an existing institution, made by a statutory authority with a mandate to act in the public interest.."[11] Such a review involved both a consideration of the *French Language Services Act* (FLSA) of Ontario (in light of structural and interpretive principles of the Constitution) and the possible application of unwritten constitutional principles to the discretionary decisions of a statutory body mandated to act in the public interest.

With respect to the FLSA, the Court of Appeal agreed that the statute must be interpreted purposively and in a manner consistent with the preservation and development of official language communities in Canada, as set out in the *Beaulac* decision of the Supreme Court of Canada.[12] In its view, the FLSA also reflected the aspirational content of subsection 16(3) of the Charter regarding the advancement of equality of Canada's two official languages.[13] A further aid to the interpretation of the

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[9] *Id.* at paragraph 111. Also at page 262 of Supreme Court of Canada decision, *ibid.*

[10] The words of caution were quoted from the Supreme Court of Canada decision the *Quebec Reference, ibid.* at p. 249.

[11] *Supra*, note 2, at paragraph 123.

[12] *R.* v. *Beaulac*, [1999] 1 S.C.R. 768.

[13] In the words of the Court of Appeal: "The F.L.S.A. is an example of the provincial legislature of Ontario using s. 16(3) to build on the language rights contained in the *Constitution Act*, 1867 and the *Charter* to advance the equality of status or use of the French language. The aspirational element contained in s. 16(3) - advancing the French language toward substantive equality with the English language in Ontario - is of significance in interpreting the F.L.S.A." *Supra*, note 2, at paragraph 129.

FLSA was also found in its preamble, which states that the Act constitutes a statutory recognition of the cultural heritage of the French-speaking population and a reflection of the Legislative Assembly's commitment to preserve that cultural heritage for future generations.

The Court of Appeal determined that the access to service provisions of the FLSA applied to Montfort Hospital, which was both a designated provincial government agency for the purposes of providing services in French and was located in a designated area. The Court also reviewed in some detail the process of territorial and institutional designation under the FLSA, coming to the conclusion that all available services offered by Montfort were subject to the Act's bilingual requirement. This latter finding proved important to the Court's decision insofar as the statutory process for altering the scope of available services had not been followed in the case of Montfort. The province had argued that the scope of available services at Montfort can simply vary from time to time and hence affect the scope of the legal right to services in French. Moreover, the province had argued that the term "services" did not include the training of health care professionals in French. With respect to the first argument, the Court of Appeal declared:

> *"We cannot accept this submission. In our opinion the words "available services" in s. 5 of the Act refer to available healthcare services at the time the agency is designated under the Act. The legislature has quite clearly manifested its intention in the preamble of the F.L.S.A. to "guarantee" the provision of services in French...Our interpretation is also consistent with the objectives of the F.L.S.A, the aspirational element of s. 16(3) of the* Charter, *and the unwritten constitutional principle of respect for and protection of minorities."*[14]

The Court of Appeal found that any changes to available services required an amending regulation under the FLSA (with proper statutory notice) and were subject to the statutory requirement that limitations on services available in French be "reasonable and necessary". As to the training of health care professionals in French, the Court ruled:

> *"The Commission appears to have attempted to frame its directions so as to make available equivalent healthcare services in French at other institutions. Language and culture are not, however, separate watertight compartments. The reality of the matter is, as found by the Divisional Court, that the Commission's directions would reduce the availability and accessibility of healthcare services in French, both directly in the Ottawa-Carleton region and eastern Ontario, and indirectly by imperiling the*

[14] *Ibid.* at paragraph 160.

TRAINING OF HEALTH CARE PROFESSIONALS, WHICH WOULD IN TURN INCREASE THE ASSIMILATION OF FRANCO-ONTARIANS. MONTFORT'S DESIGNATION UNDER THE F.L.S.A. INCLUDES NOT ONLY THE RIGHT TO HEALTHCARE SERVICES IN FRENCH AT THE TIME OF DESIGNATION BUT ALSO THE RIGHT TO WHATEVER STRUCTURE IS NECESSARY TO ENSURE THAT THOSE HEALTH CARE SERVICES ARE DELIVERED IN FRENCH. THIS WOULD INCLUDE THE TRAINING OF HEALTH CARE PROFESSIONALS IN FRENCH. TO GIVE THE LEGISLATION ANY OTHER INTERPRETATION IS TO PREFER A NARROW, LITERAL, COMPARTMENTALIZED INTERPRETATION TO ONE THAT RECOGNIZES AND REFLECTS THE INTENT OF THE LEGISLATION."[15]

While changes to the range of services available in French at Montfort can be made by regulation, the Court emphasized that any such changes can only be made after all "reasonable measures" have been made to comply with the FLSA. The Court pointed out that this standard "...does not simply mean giving a direction to the transferee hospital to attain F.L.S.A. designation and then transferring the French services before that designation has been attained. Nor does "all reasonable measures" mean creating a seemingly insurmountable problem for the training of healthcare professionals in French and leaving the affected community to solve the problem itself." Moreover, the regulation-making authority of the government cannot be exercised in any way that derogates from the purpose and intent of the FLSA. On all these grounds the directive of the HSRC regarding Montfort was clearly defective.

The final issue addressed by the Court of Appeal concerns the application of the unwritten constitutional principle of respect for and protection of minorities to the decision-making process of the HSRC. As a point of departure, the Court reiterated that "[f]undamental constitutional values have normative legal force. Even if the text of the Constitution falls short of creating a specific constitutionally enforceable right, the values of the Constitution must be considered in assessing the validity or legality of actions taken by government."[17] Discretionary decisions made by statutory bodies can thus be challenged if made without due regard to unwritten constitutional principles. As the Court said: "The statutory conferral of the power to make a discretionary decision does not immunize from judicial scrutiny the decision-maker who ignores the fundamental values of Canada's legal order."[18] With respect to the specific powers exercised by the HSRC in restructuring Ontario's health care system, the Court ruled:

"THE COMMISSION WAS REQUIRED BY STATUTE TO EXERCISE ITS POWERS WITH RESPECT TO MONTFORT IN ACCORDANCE WITH THE PUBLIC INTEREST*. IN DETERMINING THE PUBLIC INTEREST, THE COMMISSION WAS REQUIRED TO HAVE REGARD TO THE*

[15] *Id.* at paragraph 162.

[16] *Id.* at paragraph 165.

[17] *Id.* at paragraph 174.

[18] *Id.* at paragraph 176.

FUNDAMENTAL CONSTITUTIONAL PRINCIPLE OF RESPECT FOR AND PROTECTION OF MINORITIES...WE AGREE WITH THE DIVISIONAL COURT...THAT THE LANGUAGE AND CULTURE OF THE FRANCOPHONE MINORITY IN ONTARIO "HOLD A SPECIAL PLACE IN THE CANADIAN FABRIC AS ONE OF THE FOUNDING COMMUNITIES OF CANADA AND AS ONE OF THE TWO OFFICIAL LANGUAGE GROUPS WHOSE RIGHTS ARE ENTRENCHED IN THE CONSTITUTION." IF IMPLEMENTED, THE COMMISSION'S DIRECTIONS WOULD GREATLY IMPAIR MONTFORT'S ROLE AS AN IMPORTANT LINGUISTIC, CULTURAL AND EDUCATIONAL INSTITUTION, VITAL TO THE MINORITY FRANCOPHONE POPULATION OF ONTARIO. THIS WOULD BE CONTRARY TO THE FUNDAMENTAL CONSTITUTIONAL PRINCIPLE OF RESPECT FOR AND PROTECTION OF MINORITIES."[19]

Not only had the HSRC failed to give any weight to the fundamental principle at issue here, it had taken the view that any consideration of the linguistic, cultural and educational role of Montfort Hospital for the Francophone community of Ontario was beyond its mandate. In the result, no important societal objective was ever identified that rendered it necessary to depart from giving full effect to the principle of respect for and protection of minorities. The Commission's failure in this regard thus rendered its decision to reduce the range of medical services offered at Montfort constitutionally flawed.

For all the above reasons, the lower court order to quash the directions of the HSRC regarding Montfort Hospital was affirmed and the matter was remitted to the Ontario government for reconsideration in accordance with the reasoning of the Court of Appeal. In February of 2002, the Government of Ontario announced that it would not be appealing the judgment of the Court of Appeal.

2.2 Bilingual Municipalities in New Brunswick

Charlebois v. *Mowat et ville de Moncton*

As reviewed in the previous report on language rights, the principle of equality of English and French in all governmental institutions in New Brunswick (subsection 16(2) of the *Canadian Charter of Rights and Freedoms*)[20] raises important substantive issues regarding the operation of municipalities in the province. Chief among these is the scope of positive obligations that the principle imposes on New Brunswick to take all measures necessary to implement and achieve real linguistic equality. The manner in which local governmental institutions operate quite clearly has an important impact on minority official language communities. This is reflected in the case of *Charlebois* v. *City of Moncton* which involves a building standards by-law adopted by the city of Moncton in

[19] *Id.* at paragraphs 180-181.

[20] Subsection 16(2) reads: "English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick."

English only, by virtue of which a unilingual English order was issued against a Francophone resident. The last report examined the reasons given at the trial court level to uphold the validity of the by-law, as well as arguments put forward by Charlebois and various intervenors to show that the unilingual practices of the city of Moncton violated constitutional guarantees.[21] The Court of Appeal of New Brunswick has now overturned the trial level decision and declared the unilingual by-law to be unconstitutional.[22]

The Court of Appeal noted at the beginning of its judgement that New Brunswick is the only Canadian province to have declared itself to be officially bilingual. The unique bilingual status of New Brunswick was elaborated over a number of years by means of provincial law and ultimately entrenched in various constitutional provisions:

> *"Indeed, the recent history of the last thirty years shows that successive New Brunswick governments have, on four separate occasions during that period, enacted language rights legislation or have entrenched language rights in the Canadian Constitution which collectively provide the province with a constitutional language regime quite peculiar to New Brunswick and unique in the country. Obviously, these legislative and constitutional provisions impose obligations on the province which are also peculiar to New Brunswick."*[23]

Among the constitutional provisions of particular importance are found the declaration that English and French are the official languages of New Brunswick, the principle that the two languages have equality of status and equal rights and privileges in all provincial government institutions, the official recognition of the English and French linguistic communities in the province as well as the affirmation of their equality of status, rights and privileges.[24]

Whether the terms of the Constitution require the city of Moncton to adopt and issue its by-laws in both official languages also engages ss. 18(2) of the *Canadian Charter of Rights and Freedoms*, which provides that "[t]he statutes, records and journals of the

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[21] LANGUAGE RIGHTS 1999-2000, supra, note 1, at pp. 63-68.

[22] *Charlebois* v. *Mowat et ville de Moncton*, 2001 NBCA 117 (judgement rendered December 20, 2001).

[23] *Ibid.* at paragraph 8.

[24] These provisions are found in ss. 16(2) and 16.1 of the *Canadian Charter of Rights and Freedoms*:

> "16(2) English and French are the official languages of New Brunswick and have equality of status and equal right and privileges as to their use in all institutions of the legislature and government of New Brunswick."
>
> "16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities."

Sections 17-20 of the *Charter* also entrench the right to use either language in proceedings before the provincial legislature, the mandatory publication of its Acts in both languages, the right to use either French or English before provincial courts, and the right to communicate with and receive services from provincial government institutions in English and French.

legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative." The wording of ss. 18(2) is similar to that found in section 133 of the *Constitution Act, 1867*, requiring both English and French to be used in the records and journals of Parliament and the legislature of Quebec. It was this similarity that had convinced the court of first instance in *Charlebois* to apply past case law of the Supreme Court of Canada excluding municipal by-laws (in Quebec) from the bilingual requirements of section 133.[25] However, the Court of Appeal of New Brunswick pointed out that the interpretation given section 133 by the Supreme Court had been based upon historical circumstances prevailing in 1867, circumstances that tended to reveal the intention of the drafters of section 133 to exclude municipalities in Quebec from its reach. By contrast, the historical circumstances surrounding the adoption of section 18 of the *Charter of Rights and Freedoms* were entirely different. At the time the Charter was adopted in 1982, New Brunswick had passed through significant political and legislative changes beginning with the adoption of the provincial *Official Languages Act* in 1969, and leading to the passage in 1981 of a provincial statute recognizing the equality of New Brunswick's two official language communities.[26] It is this evolution and events surrounding it that provide the historical circumstances relevant to a proper understanding of the scope of ss. 18(2) of the *Charter*.

Further guidance in interpreting ss. 18(2) was also found in rules of interpretation that apply to *Charter* litigation generally. As enunciated by the Supreme Court of Canada, *Charter* rights and freedoms are best interpreted by considering their underlying purposes. Such purposes should be determined by reference to the nature and broader purposes of the *Charter* as a whole, the meaning and purpose of other textually related rights and freedoms, as well as the actual wording used and the historical origins of the protected right or freedom.[27] The Court of Appeal also referred to and applied rules of interpretation specific to language rights developed by the Supreme Court in *R.* v. *Beaulac*. These include the need to interpret language rights in such a way as to encourage the flourishing and preservation of minority official language communities. In addition, language rights should be construed remedially so as to correct past injustices that have gone unredressed.

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[25] See A.G. *(Quebec)* v. *Blaikie et al.*, [1981] 1 S.C.R. 312, at pp. 321-324.

[26] Recognition of the two linguistic communities is found in a statute entitled *An Act Recogniz ing the Equality of the Two Official Linguistic Communities in New Brunswick; Statutes of New Brunswick* 1981, c. O-1.1, sections one and two of which read:

> "1. Acknowledging the unique character of New Brunswick, the English linguistic community and the French linguistic community are officially recognized within the context of one province for all purposes to which the authority of the Legislature of New Brunswick extends, and the equality of status and the equal rights and privileges of these two communities are affirmed."
>
> "2. The Government of New Brunswick shall ensure protection of the equality of status and the equal rights and privileges of the official linguistic communities and in particular their right to distinct institutions within which cultural, educational and social activities may be carried on."

[27] The Court of Appeal adopted reasoning found in the Supreme Court decision *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. It paraphrased the Supreme Court in these words: "In short, the interests they were meant to protect must be ascertained by reference: (a) to the character and the larger objects of the *Charter* itself; (b) to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*; and (c) to the language chosen to articulate the specific right taking into account the historical origins of the concepts enshrined." *Supra*, note 22, at paragraph 49.

The Court of Appeal also referred to the unwritten constitutional principle of the protection of minorities, which can be used as an aid to interpretation. It stressed that this unwritten principle can be important for the purposes of interpreting an existing constitutional text. However, the Court cautioned against any use of the principle to establish a free-standing right unrelated to a specific provision in the Constitution:

> *"THE SUPREME COURT EXPRESSLY ACKNOWLEDGED THAT THESE UNDERLYING CONSTITUTIONAL PRINCIPLES MAY BE USED TO FILL GAPS IN THE EXPRESS TERMS OF THE CONSTITUTIONAL TEXT.[...] AS I UNDERSTAND THE EFFECT OF THE STATEMENTS MADE BY THE SUPREME COURT CONCERNING THE USE OF THESE PRINCIPLES, I THINK THAT THE ARGUMENT THAT THIS UNWRITTEN AND UNDERLYING PRINCIPLE CAN ALSO BE USED INDEPENDENTLY OF ANY CONSTITUTIONAL TEXT, AS A BASIS OF AN APPLICATION FOR JUDICIAL REVIEW TO STRIKE DOWN GOVERNMENT ACTION IS NOT VERY CONVINCING. I BELIEVE THAT THE "POWERFUL NORMATIVE FORCE" REFERRED TO BY THE SUPREME COURT CONCERNS THE INTERPRETATION OF CONSTITUTIONAL TEXTS AND NOT THE CREATION OF RIGHTS OUTSIDE OF THE CONSTITUTIONAL TEXTS."*[28]

With these interpretive principles in mind, the Court of Appeal returned to the correlation of ss. 18(2) of the *Charter* to other *Charter* rights to which it was textually related. It placed particular emphasis upon the principle of equality found in ss. 16(2), and upon the principle in ss. 16.1(1) that the English and French linguistic communities of New Brunswick enjoy equality of status and equal rights and privileges. While the Court of Appeal acknowledged that the Supreme Court in past decisions had recommended that caution be exercised when interpreting official language guarantees and that the implementation of the principle of equality found in section 16 of the *Charter* is best achieved through the legislative process,[29] it also underscored the liberal and purposive rules of interpretation for language rights developed by the Supreme Court in *Beaulac*. The latter decision specifically rejected the notion that reference to the legislative process in ss. 16(3) should limit the legal effect of the principle of official language equality.[30] In short, the principle of equality has substantive effects that cannot be ignored: "The principle of equality entrenched in subsection 16(2) must be interpreted according to its true meaning, i.e., substantive equality is the applicable norm. Substantive equality means that language rights that are institutionally based require government action for their implementation and therefore create obligations for the government."[31]

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[28] *Supra,* note 22, at paragraph 58.

[29] Regarding the implementation of the principle of equality in section 16, the Court of Appeal referred to *Société des Acadiens du Nouveau Brunswick c. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, at p. 579, where emphasis was placed on the legislative process referred to in ss. 16(3), which reads: "Nothing in this *Charter* limits the authority of Parliament or a legislature to advance the equality of status or use of English and French."

[30] The Court of Appeal quoted from *R.* v. *Beaulac* [1999] 1 S.C.R. 768, at paragraph 24: "The idea that s. 16(3) of the *Charter*, which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the Jones case, *supra,* limits the scope of s. 16(1) must also be rejected."

[31] *Supra*, note 22, at paragraph 76.

Turning to the official recognition and equality of New Brunswick's two linguistic communities, the Court of Appeal declared: "To the same extent as subsection 16(2), the principle of the equality of the English linguistic community and the French linguistic community in New Brunswick entrenched in section 16.1 of the *Charter* is a telling indication of the purpose of language guarantees and a source of guidance in the interpretation of other *Charter* provisions, including subsection 18(2)."[32] Moreover, the constitutional entrenchment of the equality of English and French linguistic communities and the role explicitly given to the government of New Brunswick to protect and promote that equal status[33] are unique and give to New Brunswick a distinctive place among Canadian provinces.

As to the meaning to be given the principle of equality of status of the two linguistic communities, the Court of Appeal looked to the purposes that lay behind it. It found that section 16.1 was meant to preserve both official languages and to favour the development and flourishing of the English and French linguistic communities. Being remedial in nature, section 16.1 also imposed substantive obligations on the New Brunswick government to introduce measures to ensure that past injustices were corrected and that the minority linguistic community did in fact enjoy the same status and privileges as that of the majority.

In light of New Brunswick's history, the evolution of its statutory provisions regarding English and French, and the constitutional entrenchment of principles that have no equivalent in the text of the *Constitution Act, 1867*, the Court of Appeal concluded that the past interpretation of section 133 was not wholly applicable to a proper understanding of the scope of ss. 18(2) of the *Charter*.[34] The latter had to be interpreted by reference to the two principles of inter-community equality and the equality of both official languages. To exclude municipal by-laws from the scope of ss. 18(2) would not only run counter to the attainment of real substantive equality for members of a minority official language community, but would be inconstistent with the preservation and vitality of the minority community. The Court of Appeal also indicated that a broad and purposive interpretation of ss. 18(2) is supported by the unwritten constitutional principle of the protection of minorities.

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[32] *Ibid.* at par. 78.

[33] This is found in ss. 16.1(2) of the *Charter*: "The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed."

[34] In summary form, the Court of Appeal declared: " In light of the recent Supreme Court decisions already discussed concerning the larger objects of the *Charter* and the purposes of the provisions of subsection 16(2) and section 16.1, which have no equivalent in the *Constitution Act, 1867*, I believe that the historical and legislative context of the enactment of subsection 18(2) reflects a linguistic dynamic much more fertile in nature than the context which might have inspired the framers of section 133 at the time of Confederation. The principle of substantive equality of official languages and of the two official language communities entrenched in sections 16 and 16.1 and the corollary that language rights based thereon require government action for their implementation and therefore create obligations for the government has nothing to do with the minimum language guarantees provided for in section 133." *Supra*, note 22, at par. 93.

The Court of Appeal rejected arguments to the effect that the city of Moncton was somehow not subject to the provisions of the *Charter*, pointing to Supreme Court jurisprudence to the contrary. It emphasized two factors identified by the Supreme Court as establishing the general applicability of the *Charter* to municipal corporations. First, municipalities have the power to enact rules of law and to enforce them over a designated territory. Second, municipalities are created by provincial governments that are, themselves, subject to the terms of the *Charter of Rights and Freedoms*. In the event that municipalities were found not to be subject to the *Charter*, provincial governments could easily escape their own obligations under the *Charter* by delegating rule-making authority to the local level of government. The constitutional obligation of New Brunswick to adopt, print and publish its provincial statutes in both official languages (under ss. 18(2) of the *Charter*) was thus quite rightly applied to municipalities which, in effect, acted as delegates of the provincial government.

The Court of Appeal entertained little doubt that the government of New Brunswick was obliged to take positive measures to ensure that the constitutional obligation under ss. 18(2) was fully implemented. It pointed to the provisions under ss. 16.1(2) regarding the role of the government to protect and promote the equal status, rights and privileges of the two linguistic communities. It concluded that: "This provision encompasses, like section 23 of the *Charter*, a collective dimension and imposes on the government the obligation to act positively to ensure the respect and substantive application of these language guarantees."[35] In addition, provincial statutory law (*An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick,* section 3) sets out in clear terms the obligation of the government: "The Government of New Brunswick shall, in its proposed laws, in the allocation of public resources and in its policies and programs, take positive actions to promote the cultural, economic, educational and social development of the official linguistic communities." By adopting these statutory and constitutional provisions: "[...]New Brunswick has accepted that is has the responsibility to take all possible steps for the preservation and development of the two official language communities. By that, it recognizes that the two languages and the two cultures they transmit constitute the common heritage of all persons in New Brunswick, and they must be able to enjoy an atmosphere conducive to development."[36]

Having determined that the city of Moncton had failed to adopt and issue its by-laws in both official languages as required by ss. 18(2) of the *Charter*, the Court of Appeal turned to the issue of possible remedies that might be ordered. While a declaration that such by-laws were legally invalid (and thus of no force and effect) was justified in the circumstances, the Court took notice of the possible legal uncertainty and chaos that

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[35] *Id.* at paragraph 115.

[36] *Id.* at paragraph 116

[37] The Court of Appeal quoted extensively from *Re Manitoba Language Rights* [1985] 1 S.C.R. 721. See Court of Appeal decision, paragraphs 121 to 124.

might ensue if such an order issued without qualification. It therefore adopted the reasoning of the Supreme Court of Canada concerning a breach of a similar constitutional guarantee by the province of Manitoba.[37] In that case, the Supreme Court had suspended the operation of its declaration of invalidity against unilingual Manitoba statutes for a period of time necessary to allow the province to readopt and reissue its laws in both official languages. By so doing the Supreme Court avoided creating a legal vacuum that would have been inconsistent with the rule of law. It was this solution that the Court of Appeal adopted:

> *" In this case, the effect of a declaration of invalidity of municipal by-laws within the boundaries of the City of Moncton, if not throughout most of the province, must also be considered. In my view, a solution of the type adopted by the Supreme Court in the circumstances outlined above appears to be the most appropriate remedy given the potentially wide ramifications that would result from a legal vacuum if the by-laws were declared invalid without the necessary period to remedy the problem of unilingual by-laws."*[38]

The Court of Appeal therefore suspended its declaration of invalidity for a period of one year in order to allow the government of New Brunswick to take the steps necessary to correct the constitutional breach. It also indicated that the provincial government should have some latitude to enact the type of measures it judged appropriate in the circumstances, suggesting that bilingual issuance of by-laws might be subject to a "where numbers warrant" test:

> *"It is obvious that the government has a choice in the institutional means by which its obligations can be met. For example, the exhaustive inquiry of the task force on official languages in New Brunswick (Towards Equality of Official Languages in New Brunswick, at pages 337-84) dealt with the linguistic composition of the population of New Brunswick municipalities. The report acknowledged that a possible approach that would meet the constitutional obligation of the principle of equality of official languages might be to implement a language policy whereby municipal services would be available in both official languages only where numbers warrant. This is a quantitative approach in which certain municipalities might be declared bilingual on the basis of a percentage of the population representing an official language minority. The percentage would have to be determined by the legislature."*[39]

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[37] The Court of Appeal quoted extensively from *Re Manitoba Language Rights* [1985] 1 S.C.R. 721. See Court of Appeal decision, paragraphs 121 to 124.

[38] *Supra*, note 22, at paragraph 125.

[39] *Ibid.* at paragraph 127.

The government of New Brunswick subsequently announced that no appeal would be launched against the *Charlebois* decision and that a complete review of the *Official Languages Act* of New Brunswick would be undertaken.

A new *Official Languages Act* for the province has now been adopted that significantly extends the rights and obligations under previous legislation.[40] The new *Act* confirms the obligations of the largest urban centres in the province to adopt and publish their by-laws in both English and French, and extends the same obligation to any other municipality containing an official language minority of at least 20%.[41] The new *Act* also establishes a time frame within which these obligations are to be met. With respect to new by-laws and new amendments made to existing by-laws, the bilingual rule takes effect as of December 31, 2002. This same obligation (including the time frame) is extended to the minutes of council proceedings in the cities and municipalities covered by the *Act.* As to existing by-laws that were adopted in these cities and municipalities in the past (with the exception of Moncton to which the obligation takes effect at the earlier date), the new *Act* provides that they will be adopted and published in both official languages on or before December 31, 2005. Cities or municipalities to which these obligations apply are also required by the new *Act* (section 36) to offer services and communications in both official languages as prescribed by regulation. A regulation has been enacted that identifies a wide range of services and communications that must be offered in English and French.[42] In addition, the new *Act* explicitly recognizes the authority of any municipality in the province to declare itself bound by the provisions of the *Act* through the adoption of a by-law to that effect by its municipal council. In the event of such a declaration, only those provisions of the *Act* apply which relate to the adoption and publication of by-laws (as well as the minutes of council proceedings) in both official languages. The new *Official Languages Act* also contains provisions that enhance and clarify rules regarding the use of both official languages in the legislative and judicial processes.

Finally, it should be mentioned, that the new *Act* creates the position of Commissioner of Official Languages (the fourth in Canada) with the authority to investigate, report on and make recommendations with respect to compliance with the *Act.* To fulfill this role the Commissioner is empowered to investigate complaints from third parties or on his or her own initiative and to report and make recommendations with respect to the results of such investigations.

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[40] *Official Languages Act*, Statutes of N.B., Chapter O-0.5, assented to June 7, 2002; repealing and replacing *Official Languages of New Brunswick Act*, Chapter O-1, Revised Statutes, 1973.

[41] Subsection 35(2) provides: "A city is required to adopt and publish its by-laws in both official languages irrespective of the percentage required under subsection (1)". Subsection 35(1) establishes the 20% threshold (regarding the size of the minority population) beyond which municipalities in general are also subject to the bilingual rule. A "city" is defined by reference to the definition found in section 16 of the *Municipalities Act.*

[42] *Services and Communications Regulation - Official Languages Act*; N.B. Regulation 2002- 63 under the *Official Languages Act* (O.C. 2002-284). Detailed obligations and deadlines are found in Schedule A to the *Regulation.*

2.3 City Mergers in Quebec

Baie d'Urfé (Ville) et al. v. Quebec (Attorney General)

Legislative changes in Quebec designed to bring about city mergers in the metropolitan regions of Montreal, Quebec and Outaouais were contested before the courts by a broad coalition of existing municipalities, organizations and individual citizens. Vigorous opposition arose in all three metropolitan regions subject to Bill 170.[43] Opposition was particularly intense on the Island of Montreal where English-speaking majorities in a number of cities slated for merger feared the effects on their cultural and linguistic heritage. These fears were amplified by parallel legislative changes to the *Charter of the French Language*, contained in Bill 171,[44] which modified the rules for determining whether a municipality could be recognized as "bilingual" and hence not be subject to some of the language requirements of the *Charter*. Before changes made in Bill 171, section 29.1 of the *Charter* provided that municipal bodies providing services to a population whose majority spoke a language other than French, could use both French and that other language in their names, their internal communications and their communications with each other. In addition, their employees could use their language of choice in their written communications with each other, signs and posters could be erected in both languages (provided French was predominant) and, by way of necessary implication, services would be available to the public in that other language as well as French.[45] This indirect manner of referring to English ("another language") has been altered by the statutory changes in Bill 171Pursuant to Bill 171 the test to be applied in the future in order to achieve "bilingual" status is whether English happens to be the mother tongue of the majority (50% plus one) of the population being served.

With respect to local administration, bilingual municipalities that were merged into the new city of Montreal have been preserved as boroughs within the new city. In addition, any of the 27 boroughs formed from municipalities that enjoyed "bilingual" status before the merger retain that status within the new city (which itself is declared to be a French-speaking city by the terms of Bill 170). However, the regulatory and administrative authority of a borough is much narrower than that enjoyed by the pre-existing municipalities.

The legal challenge to the validity of Bill 170, though based on a wide range of issues, focused considerable attention on the detrimental impact the changes would have upon the minority English-speaking community of Quebec. Indeed, a key argument presented to the Superior Court of Quebec concerned the Bill's disregard of the

[43] Bill 170 was adopted on December 20, 2000 and came into force the same day. See: S.Q. 2000, c. 56.

[44] See: S.Q. 2000, c. 57.

[45] See sections 20, 23, 24, 26 and 28 of the *Charter of the French Language*, R.S.Q., chapter C-11, in combination with section 29.1.

unwritten constitutional principle of the protection of minorities. With respect to this issue, considerable expert evidence was submitted at trial regarding the decline of the English-speaking population in Montreal and the importance of municipal institutions to the maintenance and development of minority language communities. It was argued that the disappearance of municipalities with a high proportion of English-speaking residents effectively weakened the minority's ability to sustain its numbers (because of migration to other provinces) and diminished the likelihood that the minority community would have the resources necessary to ensure the vitality of its language and culture. In light of these realities, the constitutional principle of the protection of minorities was invoked to contest the validity of measures in Bill 170 that abolished municipal institutions deemed critically important to maintaining a vigorous English-language minority community in the province of Quebec.

In rejecting this central argument against the validity of Bill 170, the Quebec Superior Court drew attention to several rules of constitutional interpretation.[46] First, it reiterated past observations of the Supreme Court of Canada to the effect that constitutionally protected language rights such as found in section 133 of the *Constitution Act, 1867* constitute a precise, albeit limited, code of rights that apply to clearly demarcated areas of governmental activity. Furthermore, the Superior Court affirmed, the circumscribed scope of such language rights is a reflection of the political compromise that resulted in their constitutional entrenchment in the first place. Courts must therefore be prudent in their interpretation of such rights so as not to stray beyond the minimum protection thereby accorded.[47] As to the proposition that this cautious and restrictive view of the interpretation of language rights has been considerably modified by the more recent Supreme Court decision in *Beaulac*, the Superior Court simply stated:

> *"[our translation] Some of the plaintiffs invited the Court to depart from the "narrow approach" to interpreting language rights adopted by Beetz J. in* Société des Acadiens *and adopt the "new" rule of interpretation used by Bastarache J. in* R. *v.* Beaulac *. . . With respect, that judgment has to be distinguished in that it dealt with a specific procedure in criminal law (that relating to s. 530 of the* Criminal Code*). The position taken by Bastarache J. was dissented from by Lamer C.J. and Binnie J. . . . The Court prefers the latter approach in keeping with the rule of caution regularly recognized by the Supreme Court in interpreting language rights."*[48]

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[46] *Baie d'Urfé (Ville) et al.* v. *Quebec (Attorney General)*, Superior Court of Quebec, June 28, 2001. Referenced as: [2001] J.Q. no 2954; JEL\2001-292.

[47] The Superior Court referred with approval to Supreme Court decisions in: *Société des Acadiens* v. *Association of Parents* [1986] 1 S.C.R. 549 and *Ford* v. *Quebec* (A.G.) [1988] 2 S.C.R. 712.

[48] *Supra*, note 46, at paragraph 135 and the Court's footnote 124.

Applying this approach, the Superior Court could find no specific language rights in sections 16 to 22 of the *Canadian Charter of Rights and Freedoms* relevant to the use of French or English by municipal corporations in Quebec (though it recognized that a form of official bilingualism might be mandated in New Brunswick by virtue of ss. 16(2) of the *Charter*). This being the case, the Court concluded that Quebec legislative authority over municipalities under ss. 92(8) of the *Constitution Act, 1867* was unfettered by any constitutionally protected language guarantees. It also rejected arguments based on ss. 16(3) of the *Charter* that narrowing the criteria used to accord "bilingual" status to a municipal body (Bill 171 amending s. 29.1 of the *Charter of the French Language*) violated an implicit constitutional guarantee that existing measures intended to achieve greater substantive equality of English and French will not be diminished in the absence of justification pursuant to section 1 of the *Charter*. To so find, reasoned the Court, would be tantamount to giving constitutional status to the current statutory language found in section 29.1, something that could only be accomplished by way of explicit constitutional amendment.

In considering the unwritten constitutional principle of the protection of minorities, the Superior Court took note of the wide-spread concern that services traditionally provided by smaller cities serving the English-speaking population would diminish considerably as a result of their disappearance. It considered that the formal declaration in Bill 170 that Montreal is a French-speaking city distorted the demographic reality and was unnecessarily provocative, especially when combined with the amendments to s. 29.1 of the *Charter of the French Language* that would make it more difficult in the future to acquire "bilingual" status. Those amendments also make it easier to lose that status in the event a request is so made pursuant to statutory requirements. Nevertheless, the Superior Court emphasized that unwritten constitutional principles could not be used to invalidate the exercise of provincial legislative authority clearly provided for in the Constitution:

> *"[OUR TRANSLATION] THE COURT HAS ALREADY SAID THAT STRUCTURAL OR UNWRITTEN RULES CANNOT IMPEDE THE EXERCISE OF A CLEAR PROVISION OF THE CONSTITUTION, SUCH AS THAT IN S. 92(8), OR BE USED TO ADD TO THE BODY OF LANGUAGE RIGHTS AS ENACTED BY THE FRAMERS OF THE CONSTITUTION. THE UNWRITTEN PRINCIPLE PROTECTION OF MINORITIES THEREFORE CANNOT NEUTRALIZE THE LEGISLATOR'S UNLIMITED POWER OVER MUNICIPAL INSTITUTIONS OR BE USED AS A CONSTITUTIONAL BASIS FOR THE CREATION OF A THIRD ORDER OF GOVERNMENT FOR THE PROTECTION OF LANGUAGE RIGHTS."*[49]

[49] *Ibid.* at paragraphs 186-187.

The Superior Court also distinguished the decision of the Ontario Divisional Court in *Montfort* (The Court of Appeal not having yet rendered its judgment), in part because no legislative provision was under scrutiny in the latter. While a purely administrative directive issued by an administrative agency might attract the application of an unwritten constitutional principle, the same could not be said when the validity of statutory provisions is placed in question. Moreover, concluded the Court, municipalities are "neutral" institutions and not, like Montfort Hospital, necessary for the defence and preservation of an official language minority. In this regard, the Superior Court seemed to think that Montfort Hospital was the only location in the province of Ontario where medical services in French were available.[50] Such a proposition allowed the Court to stress the availability of bilingual services from the old and new city of Montreal as a significant factor in assessing the impact on English-speaking communities of Bill 170.

The Superior Court's decision to reject the challenge to the validity of Bills 170 and 171 was subsequently taken to the Quebec Court of Appeal, which confirmed the lower court's decision and offered its own reasons.[51] Noting the widespread use and frequent reference to unwritten constitutional principles, the Court of Appeal felt it important to return to the Supreme Court decision in which the principles were first enunciated. It pointed out that these principles were elaborated in response to specific questions put to the Supreme Court in a reference dealing with the hypothetical secession of Quebec from Confederation.[52] The Supreme Court therefore found itself faced with a situation where no specific provision in the Constitution could be invoked to fashion a complete response to the questions asked.[53]

In the Court's view, the unwritten principle of the protection of minorities can not easily be removed from the context in which it was originally applied, namely an inquiry into what legal principles might be relevant in the event of Quebec separation. It found that there is a great difference between using unwritten principles to resolve matters regarding which the Constitution is silent and using them to rewrite the existing text of the Constitution. In this regard, the Court of Appeal underscored that the Supreme Court itself recognized the primacy of the written terms of the Constitution and cautioned against the use of unwritten principles to alter its meaning. As the Constitution clearly provides for provincial legislative jurisdiction over municipalities (ss. 92(8) of the *Constitution Act, 1867*), arguments presented by the appellants based on unwritten principles were misconceived:

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[50] In the words of the Superior Court: "[our translation] Finally, we must not forget that Montfort Hospital still the only hospital offering medical services in French in Ontario, while here the Anglophone community can receive bilingual services outside the plaintiff cities, in particular the current City of Montreal. That is why in *Montfort* the Court relied on the minority protection rule to protect the last and only bastion of medical services in French." *Ibid.* at paragraph 190.

[51] *Baie d'Urfé* v. *Quebec* (A.G.), Court of Appeal of Quebec, October 16, 2001. Referenced as: [2001] J.Q. no 4821; JEL\2001- 498.

[52] *Reference re Secession of Quebec* [1998[2 S.C.R. 217.

[53] *Supra,* note 51, at paragraph 82.

> *"[our translation] In actual fact, they rely on these rules not to fill in gaps but to defeat the provincial jurisdiction and to entrench new language obligations in municipal matters in the Constitution. They ignore the importance of the reservation made by the Supreme Court, which observed that recognition of the unwritten principles cannot be interpreted as constituting an invitation to disregard the written text of the Constitution."*[54]

The Court of Appeal cited extensive case law regarding the scope of provincial legislative jurisdiction over municipalities, concluding that any constitutional protection of existing municipal structures by virtue of their connection to a given minority would fly in the face of their status as creations of provincial law over which provinces have complete authority:

> *"[our translation] In the case at bar the towns relied on the right to the protection of their language, the vehicle of their culture and their "Englishness," to use the word used by one of the lawyers, and a powerful symbol of the existence and development of their community. They were not claiming new or additional language rights, they said, simply the continuance of the existing municipal institutions which ensured that those rights would be preserved and continued. This argument accordingly implies recognition of the permanent existence of certain municipalities and hence a limitation on legislative authority pursuant to s. 92(8); such argument is clearly inconsistent with the rule that "in the Canadian legal order . . . municipalities remain creatures of provincial legislators" . . . If the appellant's argument were accepted it would place beyond the scope of the s. 92(8) power a number of municipalities where it could be shown that they play an important part in protecting any minority whatever. Such a conclusion would have a considerable effect on the organization of local governments in practical terms."*[55]

Ruling that unwritten constitutional principles could not produce such a result, the Court of Appeal then turned to a consideration of whether any specific constitutional rights, language or otherwise, might operate so as to limit provincial legislative jurisdiction in the case at bar. As to language rights, it pointed out that the original linguistic guarantees under section 133 of the *Constitution Act, 1867* (applicable to the legislature and the courts of Quebec) do not apply in any way to municipal corporations. The Court also characterized s. 133 and subsequent language rights entrenched in section 16 to 23 of the *Canadian Charter of Rights and Freedoms* as forming a complete code and precise system of rights that the courts may not add to by way of judicial

[54] *Ibid.* at paragraph 92.

[55] *Id.* at paragraph 122.

interpretation. To the extent the code was incomplete, reasoned the Court, it fell to legislatures to provide whatever statutory relief they considered appropriate. The Court of Appeal therefore approved of the caution expressed in the Supreme Court decisions in *Société des Acadiens* and *MacDonald* with respect to the way language rights should be approached:

> *"It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation, as was held in the* Jones *case. And it is a scheme which can of course be modified by way of constitutional amendment. But it is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise."*[56]

To the argument that this cautious approach to the issue of language rights has been significantly modified by the Supreme Court decision in *Beaulac*, the Court of Appeal declared:

> *"[our translation] The appellants are mistaken when they say that the Supreme Court is now urging us to lay aside the previously stated rules. In* Beaulac, *the Supreme Court said that it was the expressly specified language rights that should be given a broad and liberal interpretation. Consequently,* Beaulac *has to be placed in its context, in which the Court had to rule on the extent of the language rights specifically enacted by s. 530 of the* Criminal Code*."*[57]

The Court of Appeal therefore concluded that the proposition that language rights should be interpreted liberally and in line with their underlying purposes applied only in cases where specific language rights actually existed, and did not empower the courts to create new rights where none existed before.[58] It pointed out that in both Supreme Court decisions cited in support of a liberal and purposive interpretation of language rights, either a statutory provision (section 530 of the *Criminal Code*) or a specific constitutional right (section 23 of the *Charter*) was at play. In contrast, the appellants in the case at bar sought to create an entirely new language right by way of judicial interpretation that would immunize certain municipalities from the effects of Bill 170.

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[56] *Quoted from MacDonald* v. *City of Montreal [*1986] 1 S.C.R. 460, at p. 496. See paragraph 135 of the Court of Appeal decision, supra, note 51.

[57] *Supra,* note 51, at paragraph 140.

[58] The Court of Appeal summarized its conclusion in this regard in the following words: "[our translation] By concluding that language rights should be given a generous interpretation consistent with their purpose, the Supreme Court did not thereby abandon the rule that it is not the courts' function to add to the political compromise on language rights." *Ibid.* at paragraph 143.

While the Court of Appeal rejected the notion that any current constitutional language guarantees placed in question the provisions of Bill 170, it went on to consider arguments presented by the Commissioner of Official Languages (who had been added as an intervener) that ss. 16(3) of the *Charter* prevents any reduction of existing rights or benefits enjoyed by an official language community. The Commissioner took the position that section 16 is built upon three fundamental principles: (i) the substantive equality of constitutional language rights; (ii) the advancement toward equality of English and French; and (iii) the protection of and respect for official language minority communities. As ss. 16(3) embodies the commitment of both federal and provincial governments to take measures that advance official language equality, any measure that reduces the rights or benefits enjoyed by members of an minority official language community would be incompatible with it. In other words, where a legislature exercises its powers with respect to an official language minority, those powers may only be exercised in a manner not unfavourable to the minority. Any measure that reduces current rights and benefits would have to be justified as reasonable in a free and democratic society within the meaning of section one of the *Charter*.

The Commissioner argued that ss. 16(3) thus interpreted operates so as to place in question the validity of amendments to s. 29.1 of the *Charter of the French Language* made by Bill 171. In her view, the introduction of the criterion of English mother tongue to determine the possible "bilingual" status of a borough or municipality lessens the likelihood that such status will be accorded in the future, and increases the likelihood that it will be removed from those boroughs or municipalities currently so designated. The rights that accrue to a "bilingual" borough or municipality are arguably exercised for the benefit of the minority English-speaking community; for example, the right to erect signs in both English and French, the right to use English in its name, and the right to use English as an internal language of work. Moreover, the legal right of "bilingual" boroughs and municipalities to function in English ensures, as a practical result, that members of the minority community will have access to municipal services in English. Consequently, any reduction in the ability to achieve "bilingual" status will effectively diminish the rights and benefits that are currently enjoyed by Anglo-Quebecers. The Commissioner therefore argued that provisions in Bill 171 that amend s. 29.1 are inconsistent with ss. 16(3) of the *Canadian Charter of Rights and Freedoms*.

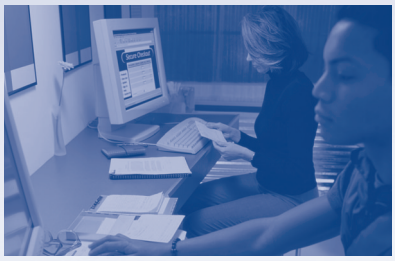
The Court of Appeal did not directly answer the arguments presented by the Commissioner. However, it did find that Bill 171 preserved the "bilingual" status of the merged cities by transferring the same status to the boroughs into which they were transformed. In this regard, the Court of Appeal declared:

> *"[our translation] The appellants maintained that the "Anglophone" towns were offering far more extensive services than those expressly authorized by s. 29.1 and the other provisions of the* Charter of the French Language*, and this is true. At the same time, Bill 171 does not alter their legal position in any way, since the bilingual boroughs retain the same rights and privileges that bilingual or "Anglophone" towns formerly had under the* Charter of the French Language*."* [59]

The fact that their jurisdiction was significantly reduced (and so too the scope of services they offered to the public) did not seem to be significant to the Court of Appeal for purposes of assessing any possible reduction of rights. It further found that the facts did not support the allegation that the provincial government intended to use the new eligibility criterion to withdraw any "bilingual" status currently enjoyed by boroughs and municipalities. It suggested that, should this prove to be the case in the future, the arguments presented by the Commissioner might be reconsidered.

The Court of Appeal also rejected arguments made by the appellants to the effect that Bill 170 discriminated against English-speaking Quebecers because it deprived them of control over their own municipal corporations, institutions that were essential to their cultural and linguistic vitality and development, and important to ensuring the delivery of municipal services in English. No such detrimental effects, they argued, were felt by the majority French-speaking population of the province. In this regard, the Court concluded that the underlying distinction embodied in Bill 170 that had an impact on Anglo-Quebecers related to a person's place of residence and not his language. As "place of residence" could not be considered an analogous ground of prohibited discrimination under section 15 of the *Canadian Charter of Rights and Freedoms*, nor fall within the notion of "civil status" under the *Quebec Charter of Human Rights and Freedoms*, the equality arguments of the appellants were dismissed. An application to the Supreme Court of Canada to appeal this decision was dismissed on December 7, 2001 (with costs).

[59] *Ibid.* at paragraph 213.



III. MINORITY LANGUAGE EDUCATION RIGHTS

1.1 Access to Minority Language Schools

ELIGIBILITY RULE FOR ACCESS: "MAJOR PART OF SCHOOL INSTRUCTION"

Solski et al. v. *A.G. Quebec*

Access to English language schools in Quebec finds its constitutional source in ss. 23(1)(b) of the *Canadian Charter of Rights and Freedoms*, which recognizes the right of citizens of Canada to educate their children at the primary and secondary level in the official minority language of the province where they reside, if such citizens have themselves received their primary school instruction in that language somewhere in Canada.[60] The *Charter* [at ss. 23(2)] also provides a continuity of language of instruction guarantee designed to ensure that all children in the same family have access to the same language of instruction.[61]

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[60] The actual wording of ss. 23(1)(b) is: "Citizens of Canada...(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province."

[61] Section 23(2) states that "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."

These constitutional provisions have been embodied in Quebec law under subsection 73(1) and (2) of the *Charter of the French Language*, which provides:

> *"THE FOLLOWING CHILDREN, AT THE REQUEST OF ONE OF THEIR PARENTS, MAY RECEIVE INSTRUCTION IN ENGLISH:*
>
> > *(1) A CHILD WHOSE FATHER OR MOTHER IS A CANADIAN CITIZEN AND RECEIVED ELEMENTARY INSTRUCTION IN ENGLISH IN CANADA, PROVIDED THAT THAT INSTRUCTION CONSTITUTES THE* **MAJOR PART** *OF THE ELEMENTARY INSTRUCTION HE OR SHE RECEIVED IN CANADA; (EMPHASIS ADDED)*
> >
> > *(2) A CHILD WHOSE FATHER OR MOTHER IS A CANADIAN CITIZEN AND WHO HAS RECEIVED OR IS RECEIVING ELEMENTARY OR SECONDARY INSTRUCTION IN ENGLISH IN CANADA, AND THE BROTHERS AND SISTERS OF THAT CHILD, PROVIDED THAT THAT INSTRUCTION CONSTITUTES THE* **MAJOR PART** *OF THE ELEMENTARY OR SECONDARY INSTRUCTION RECEIVED BY THE CHILD IN CANADA."*[62] *(EMPHASIS ADDED)*

Reference in these legislative provisions to the "major part" of school instruction has no counterpart in the wording of ss. 23(2) of the *Charter*. The question therefore arises as to whether the statutory language and policy underpinning it are compatible with the *Charter* right.

The last Language Rights Report reviewed the case of *Solski* v. *Quebec* in which the Quebec Superior Court ruled that the statutory restriction of language guarantees under ss. 23(2) of the *Charter* violated the Constitution.[63]

The Court of Appeal of Quebec has now overturned the lower court decision.[64] As a point of departure, the Court of Appeal emphasized that any analysis of a *Charter* right must be undertaken by reference to its underlying purpose and in light of relevant linguistic, philosophical and historical contexts.[65] The Court therefore reviewed in detail the work of numerous commissions that had studied and reported on the condition of the French language in Quebec and Canada, past statutory frameworks designed to promote its use and development as a primary language of school instruction, constitutional changes introduced in 1982 and the litigation that subsequently ensued.

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[62] *Charter of the French Language*, R.S.Q. 1977, C. c-11, ss. 73(1) and (2). The present wording of these two paragraphs was adopted in 1993 by means of an amending statute: S.Q. 1993, c. 40.

[63] See LANGUAGE RIGHTS 1999-2000, *supra*, note 1, at pp. 35-38.

[64] *Solski et al.* v. *A.G. Quebec*, Court of Appeal of Quebec, May 15, 2002; No: 500-09- 010454-007 (500-05-046976-989). Other parties with similar challenges to the statutory provisions in question were added as intervenors to the original action begun by Solski.

[65] It relied on the Supreme Court decision in *R.* v. *Big M. Drug Mart Ltd.* [1985] 1 S.C.R. 295, p. 344. See paragraphs 31 and following of the Court of Appeal judgment, ibid.

This historical synopsis included reference to past economic and social disadvantages that French Canadians in Quebec had suffered, as well as the marked tendency of immigrants to choose English as a second language for themselves and their children. Believing that the use of French in Quebec would inevitably decline in the face of demographic and economic pressures, the Quebec government first adopted comprehensive legislation in 1974 declaring French to be the official language of the province. Access to English language schools was at that time made contingent upon a child's sufficient knowledge of English, to be determined by appropriate language testing. This eligibility rule (which had proven difficult to implement in a fair and impartial manner) was subsequently replaced by relevant provisions in the *Charter of the French Language* (1977) that allowed access only where the mother or father of a child had received his or her primary instruction in English in Quebec. Following a court decision[66] that interpreted the provision as requiring that the totality of primary instruction be in English, the Quebec government modified (1983) the relevant section so as to require such instruction to have been only a "major part" of a parent's primary schooling in Quebec. This section was ultimately found by the Supreme Court of Canada to be contrary to section 23 of the *Canadian Charter of Rights and Freedoms* in so far as it required that the primary school instruction in English have taken place in Quebec.[67] It was in light of that Supreme Court decision that legislative changes were made (1993) formally replacing the so-called Quebec clause with the eligibility criteria found in the *Canadian Charter* regarding the language in which a parent received his or her primary schooling anywhere in Canada.

Although the claim of the plaintiffs invoked the specific provisions found in ss. 23(2) of the *Canadian Charter* involving continuity of language of instruction, the Court of Appeal felt it important to consider the more general purposes that lay behind section 23 as a whole. The Court of Appeal therefore quoted from a number of Supreme Court decisions, in particular observations made by the Supreme Court in *Mahé*:

> *"THE GENERAL PURPOSE OF S. 23 IS CLEAR: IT IS TO PRESERVE AND PROMOTE THE TWO OFFICIAL LANGUAGES OF CANADA, AND THEIR RESPECTIVE CULTURES, BY ENSURING THAT EACH LANGUAGE FLOURISHES, AS FAR AS POSSIBLE, IN PROVINCES WHERE IT IS NOT SPOKEN BY THE MAJORITY OF THE POPULATION. THE SECTION AIMS AT ACHIEVING THIS GOAL BY GRANTING MINORITY LANGUAGE EDUCATIONAL RIGHTS TO MINORITY LANGUAGE PARENTS THROUGHOUT CANADA.*

[66] See *Campisi* v. *Quebec* (A.G.) [1977] S.C. 1067, at pp. 1075-1076.

[67] *Attorney General* v. *Quebec Protestant School Boards* [1984] 2 S.C.R. 66.

MY REFERENCE TO CULTURES IS SIGNIFICANT: IT IS BASED ON THE FACT THAT ANY BROAD GUARANTEE OF LANGUAGE RIGHTS, ESPECIALLY IN THE CONTEXT OF EDUCATION, CANNOT BE SEPARATED FROM A CONCERN FOR THE CULTURE ASSOCIATED WITH THE LANGUAGE. LANGUAGE IS MORE THAN A MERE MEANS OF COMMUNICATION, IT IS PART AND PARCEL OF THE IDENTITY AND CULTURE OF THE PEOPLE SPEAKING IT..."[68]

It also quoted with approval observations made by the Supreme Court in 1984 to the effect that section 23 was motivated by a desire "...to adopt a general rule guaranteeing the Francophone and Anglophone minorities in Canada an important part of the rights which the Anglophone minority in Quebec had enjoyed with respect to the language of instruction before Bill 101 was adopted"[69] It concluded that the specific wording of ss. 23(2), in particular the expression "has received or is receiving primary school instruction in English or French in Canada", must be interpreted in light of the general purposes that motivated the adoption of section 23 as a whole.

Having reproduced various portions of past Supreme Court decisions, the Court of Appeal went on to express its concern that arguments made by the plaintiffs would essentially establish a principle of freedom of choice in language of instruction in Quebec:

"[OUR TRANSLATION] THE RESPONDENTS AND THE INTERVENERS ARGUED THAT IT WILL ONLY BE NECESSARY FOR ONE OF THEIR CHILDREN TO HAVE RECEIVED OR BE RECEIVING INSTRUCTION IN ENGLISH IN QUEBEC AT SOME POINT IN HIS OR HER SCHOOL CAREER FOR THE CHILD TO ACQUIRE AN ABSOLUTE RIGHT TO PURSUE THAT INSTRUCTION IN THE PUBLIC SYSTEM PROVIDED FOR THE ANGLOPHONE MINORITY IN QUEBEC, AND THAT THE RIGHT WOULD EXIST FOR THE CHILD'S BROTHERS AND SISTERS AND THEIR DESCENDANTS, HOWEVER LONG THE PERIOD OF INSTRUCTION RECEIVED LASTED.."[70]

Referring to the lower court decision, the Court of Appeal declared:

"[OUR TRANSLATION] THE JUDGMENT A QUO *ESSENTIALLY, AS THE APPELLANT ARGUED, ENSHRINES THE UNPRECEDENTED RIGHTS OF ALL PARENTS TO CHOOSE THEIR CHILDREN'S LANGUAGE OF INSTRUCTION, WHEN THE FRAMERS OF THE CONSTITUTION CLEARLY INTENDED NOT TO GIVE LANGUAGE RIGHTS THAT SCOPE. THE INTERPRETATION GIVEN BY THE JUDGE WOULD ALLOW QUASI-AUTOMATIC ACCESS TO ENGLISH SCHOOLS IN QUEBEC FOR CHILDREN OF THE FRANCOPHONE MAJORITY OR OF ALLOPHONES WHO WOULD COMPLETE A BRIEF PERIOD IN THE PRIVATE ENGLISH SCHOOLS THAT RECEIVE*

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[68] Quoted from *Mahé* v. *Alberta* [1990] 1 S.C.R. 342, p. 362. Reproduced at paragraph 49 of the Court of Appeal judgement, *supra*, note 64.

[69] *A.G. (Que.)* v. *Quebec Protestant School Boards* [1984] 2 S.C.R. 66, p. 84. A more extensive quote of the Supreme Court is reproduced at paragraph 51 of the Court of Appeal judgement, ibid.

[70] *Supra,* note 64, at paragraph 53.

NO GRANTS SO THEY COULD BE ELIGIBLE FOR PUBLIC OR PRIVATE GRANT-AIDED SCHOOLS. THIS INTERPRETATION AND ITS CONSEQUENCES CERTAINLY RUN CONTRARY TO THE OBJECTIVE OF S. 23, ACCENTUATING STILL FURTHER THE IMBALANCE EXISTING BETWEEN FRANCOPHONE AND ANGLOPHONE GROUPS IN CANADA, IN A NORTH AMERICAN CONTEXT THAT IS VERY LARGELY DOMINATED BY ENGLISH."[71]

The Court of Appeal would appear to view one of the purposes behind section 23 as related to protecting the position of the French language in Quebec, despite the fact that French is the majority language of the province. In this regard, it ties the interpretation of section 23 to the presumed collective rights of the French majority in Quebec:

"[OUR TRANSLATION] IN THE COURT'S VIEW, AS ALREADY STATED, LANGUAGE RIGHTS ARE SPECIFIED IN THE CONSTITUTION IN ORDER TO PROTECT THE OFFICIAL LANGUAGE MINORITIES IN CANADA. OF COURSE IT IS FOR EACH INDIVIDUAL TO CLAIM HIS OR HER RIGHT TO BE EDUCATED IN THE MINORITY LANGUAGE IF HE OR SHE MEETS THE CONSTITUTIONAL CRITERIA, BUT THE FACT REMAINS THAT IN CANADA LANGUAGE RIGHTS, IF WE LOOK AT THEIR HISTORICAL AND SOCIOLOGICAL BACKGROUND, ARE FIRST AND FOREMOST COLLECTIVE RIGHTS (BASED ON A COMMUNITY).

IN ENACTING S. 23(2), THE FRAMERS OF THE CONSTITUTION WERE AWARE OF THE SITUATION EXISTING IN QUEBEC AT THAT TIME AND THE STATED NEED TO ENSURE THAT FRENCH WOULD CONTINUE TO EXIST IN THE TERRITORY OF QUEBEC."[72]

As mentioned above, the Court of Appeal was apparently concerned about giving an interpretation to ss. 23(2) that would have allowed members of the French-speaking majority of Quebec to gain access to English public schools by enrolling a child for a short period of time in an English language private school (not subject to the relevant provisions of the *Charter of the French Language*) and then claiming a constitutional right to that child's enrollment in the public school sector serving the minority English community. This was in fact the situation of one of the intervenors who had been joined to the original *Solski* action, a mother who had received her primary and secondary education in French in Quebec. Deference to the collective rights of the French majority is also reflected in the Court of Appeal's view that:

"[OUR TRANSLATION] THE CANADIAN CHARTER *DOES NOT SPECIFY THE EXTENT OF INSTRUCTION RECEIVED IN ORDER TO ENJOY ACCESS TO EDUCATION IN ONE LANGUAGE OR ANOTHER. THE QUEBEC LEGISLATOR, FOR ITS PART, HAS PERFORMED ITS CONSTITUTIONAL DUTY REGARDING EDUCATION IN ENGLISH AND HAS BEEN MORE SPECIFIC IN DRAFTING THE LEGISLATION. AS THE QUEBEC LEGISLATOR HAS EXCLUSIVE*

[71] *Ibid.* at paragraph 55.

[72] *Id.* at paragraphs 77-78.

JURISDICTION OVER EDUCATION, THERE WAS NO REQUIREMENT THAT BOTH PIECES OF LEGISLATION BE IDENTICAL IN EVERY RESPECT."[73]

The Court of Appeal also found inspiration in past pronouncements of the Supreme Court of Canada declaring language rights to be a unique species of right based on a political compromise that should not be lightly interfered with by the courts.[74]

The Court of Appeal also identified factors that appear more significant when interpreting ss. 23(2) of the *Charter*. It pointed out that the framers of ss. 23(2) must have had in mind the situation of children who had not yet completed their schooling, as well as the principle of inter-provincial mobility found in section 6 of the same *Charter*. The Court therefore concluded that the framers were concerned to ensure that a child who changed his or her province of residence would be able to continue his or her schooling in the official language in which it was commenced. Although the Court of Appeal acknowledged that a sister court in Ontario (Court of Appeal of Ontario) had ruled that inter-provincial movement was not essential to invoking ss. 23(2) rights, it distinguished that decision on the basis that no illegality was involved in the Ontario case with respect to minority school enrollment.[75] In the case before it (as it regarded Solski), the children in question attended an English-language school in 1997 and completed grade 7 without the requisite ministerial permit. The Court of Appeal therefore refused to apply the decision in the Ontario case to a situation where the attendance of children at an English-language public school in Quebec was tainted, in its view, with illegality.

Application for leave to appeal this decision was subsequently filed before the Supreme Court of Canada on behalf of the intervener Edwidge Casimir.[76]

ELIGIBILITY RULE: "LANGUAGE OF INSTRUCTION OF A PARENT"

Gosselin (tuteur de) et al. v. *Quebec (Attorney General)*

The eligibility rules for access to English-language public schools in Quebec based on the language of schooling of a parent have also been challenged as contrary to equality rights found in section 10 of the *Quebec Charter of Human Rights and*

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[73] *Id.* at paragraph 64.

[74] The Court of Appeal quoted approvingly from the Supreme Court decision in *Société des Acadiens du Nouveau-Brunswick Inc.* v. *Association of Parents for Fairness in Education in Education* [1986] 1 S.C.R. 549, p. 578. See Court of Appeal decision at paragraph 58. However, this is the very passage disapproved of by the Supreme Court in R. *Beaulac* [1999] 1 S.C.R. 768.

[75] The Ontario decision referred to is: *Abbey* v. *Essex County Board of Education,* (1999) 42 O.R. (3rd) 481 (Ontario Court of Appeal). For a more complete discussion of this case see Language Rights Report, *supra*, note 1, pp. 33-35.

[76] See Application for Leave to Appeal (Edwidge Casimir, Applicant); Section 40(1) of the Supreme Court Act, Rule 25; No. 29297, filed August 13, 2002. Although the original plaintiffs (the Solski parents) had abandoned further legal action prior to the Court of Appeal decision, the case had been continued by interveners Casimir and Lacroix.

Freedoms.[77] It was argued by a group of ten plaintiffs, all but two of whom had been educated in French in Quebec, that the exclusion of their children from enrollment in English public schools constituted discrimination against them based on their civil status.

In rejecting the plaintiffs' arguments, the Court of Appeal first dealt with the issue of equality of treatment from a constitutional point of view. It pointed out that language rights by their very nature must be distinguished from fundamental rights that are universal in character, quoting from the Supreme Court decision in *Beaulac*:

> *"It is also useful to re-affirm here that language rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin."*[78]

The Court of Appeal also emphasized that the Supreme Court had recognized (when considering equality rights under section 15 of the *Canadian Charter of Rights and Freedoms*) that special status had in effect been recognized for members of minority official language communities by virtue of section 23 of the *Canadian Charter of Rights and Freedoms*:

> *"...the section (23) is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada. As the Attorney General for Ontario observes, it would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to "every individual"*[79]

As the provisions in the *Charter of the French Language* use the very category of persons set out in section 23 of the *Canadian Charter of Rights and Freedoms* (i.e. a parent who received his or her primary instruction in the minority official language of the province where they currently reside), the Court of Appeal determined that such provisions could no more breach the principle of equality than the terms of the Constitution itself.[80]

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[77] *Gosselin (tuteur de) et al. v. Quebec (Attorney General), Court of Appeal of Quebec, May 15, 2002; [2002] J.Q. no 1126; JEL\2002-418.*

[78] *Ibid.* at paragraph 24. The Court of Appeal was quoting from *R.* v. *Beaulac* [1999] 1 S.C.R. 768, p. 792.

[79] *Id.* at paragraph 23, quoting from the Supreme Court decision in *Mahé* v. *Alberta* [1990] 1 S.C.R. 342, p. 369.

[80] *Id.* at paragraphs 27-28.

The Court of Appeal would have dismissed the allegations of discrimination on this basis alone:

> *"[our translation] As already mentioned, this context leads the Attorney General to say that, with s. 73 of the* Charter of the French Language*, the Quebec legislator has discharged its constitutional duty to give effect to the education rights of the Anglophone minority in Quebec by reproducing the same categories of persons as those laid down by the framers of the Constitution in s. 23 of the* Canadian Charter*. How could the Quebec legislator have been guilty of discrimination by acting in conformity with the* Canadian Charter *. . . The appeal should therefore be dismissed on this ground."*[81]

With respect to arguments that the distinction made was one based on the civil status of the children involved, the Court of Appeal adopted the reasoning of the lower court:

> *"[our translation] The parent's language of education is only the means of establishing the possible language of the child. A very young child speaks its first words in the language used by its parents to communicate with him or her. As a result the language spoken with the parents is generally the child's language . . . Consequently, the real effect of the distinction is to determine the child's language, not to exclude the child for a reason having to do with civil status."*[82]

As the eligibility criterion in question essentially seeks to determine the mother tongue of a child, it could not be said to be discriminatory (based on civil status) under the *Quebec Charter of Human Rights and Freedoms*. Moreover, reasoned the Court, the right to equality under the *Quebec Charter* is not a free-standing right but one that is linked to other rights and freedoms protected thereunder. In this regard, the plaintiffs had failed to show that they had suffered discrimination in the enjoyment of any of the rights and freedoms protected under section 10 of the *Quebec Charter*.

The plaintiffs had also invoked, unsuccessfully, various international treaties to support their claim of discrimination. As to the *International Covenant on Political and Civil Rights*, the Court of Appeal pointed out that the *Charter of the French Language* was justified as a measure intended to correct the disadvantaged position of French, and thus could not be said to violate the Covenant. In addition, the Court emphasized that decisions of the Human Rights Committee of the UN constituted recommendations only and were not binding on member States. The Court also dismissed arguments based on

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[81] *Ibid.*

[82] *Ibid.* at paragraph 38.

the *International Convention of the Rights of Children*, concluding that the provisions of the latter in no way applied to the facts and issues raised in the case before it. The plaintiffs have sought leave to appeal this decision to the Supreme Court of Canada.[83]

ADMINISTRATIVE PROCEDURES AND JURISDICTION FOR DETERMINING ACCESS

Casimir v. *A.G. Quebec* / *Zorilla* v. *A.G. Quebec* / *Okwuobi* v. *A.G. Quebec*

Litigation surrounding the constitutional validity of section 73 of the *Charter of the French Language* has also raised important jurisdictional issues relevant to administrative procedures now in place for determining access to English-language public schools. Parents wishing to enrol children in such schools are required to make application to the relevant school board along with supporting documentation required by-law.[84] The request and documentation are then transmitted to a person designated by the Minister of Education who is authorized to determine if the applicant is eligible to register a child in an English-language public school. If so, a certificate of eligibility is issued. Where a claim is denied, provision is made to appeal the decision to a committee of three members appointed by the government after consultation with organizations deemed most representative of parents, teachers, school boards, school administrators and socio-economic groups. Decisions of the review committee may be contested before the Tribunal administratif du Quebec (TAQ), an administrative tribunal empowered to determine questions of fact and law.

Several recent cases focus on the rights of parents to initiate legal action in the Quebec Superior Court prior to commencing or completing application to a designated person, appeals to the review committee and proceedings before the TAQ. More specifically, three separate applications were made to the Superior Court for interlocutory and permanent declaratory and injunctive relief pursuant to ss. 24(1) of the *Canadian Charter of Rights and Freedoms* for violation of rights under ss. 23(2), but before administrative remedies provided for under Quebec law had been fully exhausted. These cases form the basis for a current application for leave to appeal to the Supreme Court of Canada,[85] following the decision of the Quebec Court of Appeal to dismiss the applications filed in the Superior Court on jurisdictional grounds.

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[83] *Gosselin, et al.* v. *A.G. of Quebec (Minister of Education)*; Application for leave to appeal No. 29298, filed August 13, 2002.

[84] See Revised Regulations of Quebec 1981, C-11, r. 4.2 - *Regulation respecting requests to receive instruction in English*. Amended by Order in Council 1758-93, December 8, 1993 - (1993) G.O., 8897 (eff. 94-01-06)

[85] Edwidge Casimir (applicant) v. A.G. Quebec (Minister of Education)(respondent) and Consuelo Zorrilla (applicant) v. A.G. Quebec (respondent) and Ikechukwu Okwuobi (applicant) v. A.G. Quebec (Minister of Education)(respondent); filed August 13, 2002; Docket No. 29299.

In each of the three cases, the designated person under the *Charter of the French Language* had determined that the children in question were not eligible for English-language education.

The Quebec Court of Appeal dismissed the applications for declaratory and injunctive relief before the Superior Court, ruling that the TAQ had exclusive jurisdiction to determine all legal and factual issues related to the rules governing access to English-language schools, including any possible remedies that might be available under section 24 of the *Canadian Charter of Rights and Freedoms*.[86] The applicants have finally sought leave to appeal this decision to the Supreme Court of Canada.

[86] The Court of Appeal decision was released on May 15, 2002 and was applied to all applications then pending on the facts in Casimir, Zorrilla and Okwuobi. The specific decision of the Court of Appeal in Casimir is filed under the docket number 500-09-010417-004. The Court of Appeal decision also effectively overturned a previous Superior Court decision favourable to the application of Zorrilla issued March 7, 2001 and filed under docket number 500-05-062118-003; and reported as [2001] J.Q. no 867 JEL\2001-125.

3.2 Enforcement of Court Orders relating of the Establishment of Minority Language School

Doucet-Boudreau v. *Nova Scotia (Dept. of Education)*

Our previous Language Rights Report reviewed a decision of the Nova Scotia Supreme Court on issues relevant to the establishment of homogeneous minority language schools.[87] The decision found in favour of Francophone parents in five different regions of the province who had struggled for years to see the implementation of fully French-language educational programs dispensed in school facilities devoted to that purpose. At the time he issued orders for the establishment of homogeneous schools in those regions, together with a time frame within which this was to be accomplished, the presiding judge acceded to the request of the parents (applicants before the court) and declared that he would retain jurisdiction over the case. He also scheduled a further appearance before him for some six weeks later, at which time the Department of Education (respondent before the court) was to report on the status of their efforts to implement his orders. He indicated to Departmental representatives that they were to use "their best efforts" to comply. The Department of Education ultimately contested the validity of the judge's decision to retain jurisdiction and sought review of the matter by the Court of Appeal.

By majority judgement, the Nova Scotia Court of Appeal has overturned the trial judge's decision to retain jurisdiction in the case and to preside over a series of hearings about what steps the province might have taken to implement his original orders.[88] At the outset, the Court of Appeal emphasized that the merits of the lower court decision regarding section 23 *Charter* rights were not at issue. Nor did any of the parties challenge the remedy issued by the lower court that required the province to use its best efforts to provide homogeneous French-language schools and programmes within the time frames set out in the various orders.

As to retention of jurisdiction, the Court of Appeal came to the following conclusion:

> *"The effect of the common law principle of* FUNCTUS OFFICIO *and the provisions of the* JUDICATURE ACT *make it clear that the trial judge, having*

[87] *Doucet-Boudreau* v. *Nova Scotia (Minister of Eduction)*, (2000) 185 N.S.R. (2nd) 246 (N.S. Supreme Court). For a review of this decision see: LANGUAGE RIGHTS REPORT 1999-2000, *supra*, note 1, at pp. 28-33.

[88] The Court of Appeal identified three "reporting sessions" that took place between the date of the trial judge's decision (June 15, 2000) and the date of the order giving effect to that decision (December 14, 2000). A forth session occurred on March 23, 2001, and a fifth was scheduled for August 10th of the same year. It described these sessions in the following words: "Prior to each reporting session the trial judge directed the Province to file an affidavit from the appropriate official at the Department of Education setting out the department's progress in complying with the trial judge's decision. The trial judge permitted the respondents and CSAP to cross-examine the government official on his affidavits. He also permitted the respondents and CSAP to adduce evidence, including rebuttal evidence. All this was done without any application seeking particular relief, and, therefore, there was nothing to define the parameters of the reporting session. Further, all this was done over the objections of counsel for the appellant claiming that the trial judge had no jurisdiction to conduct these reporting sessions, that the trial judge was *functus officio*, that there was no fresh proceeding before him, and that the trial judge was powerless to make any order without such fresh proceedings." See paragraph 15 of the judgment, *infra*.

RENDERED HIS DECISION ON THE ISSUE THAT WAS BEFORE HIM, AND HAVING ISSUED AN ORDER GIVING EFFECT TO THAT DECISION, HAS NO FURTHER JURISDICTION WITH RESPECT TO THE PARTIES, SAVE WHATEVER JURISDICTION HE MAY HAVE, AS A JUDGE OF THE SUPREME COURT OF NOVA SCOTIA, TO HEAR A FURTHER APPLICATION BY ONE OR MORE OF THE PARTIES WITH RESPECT TO A MATTER THAT MIGHT ARISE AS A RESULT OF HIS DECISION AND ORDER."[89]

The Court of Appeal pointed out that any difficulties regarding enforcement of an order can be dealt with by way of a new application to the Supreme Court. It characterized the subsequent hearings held before the trial judge as "reporting sessions" that were wholly unrelated to a proper application before the court:

"FROM MY REVIEW OF THESE POST-HEARING REPORTING SESSIONS IT APPEARED TO ME AS IF THE TRIAL JUDGE WAS ACTING AS A "REFEREE"OVER ISSUES THAT WERE RAISED CONCERNING, AMONG OTHER THINGS, THE TYPE OF CONSTRUCTION OF THESE SCHOOL FACILITIES, WHETHER THEY WOULD BE NEW SCHOOL FACILITIES OR THE RENOVATION OF EXISTING BUILDINGS, SUBMISSIONS WITH RESPECT TO OTHER SCHOOL FACILITIES WHICH WERE NOT PART OF THE ORIGINAL APPLICATION, AND EXTENDING TO SUCH MINUTE DETAIL AS, FOR EXAMPLE, THE TYPE OF VENTILATION SYSTEM WHICH WOULD BE INCLUDED IN THE SCHOOL FACILITIES. IN CONDUCTING THESE REPORTING SESSIONS, THE TRIAL JUDGE WAS ACTING MORE IN THE CAPACITY OF AN ADMINISTRATOR THAN AS A JUDGE."[90]

The Court of Appeal also rejected the notion that the authority of a court under subsection 24(1) of the *Charter* to issue "such remedy as the court considers appropriate and just in the circumstances" superseded principles found in common law or provisions set out in the *Judicature Act* of Nova Scotia. It reviewed case law relevant to the innovative types of remedies issued under section 24 in the past, concluding that in no instance did a remedy that was issued override the principle of *functus officio*. In all cases cited, the Court ruled, there had been no issue left undecided following the disposition of the litigation and issuance of a remedy. It therefore concluded that "...while it is true that courts of competent jurisdiction have broad and wide ranging powers to fashion appropriate remedies under s. 24(1) of the *Charter* - and have even been encouraged to be creative in so doing - the *Charter* does not extend the jurisdiction of these courts from a procedural point of view. Ordering a remedy is one thing. Providing for its enforcement is quite another."[91]

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[89] *Doucet-Boudreau* v. *Nova Scotia (Department of Education)*, Court of Appeal of Nova Scotia, June 26, 2001, at paragraph 24. Referenced as [2001] N.S.J. No. 240/2001 NSCA 104; Docket: CA 168059. With respect to strictly statutory provisions, the Court found: "There is no provision in the *Judicature Act* which authorizes a trial judge who has decided the matter between the parties, and has issued an order with respect thereto, to retain any further jurisdiction in the case in order to be able to determine that there will be compliance with his order, and to that end to direct a party to file affidavits with him setting forth the status of that party's efforts to comply with his decision and order." See paragraph 23.

[90] *Ibid.* at paragraph 16.

The Court of Appeal also stressed the importance of maintaining harmonious relations between the judicial and other branches of government. It found that the "continuous post-trial intervention by the trial judge" into matters that properly belonged to the "administrative branch of government" was "unnecessary and unwarranted", given the absence of any evidence that the government would not comply with the trial judge's decision and due to enforcement procedures available to a party alleging noncompliance.

A dissenting judge in the Court of Appeal took a different view as to whether the decision of the trial judge was so final as to constitute a conclusion to the proceedings, thus rendering him *functus officio*. He found that there were two elements to the trial level decision: one dealing with a declaration regarding section 23 rights; and the other being a "gently-phrased" mandatory injunction requiring the best efforts on the part of governmental authorities to give effect to those rights. It was this second element that essentially prolonged the jurisdiction of the trial judge:

> *"This creative blending of declaratory and injunctive relief with a means of mediation appears to me to be of the very essence of the kind of remedy courts are encouraged to seek pursuant to s. 24(1) to give life to* Charter *rights. The mandatory injunction element suggests a requirement for a degree of continuing supervision, and the judgment cannot be said to be final, nor the judge functus, until that requirement has been fulfilled. Courts have traditionally avoided granting mandatory injunctions not for lack of jurisdiction, but for policy reasons related to the onerous duties they involve. In my view Justice LeBlanc was entitled to keep his judgment from becoming final, and to remain seized with jurisdiction, by the simple expedient of declaring that he was doing so. If this imparted qualities of an interim order to the preceding provisions, it would not be remarkable."*[92]

Since a judge's power to issue injunctive relief does not depend upon the *Charter* itself, reasoned the dissenting judge, there was no need to consider the issue of whether section 24 of the *Charter* could be said to supersede the common law principle of *functus officio* or provisions in the Nova Scotia *Judicature Act*. He laid emphasis on the pragmatic approach reflected in the trial judge's decision to combine elements of declaratory and injunctive relief with a machinery for mediation, one that depended for success on an already existing good faith and degree of cooperation of all the parties involved in the litigation. Had this cooperation not been there and had the remedy he fashioned failed, questions might then have arisen as to whether the trial judge had the authority to issue a further order independently of a formal application for compliance with his decision.

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[91] *Id.* at paragraph 39.

[92] *Id.* at paragraph 70.

The judgment of the Court of Appeal has now been appealed to the Supreme Court of Canada. As intervener, the Commissioner of Official Languages has taken the position that subsection 24(1) of the *Charter* authorizes a court of competent jurisdiction to retain jurisdiction over parties for the purposes of monitoring whether parties have taken steps to implement section 23 rights.

IV. LANGUAGE RIGHTS BEFORE THE COURTS

4.1 Criminal Law Proceedings

LANGUAGE OF CHARGES

R. v. *Boutin*

State obligations regarding the language in which charges are laid against an accused person were re-examined recently by the Superior Court in Ontario in the case of *R.* v. *Boutin*.[93] The facts of the case involve charges set out in a bilingual information form where the particulars of the offence had been added by a law enforcement officer in English only. The accused persons subsequently informed the Crown of their desire to have a bilingual trial. As a result, they were provided with a French translation of the English particulars found on the bilingual information form.[61] At trial, the accused successfully argued that the French translation, which had not been sworn under oath, was inadequate in light of the interpretive principles developed by the Supreme Court of Canada in the *Beaulac* decision and therefore null and void. However, the trial level decision has now been overturned by the Superior Court.

[93] *R.* v. *Boutin*, Superior Court of Justice (Ontario), June 7, 2002; [2002] O.J. No 2245.

In dealing with the issues raised by the case, the Superior Court made reference to section 133 of the *Constitution Act, 1867*, which provides that either English and French "may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the courts of Quebec." While this constitutional provision does not apply to the courts of Ontario, the Superior Court viewed it, and the case law related to it's interpretation, as having a bearing upon the issues in Boutin. That interpretation clearly established that the freedom to use either official language before the designated courts imposed no obligations on government to ensure that such courts could operate directly in the language chosen by an accused person. In short, the language rights protected by section 133 "...are those of litigants, counsel, witnesses, judges and other judicial officers who actually speak, not those of parties or others who are spoken to; and they are those of writers or issuers of written pleadings and processes, not those of the recipients or readers thereof."[94]

While the scope of section 133 is limited, more extensive language rights are now provided for in the *Criminal Code* at sections 530 and 530.1. Subsection 530(1) provides that where an accused whose language is one of the official languages of Canada makes an application (within the time limits therein set out), an order shall be made directing that "the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada." A similar order may issue, on the application of an accused under subsection 530(2), establishing the language of trial as a function of the official language in which an accused can best give testimony. As to section 530.1, it sets out in detail the rights and obligations that apply when a trial is being conducted in the preferred official language of an accused. The Superior Court in *Boutin* referred to a number of paragraphs under section 530.1 that had a bearing upon the resolution of issues before it:

> *"(a) THE ACCUSED AND HIS COUNSEL HAVE THE RIGHT TO USE EITHER OFFICIAL LANGUAGE FOR ALL PURPOSES DURING THE PRELIMINARY INQUIRY AND TRIAL OF THE ACCUSED;*
>
> *(f) THE COURT SHALL MAKE INTERPRETERS AVAILABLE TO ASSIST THE ACCUSED, HIS COUNSEL OR ANY WITNESS DURING THE PRELIMINARY INQUIRY OR TRIAL;*
>
> *(g) THE RECORD OF PROCEEDINGS DURING THE PRELIMINARY INQUIRY OR TRIAL SHALL INCLUDE*
>
> > *(iii) ANY DOCUMENTARY EVIDENCE THAT WAS TENDERED DURING THOSE PROCEEDINGS IN THE OFFICIAL LANGUAGE IN WHICH IT WAS TENDERED."*

[94] See *MacDonald* v. *City of Montreal* [1986] 1 S.C.R. 460, p. 496. The facts of the MacDonald case concerned an English-speaking Montrealer who was issued a unilingual French summons to appear in Municipal Court to answer to charges of having violated a city by-law. He contested the jurisdiction of the court to proceed against him on the basis that the summons had violated his constitutional rights to use English before the courts of Quebec as protected under section 133 of the *Constitution Act, 1867*. It was in this context that the Supreme Court had determined that a unilingual French summons did not violate section 133, and that the rights protected thereunder apply to those who issue processes, not to those who receive them.

It also referred to ss. 841(3) of the *Criminal Code*, which provides that: "any pre-printed portions of a form (set out in Part XXVII of the Code) varied to suit the case or of a form to the like effect shall be printed in both official languages."

The Superior Court pointed out that the Ontario Court of Appeal in a previous decision had already determined that these statutory provisions did not oblige the police to provide a sworn translation of particulars set out in an information, although other constitutional rights to a fair and equitable trial would oblige the Crown, on demand of the accused, to translate the particulars into his preferred official language.[95] The Superior Court rejected arguments to the effect that the Supreme Court decision in *Beaulac* had effectively overturned the past reasoning of the Court of Appeal. Statements in the *Beaulac* decision that a liberal interpretation of section 530 required courts hearing criminal matters to be institutionally bilingual could not be extended to oblige police officers to swear to criminal particulars in both official languages. The Superior Court pointed out that the accused's comprehension of the charges against him is assured by the presence of interpreters in the court room when the information against him is read and a plea is entered. A requirement that the particulars in an information be sworn in both official languages by a police officer would render the presence of interpreters redundant. Moreover, reasoned the Court:

> *"[our translation]... if the accused argue that persons completing the form should take an oath on both linguistic versions, this requirement is impossible and contrary to the Constitution. It is impossible because people who complete the forms are not generally bilingual. They cannot swear under oath to the truth of information in a language they do not understand. The requirement is contrary to the Constitution because, whatever the extent of the Charter's language guarantees, those guarantees cannot negate another constitutional right like the one contained in s. 133."*[96]

As to any statutory requirement under provincial law that might apply, the Court referred to provisions in the *Courts of Justice Act* that allow the use of French in any process issued in or giving rise to a criminal proceeding and require a court to provide, on the request of a party, a French or English translation of any such process.[97] Nothing in these provisions could be said to operate so as to require an information to be sworn in both English and French. Nor could relevant provisions in the Criminal Code reproduced above be said to establish such an obligation either.

Although the Court seemed to agree that progress towards greater substantive equality regarding the use of both official languages in the criminal trial process was desirable, it concluded:

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[95] See *R.* v. *Simard* (1995) 27 O.R. (3rd) 116

[96] *Supra*, note 93, at paragraph 18.

[97] *Ibid.* at paragraph 9.

"[our translation] If in its wisdom Parliament seeks to carry language equality still further, it is for Parliament and not the courts to do this, as the courts are not equipped to work out the delicate political compromises necessary to balance the many competing rights, some of which have been discussed above."[98]

PRE-TRIAL DISCLOSURE OF EVIDENCE

R. v. *Stadnick*

The official language in which pre-trial disclosure of evidence is made to an accused and counsel was at issue in a recent decision of the Quebec Superior Court.[99] At the request of the accused (under section 530 of the *Criminal Code*), a judicial order issued that they be tried in an English-language proceeding, the only language that they and their counsel understood and spoke. Much of the evidence relevant to the charges was in the French-language. An order was therefore sought requiring the Crown to provide an English language translation of all evidence prior to the commencement of trial.

In refusing the application for pre-trial disclosure of all evidence in English, the Quebec Superior Court took as its guiding principle that only such disclosure as is necessary to allow an accused to make full answer and defence to the charges is required to protect his right to a fair hearing. It felt that a translated summary of evidence ("précis), which the Crown was obliged to deliver to an accused, would be sufficient to ensure that the accused could make a full answer and defence. An alleged broader duty to translate all evidence into English due to the unilingualism of counsel chosen by the accused could not, in the eyes of the court, be justified:

"There is an underlying danger in this scheme of argumentation: it opens the door to a strategic use of the language provisions of the Code to gain time, and as a weapon in a plea bargain. Parliament could not have legislated in that sense when it adopted the present legislation. The Crown should not be accounted for the choice an accused makes of his lawyer. Allowing an automatic translation, which is not an obligation under the Code, would result in a paralysis of the judiciary system, especially in cases like this one, where the volume of the evidence disclosed is huge."[100]

The Court stressed that s. 530.1 of the *Criminal Code* creates no obligation at all to provide a translation of evidence, quoting the *Beaulac* decision to the effect that

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[98] *Ibid.* at paragraph 21.

[99] *R.* v. *Stadnick*, Quebec Superior Court, October 24, 2001; [2001] Q.J. No. 5226.

[100] *Ibid.* at paragraph 11.

language rights must be distinguished from the right of an accused to a fair trial. Indeed, the Court pointed out that s. 530.1(g)(iii) specifically provides that "...documentary evidence is tendered during the proceedings in the official language in which it was gathered."[101] In any event, reasoned the Court, the mandatory presence of interpreters at trial would ensure that the actual evidence presented (which consisted of testimony of French-speaking witnesses and experts as well as transcripts of wiretapped conversations in French) was translated in the course of the proceedings, thus causing no prejudice to the accused's right to make full answer and defence to the charges.[102] An application for leave to appeal this decision was submitted directly to the Supreme Court of Canada. The application was dismissed.[103]

LANGUAGE OF CROSS-EXAMINATION

R. v. *Peters*

In another case from Quebec, the right of an accused to make full answer and defence was invoked to justify an evaluation of the official language abilities of a crucial crown witness.[104] At trial, the presiding judge had denied the opportunity to defence counsel to cross-examine a Francophone witness in English with a view to placing in doubt the probative value of the witness' testimony regarding alleged statements made by the accused. The trial judge had justified his refusal by indicating that the witness had the right to be questioned and to respond in French (presumably by virtue of s. 133 of the *Constitution Act, 1867*). The Court of Appeal of Quebec overturned this ruling:

> *"...THE TRIAL JUDGE ERRED IN REFUSING TO PERMIT THE APPELLANT TO CROSS-EXAMINE PRINCE IN ORDER TO TEST HIS COMPREHENSION AS TO WHAT THE ACCUSED SAID AND HIS CREDIBILITY AS TO WHAT WAS CLEARLY AN IMPORTANT PIECE OF EVIDENCE - A STATEMENT ALLEGEDLY MADE BY THE ACCUSED WHICH THE TRIAL JUDGE CONSIDERED VERY INCRIMINATING, IN THE FORM RELATED BY PRINCE.*
>
> *WITH RESPECT, THIS WAS NOT A CASE WHERE THE RIGHT OF DETECTIVE PRINCE TO TESTIFY IN HIS OWN LANGUAGE WAS IN QUESTION. THAT WAS NOT THE ISSUE. THE ISSUE WAS WHETHER OR NOT PRINCE HAD UNDERSTOOD WHAT THE ACCUSED HAD SAID TO HIM IN ENGLISH AND WHETHER PRINCE'S COMPREHENSION OF ENGLISH WAS SUFFICIENT TO PERMIT HIM TO UNDERSTAND AND TO RELATE ACCURATELY THE STATEMENTS THAT WERE MADE TO HIM IN ENGLISH."*[105]

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[101] *Ibid.* at paragraph 15.

[102] *Ibid.* at paragraph 18.

[103] *R.* v. *Stadnick,* [2002] S.C.C.A. No.413.

[104] *R.* v. *Peters,* Quebec Court of Appeal, September 8, 1999; [1999] J.Q. No. 4143

[105] *Ibid.* at paragraphs 35-36..

4.2 Bilingual Police Services

R. v. *Doucet*

The official language obligations of the RCMP when engaged under contract to enforce provincial penal statutes were at issue in a recent decision of the Provincial Court of Nova Scotia.[106] The case involved a routine issuance of a speeding ticket during which the driver's use of French with the RCMP officer (who was unilingual in English) had no impact on the language in which communications took place. At trial, the defendant (driver of the vehicle) argued that it was incumbent upon the RCMP officer to take the necessary steps to ensure communications could be made in French once the defendant had spoken to him in that language. That obligation was said to arise by virtue of section 20 of the Canadian *Charter of Rights and Freedoms*:

> *"20(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French; and has the same right with respect to any other office of any such institution where*
>
> > *(a) there is a significant demand for communications with and services from that office in such language; or*
> >
> > *(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French."*

The trial judge concluded that section 20(1) of the *Charter* applied only to non-judicial communications made in a federal sphere of activity, finding support for this view in the Ontario Court of Appeal decision in *R* v. *Simard*.[107] He pointed out that Nova Scotia was not an officially bilingual province and that it would be incongruous to determine the scope of official language obligations as a function of the police force that was empowered to apply provincial law, such as the *Motor Vehicle Act*:

> *"[our translation] Clearly, the action taken by the officer in the case before me was to ensure compliance with a provincial statute pursuant to a contract with the province. The act of issuing the ticket was not an activity of the federal government in this case. I agree with the Crown that the result of the interpretation suggested by the defendant would be an application of the law that would be dictated by the police force*

[106] *R.* v. *Doucet,* Provincial Court of Nova Scotia, July 15, 2001; File number 795959.

[107] *Supra*, note 95.

RESPONSIBLE FOR THE INVESTIGATION. ACCORDINGLY, THE CHARTER *RIGHTS WOULD BE DIFFERENT, FOR EXAMPLE, IF THE POLICE FORCE WERE A MUNICIPAL ONE. I DO NOT ACCEPT THAT SUCH A RESULT COULD REPRESENT PARLIAMENT'S INTENTION."*[108]

The provincial court judge also applied case law from New Brunswick to the effect that no state obligation existed to inform an individual of any right he might have under any particular section of the *Charter,* including section 20.[109] Although aware of the Supreme Court decision in *Beaulac*, the trial judge determined that it did not affect existing jurisprudence that excludes any state obligation to inform a person of rights under the *Charter*.

The defendant appealed this specific decision to a higher court, whose judgement has not yet been rendered, and commenced other proceedings before the Federal Court of Canada in which he places in question the constitutional validity of regulations adopted under the *Official Languages Act* and applicable to the RCMP.[110] More specifically, Mr. Doucet argues in his action against Her Majesty in the Right of Canada that the designation of the RCMP detachment serving the area where the speeding ticket was issued (region of Amherst) as unilingual (hence not subject to any obligation to communicate and provide services in either official language) violates rights set out in section 20 of the *Canadian Charter of Rights and Freedoms*.

4.3 CIVIL PROCEEDINGS

LANGUAGE OF WITNESS

Les Contenants Industriels Ltée v. *La Commission des lésions professionnelles, et al.*

A recent case from Quebec has dealt with the right of witnesses in civil proceedings to chose the official language in which their testimony is given. The issue arose from a decision made by the Commission des lésions professionnelles (CLP), a quasi-judicial administrative tribunal established by provincial legislation to review decisions made regarding employer liability for work-related injuries. In the course of hearing the appeal of a unilingual anglophone employee, the CLP inquired of a French-speaking expert witness (called by the employer) as to whether he would agree to testify in English. The witness acknowledged that while his level of English would in fact allow him to so testify, his testimony would lack the spontaneity and precision it would otherwise have in French. Nevertheless, neither the witness nor counsel for the employer objected formally to proceeding in English. In addition, the CLP indicated that should the witness at any time feel more comfortable testifying in French he should feel free to do so. A second witness whose first language was French also agreed, upon similar inquiries and

[108] *Supra*, note 105, at page 5.

[109] The trial judge quoted from *R.* v. *Haché* [1993] N.B.J. No. 474 (Court of Appeal of New Brunswick)..

[110] *Donnie Doucet* v. *The Queen in Right of Canada and RCMP*; Federal Court Trial Division; File No. T-1151-00.

assurances from the presiding commissioner of the CLP, to testify in English.

Following a decision of the CLP on the merits of the claim for compensation (favourable to the employee), an appeal was brought before the Quebec Superior Court alleging a breach of the right of witnesses to chose the official language in which to testify. The decision of the Superior Court,[111] placed considerable emphasis on the manner in which the CLP had made inquiries of the witnesses regarding their second language ability, as well as the CLP's underlying motivation for so doing. The Superior Court found that both the parties and counsel appearing for them had voluntarily agreed to proceed in English in order to avoid slowing down the process by any need to provide interpretation to the unilingual respondent (who had represented himself). While the Court recognized that a Francophone witness testifying in English might lack his usual spontaneity and precision, this fact alone would not justify declaring the decision of the CLP to be null and void, especially given the willingness of the witness to testify in English:

> *"[our translation] If a witness voluntarily agrees to testify in a language other than his or her mother tongue without raising the least objection to doing so, when he or she can decide to switch to their mother tongue at any time, that witness cannot later argue that the testimony was incomplete or less precise or contained irregularities forming a basis for review on the ground that his or her right to use the language of his or her choice was disregarded."*[112]

The Court pointed out that legal counsel, a party or a witness frequently agree for any number of reasons to address a tribunal in a language other than their mother tongue. Only in cases where the evidence showed that the choice of language resulted from the refusal of a tribunal to allow the use of a person's mother tongue would a court intervene and issue an appropriate remedy.[113] In the case at bar, the actions of the CLP were characterized by the Superior Court as nothing more than inquiries as to the willingness of witnesses to testify in English and thus did not involve any error going to the jurisdiction of the tribunal:

> *"[our translation] The Court accordingly dismisses the argument that there was an excess of jurisdiction by the Commissioner when he asked*

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[111] *Les Contenants Industriels Ltée* c. *La Commission des lésions professionnels, et al.*; Superior Court of Quebec, March 7, 2002; No. 500-05-064334-012.

[112] *Ibid.* at paragraph 55.

[113] In the words of the Court: "[our translation] Unless the basis for that choice is the refusal by the presiding authority to allow such persons to testify in their mother tongue, they cannot subsequently claim that the procedure was invalid and argue that the person in question was uncomfortable and all the fine points that should be expressed could not be." *Ibid.* at paragraph 58.

THE WITNESSES WHETHER THEY SAW ANY PROBLEM WITH CONTINUING IN ENGLISH, WHILE AT THE SAME TIME CONFIRMING THAT IF NECESSARY THEY COULD ANSWER IN FRENCH TO CLARIFY ANY FINE POINTS THEY THOUGHT ADVISABLE IN THE CIRCUMSTANCES, WITHOUT ANY OBJECTION WHATEVER BY THE APPLICANT OR HIS COUNSEL."[114]

In an application before the Court of Appeal, the counsel for the appellant took exception to the Superior Court's finding that the witnesses had voluntarily agreed to testify in English. She argued that the Superior Court had effectively ignored testimony given by both witnesses about having been taken by surprise and feeling obliged to proceed in English. She took the view that the evidence in no way supported the conclusions made by the Superior Court, and that such a manifest error rendered its decision fatally flawed. She also argued that it was a legal error to conclude from the absence of any explicit objection by counsel during the proceedings before the CLP that the witnesses' language rights had been fully respected. Such language rights belong to the witnesses appearing before the tribunal and their exercise should not depend upon statements made by legal counsel representing one of the parties. In a brief handwritten decision, the Court of Appeal characterized the issue of language rights in the case as being essentially a question of fact. In its view, whether a witness consented to testify in English rather than French involved the weighing of evidence rather than the determination of a question of law. As it was not the role of the Court of Appeal to re-evaluate purely factual matters, the application for leave to appeal the lower court decision was dismissed.[115] An application for leave to appeal to the Supreme Court of Canada was dismissed on November 28, 2002 (without costs).

LANGUAGE OF PLEADINGS AND EVIDENCE

Charlebois v. *City of Saint John*

Mario Charlebois (whose action against the city of Moncton was reviewed in section II of this report) also initiated action against the city of Saint John for a court order requiring that city to offer municipal services in both English and French on the basis of equality between the two official languages.[116] In the course of that litigation, Mr. Charlebois (who commenced his action in French) objected to the use of English by the city in pleadings and affidavits filed in its defence, as well as in documents and case law submitted by the provincial Attorney General appearing as an intervener in the case. He therefore filed a motion requesting a court order that the city be required to use French in its pleadings (which the Attorney General had done), and that all other

[114] *Id.* at paragraph 60.

[115] *Les Contenants Industriels Ltée* v. *La Commission des lésions professionnelles et al.*; Court of Appeal of Quebec, Pierre Dalphond, J.C.A., May 2, 2002. The Court of Appeal declared: "[our translation] On the question of language rights, the motion for leave to appeal a judgment dismissing a motion for judicial review actually raises a question of assessment of facts, and in particular the consent of witnesses to testify in English rather than in French."

[116] *Charlebois* v. *Saint John (Ville)*; Court of Queen's Bench of New Brunswick, December 11, 2002; Referenced as: [2002] NBQB 382; No S/M/72/02.

documents to be used in the case (affidavits and case law) be made available in French as well.

In support of his motion, Mr. Charlebois cited section 22 of the new *Official Languages Act* of New Brunswick, which provides:

> *"Where Her Majesty in right of the Province or an institution is a party to civil proceedings before a court, Her Majesty or the institution concerned shall use, in any oral or written pleadings or any process issuing from a court, the official language chosen by the other party."*[117]

The word institution is defined in the *Act* (at section one) as meaning "an institution of the Legislative Assembly or the government of New Brunswick, the courts, any board, commission or council, or other body or office, established to perform a governmental function by or pursuant to an Act of the Legislature or by or under the authority of the Lieutenant Governor in Council, a department of the Government of New Brunswick, a Crown corporation established by or pursuant to an Act of the Legislature or any other body that is specified by an Act of the Legislature to be an agent of Her Majesty in right of the Province or to be subject to the direction of the Lieutenant-Governor in Council or a minister of the Crown."

In determining whether the term "institution" was broad enough to include municipalities within its scope, the Court of Queen's Bench referred to other provisions in the new *Official Languages Act* that deal with the right of the public to receive services in either official language, as well as the linguistic obligations of municipalities. It noted that the *Act* contains detailed provisions defining what cities are subject to official language obligations and that only those cities are required to offer services in both official languages. It reasoned that if the general right to receive services from, and communicate with, provincial institutions in either official language (set out in section 27) were meant to apply to municipalities, the specific statutory provisions in section 36 dealing with municipal services and communications would be redundant. It therefore concluded that the definition of "institution" under the *Act* did not include municipalities. It also appeared to conclude (though it gave no reasons) that the meaning of "institutions"found in subsection 16(2) of the *Canadian Charter of Rights and Freedoms* had no bearing on the linguistic obligations of municipalities in New Brunswick.[118] In light of these findings, the Court ruled that the city of Saint John, its lawyers and public servants were free to choose the official language they wished to use in civil proceedings before the courts. In other words, section 22 of the new *Official Languages Act* could not be said to apply to them.

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[117] *Supra*, note 40.

[118] Subsection 16(2) provides: "English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick."

The Court also addressed the issue of the language of documents used in litigation that might fall within the notion of "oral and written pleadings". While the provincial Attorney General had used French as its main procedural language, certain of its exhibits (referred to in a French-language affidavit) and past court decisions relied on as precedents were presented in their original language (i.e. English). The Court found that these matters fell outside the scope of what constitutes "pleadings". The latter refers to the formal statement of fact and argument supporting a cause or action (i.e. the assertion of a claim or the exercise of a right) or setting out the defence raised in opposition to such a cause of action. Evidence used in support of a claim or a statement of defence would thus not normally fall within the notion of pleadings. The Court also found that the presentation of evidence, orally or by way of affidavit, engages the constitutional right of witnesses to use either official language in legal proceedings in New Brunswick. It therefore concluded that the wording of section 22 of the new *Official Languages Act* could not be said to create any statutory obligation to provide a translation into French of affidavits (and attached exhibits) originally written in English, nor any case law written in English used by the Attorney General to support its arguments.[119] The motion of Mr. Charlebois was accordingly dismissed.

Mr. Charlebois is seeking leave to appeal this interlocutory decision.

4.4 Provincial Offences

LANGUAGE OF CHARGES

R. v. *Charest*

A recent case of the Ontario Court of Justice has considered the rules of interpretation that should apply to provisions in provincial law governing the conduct of bilingual trials under the *Provincial Offences Act*.[120] The *Courts of Justice Act* of Ontario recognizes the right of persons prosecuted under the *Provincial Offences Act* to require that the trial be conducted as a bilingual proceeding. If a person exercises that right (in line with modalities set out in regulations) the law provides that the proceedings will be presided over by a judge who speaks both English and French. The same linguistic requirement applies to the prosecutor assigned to the case. The law also allows for the use of French in any process giving rise to a prosecution, without at the same time requiring it.[121]

In a prosecution for violation of a Toronto municipal by-law, the accused requested

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[119] The Court of Queen's Bench relied on a previous decision of the Federal Court of Canada that had distinguished pleadings from evidence and had concluded that neither the Constitution nor the federal *Official Languages Act* obliged the Crown in right of Canada to present affidavit evidence in an official language other than that in which it was prepared. See *Lavigne* v. *Canada (Human Resources Development)*, [1995] F.C.J. No. 737.

[120] *R.* v. *Charest*, Ontario Court of Justice, December 11, 2001; Referenced as [2001] O.J. No. 5763.

[121] See ss. 126(5) *Courts of Justice Act*, Revised Statutes of Ontario 1990, c. 43.

a bilingual trial in conformity with legal requirements. Accordingly, a bilingual judge and prosecutor were assigned to the case. However, the charges against the accused were written in English only ("dog running at large"). At trial, counsel for the accused moved to have the charges dismissed for breach of language rights, in that the text of the charges had not been provided to the accused in French. Counsel for the city took the position that the permissive language of the *Courts of Justice Act* regarding the language in which a procedural act could be written did not give rise to any strict obligation to provide the accused with a French version of the charges.

While it was argued that interpretive rules for language rights set out in the Supreme Court decision should not be transposed from a matter involving the federal *Criminal Code* to a trial conducted under provincial legislation, the presiding judge took a different view. He pointed out that the Ontario Court of Appeal in the *Montfort* decision had applied the generous approach to interpreting language rights found in *Beaulac* to the *French Language Services Act*, concluding that the same approach should be applied to interpreting provisions in the *Courts of Justice Act*. This meant that a statutory language right should be interpreted in light of the aspiration towards official language equality (found in ss. 16(3) of the *Charter*), by reference to the unwritten constitutional principle of the protection of minorities, and be construed liberally in line with its underlying objective.

The presiding judge noted that the *Courts of Justice Act* (section 125) declared English and French to be the official languages of Ontario courts, in addition to setting out the more specific provisions dealing with the conduct of bilingual trials. He also referred to recent amendments to regulations governing the modalities of exercising the right to a bilingual trial which he felt were intended to facilitate greater access to trials in French.[122] In light of all these factors, he concluded that unilingual English charges in the context of a bilingual trial under the *Provincial Offences Act* were null and void. He therefore ordered, pursuant to section 24 of the *Charter*, that the charges against the accused be stayed. A notice of appeal has been filed by the City of Toronto.

[122] Ontario Regulation 53/01 entitled *Bilingual Proceedings*, under the *Courts of Justice Act*.

V. LANGUAGE RIGHTS RELATED TO FEDERAL JURISDICTION

5.1 Services to the Public

AIR CANADA GROUND SERVICES

Commissaire aux langues officielles c. Air Canada

Our last Language Rights Report reviewed legal action taken by the Commissioner against Air Canada regarding ground services at Pearson and Halifax airports, in-flight services at Air Ontario, and the applicability of Part IV of the OLA to Air Canada subsidiaries (the latter question by way of a reference procedure to the Federal Court).[123]

In the two instances relating to ground services, pre-trial mediation was being conducted in an effort to reach an out of court settlement regarding ground services at Pearson and Halifax airports. Those efforts resulted in an agreement being signed in the fall of 2001 between Air Canada, union representatives and the Commissioner of Official Languages.

[123] See LANGUAGE RIGHTS REPORT 1999-2000, pp. 82-85, *supra*, note 1; the amend ments to the *Air Canada Public Participation Act* (S.C. 2000, c.15) set out specific criteria to determine when the OLA applies; since Air Canada was explicitly obliged to ensure that its subsidiaries have to provide in-flight and incidental services to its customers in either official language (whenever the OLA would so require Air Canada) the reference to the Federal Court has been withdrawn.

That agreement acknowledges the measures adopted by Air Canada since legal action was taken against it, measures which, "in principle, make it possible to resolve various problems raised by these court remedy actions..." The agreement further recognizes that "Air Canada has also reconsidered the situation and made efforts to ensure the maintenance or introduction of bilingual services in the new Air Canada..." While the measures taken should "in principle" result in necessary changes, the agreement recognizes that problems may arise in the implementation of them and that complaints may continue to be received by the Commissioner. In order to ensure clear identification of problems that may form the basis of future complaints, the agreement sets out procedural guidelines that will be followed in any investigations. Provision is also made for expeditious notification of Air Canada regarding any intention to investigate a complaint under section 59 of the OLA, and sets out Air Canada's undertaking to inform the OCOL within 30 days "...of its position with respect to the complaint, ...make available all information required to resolve the complaint and...indicate the corrective measures that may have been taken." As to the Union, it agrees "to identify a representative to work, together with Air Canada, to resolve the problems raised by complaints, as necessary."

As seniority clauses in collective agreements were identified as a barrier to the effective implementation of measures in the past, the agreement foresees meetings between Air Canada and CAW "to review and consider various means of assigning bilingual agents and/or any other measures so as to provide compliance with the *Official Languages Act*." Air Canada also undertakes pursuant to the agreement to report, in writing, to the Commissioner on progress made in such meetings. The OCOL undertakes "to participate, at Air Canada's request, in any meeting organized by Air Canada involving representatives of CAW and other unions for the purpose of finding solutions to problems raised that comply with the *Official Languages Act*" and "to make presentations to unions to inform them of any issue related to the implementation of the *Official Languages Act*." Finally, in light of all the provisions set out in the agreement, the Commissioner agreed to withdraw the two court cases arising from specific complaints about Pearson and Halifax airports.

BROADCAST OF THE DEBATES OF THE HOUSE OF COMMONS

Louis Quigley v. *Canada (House of Commons) et al.*

The House of Commons approved radio and television broadcast of its debates in 1977; and from 1979 to 1991 those debates were broadcast by the CBC in both official languages via two parliamentary channels established for that purpose. The CBC decided in 1991 that it was unable, due to budgetary restrictions, to continue funding its Parliamentary Channel. Soon after, a consortium of Canadian cable companies offered to assume responsibilities for broadcasting by means of a non-profit corporation called

the Cable Public Affairs Channel (CPAC) of which they were all shareholders. An agreement between the House and CPAC was accordingly entered into setting out the terms under which the House debates would be supplied and broadcast. The agreement which ran from 1994 to 2001 contained the following provisions:

> *"1. The House produces and delivers its debates and proceedings and certain committee proceedings in both official languages to CPAC;*
>
> *2. The House will deliver to CPAC a live television (video) signal and three audio programming signals: (i) a sound signal originating from the floor of the House ("floor sound"); (ii) a sound signal in English only; and (iii) a sound signal in French only;*
>
> *3. CPAC will transmit these four signals to all cable television distribution undertakings throughout Canada."*

The language in which CPAC is distributed to cable subscribers in Moncton, New Brunswick gave rise to a complaint to the Commissioner that was fully investigated and resulted in a final report entitled *Enhanced Investigation Report: Investigation Report Concerning the Broadcasts and Availability of the Proceedings of the House of Commons in Both Official Languages* (October 2000). The facts of the complaint concerned the decision of Rogers Cable Company of Moncton to distribute CPAC to its subscribers in the floor language only. This policy effectively deprived the complainant (Louis Quigley), who is unilingual in English, of the means to understand portions of any debate in the House that took place in French. The Commissioner's report found, amongst other things, that the House of Commons had failed (in its agreement with CPAC) to ensure that the broadcast and delivery of its debates respected the principle of equal access to parliamentary proceedings and the requirements of bilingualism that flow from the equal access principle implicit in section 4 of the *Official Languages Act* (OLA). Moreover, the report found that the audio-visual publication of parliamentary debates is a service provided to the public under Part IV of that *Act* and hence subject to the right of members of the public to receive such service in either official language. It also found that CPAC was a third party acting on behalf of the House of Commons within the meaning of section 25 of the OLA. Accordingly, the House of Commons was required to ensure that services offered by that third party were available in the preferred official language of a member of the public. The report therefore recommended that the House take immediate measures (in collaboration with all interested parties) to ensure that members of the public had access to the debates in their preferred official language; and to take into account its obligations under Parts I and IV of the OLA when negotiating any new agreement with a third party for the broadcast and delivery of its debates.

Mr. Quigley subsequently made application to the Federal Court for a remedy under ss. 77(1) of the OLA, to which the Commissioner was joined as an intervener.[124] At trial, the issue of parliamentary privilege was raised to suggest that the Court had no authority to interfere in a matter related to the efficient functioning of the House of Commons. Reliance was placed upon a decision of the Supreme Court of Canada recognizing that "..Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional. The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege."[125] The Supreme Court had identified these privileges as including (i) immunity from civil proceedings regarding matters arising from the carrying out of the duties of a member of the House, (ii) exclusive control over the House's own proceedings, (iii) ejection of strangers from the House and its precincts, and (iv) control of publication of debates and proceedings in the House.

In its decision, the Federal Court recognized that a privilege existed with respect to controlling the publication of debates and proceedings in the House of Commons, but quoted at some length from the Supreme Court decision just mentioned regarding its meaning. For example, it reproduced portions of that judgement indicating that this particular privilege recognized the right of the House to prohibit the publication of debates or proceedings, especially false and perverted reports of them.[126] However, the decision to restrict publication was not raised on the facts of the case before the Court, which concluded:

> *"I do not see the House's privileges over the publication of its debates arising in this case. The decision to make the proceedings of the House available to CPAC in English, French and floor sound has already been made by the House. The House did not say that it was exercising its privilege to control the publication of the debates by not providing an audio signal in one language or the other...The respondents have already chosen the manner in which they wish to publish the proceedings of the House. This is a deliberate decision made by the respondents."*[127]

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[124] *Louis Quigley* v. *Canada (House of Commons) et al.*, Federal Court Trial Division, June 5, 2002; Docket: T-2395-00/Neutral citation: 2002 FCT 645.

[125] *New Brunswick Broadcasting Co.* v. *Nova Scotia* [1993] 1 S.C.R. 319, p. 385.

[126] *Supra*, note 124, paragraph 43.

[127] *Ibid.* at paragraph 49.

The Court therefore dismissed arguments based on the constitutional privileges of the House of Commons.

With respect to rights and obligations under the OLA that the House of Commons might have breached, the Federal Court focussed exclusively on the delivery of services by third parties under section 25. Although it reproduced arguments advanced by the applicant and the Commissioner related to section 4 (proceedings in Parliament) of the OLA and to various constitutional provisions relevant to the use of official languages in Parliament and in services available from federal government institutions, the Court offered no analysis of its own. As to third party delivery of services, it found that the audio-visual signals supplied to CPAC for distribution to BDUs brought CPAC within the terms of section 25. The Court then stated:

> *"Section 25 of the Act requires that every federal institution, and the House is defined as a federal institution by the Act, must, if it uses another person or organization to deliver services that are required to be provided in both official languages, ensure that the person or organization providing such service does so in both official languages. That has not happened in this case since CPAC, in its agreement with the House, did not undertake to ensure that its distribution contracts with various BDUs would guarantee that CPAC would be broadcast in both official languages."*[128]

As a result, the Court found that the House was obliged to ensure that the eventual broadcast of its proceedings (already made available with three audio signals to CPAC) be in both official languages in order to respect the language rights of members of the public. It therefore ordered that the House take the necessary steps to bring its practices into compliance with section 25 of the OLA within one year from the date of its decision. An appeal from this decision has been filed.

It is important to note that the Federal Court of Appeal has also authorized the intervention of Mauril Bélanger, member of Parliament for the riding of Ottawa-Vanier. Mr. Bélanger also chairs the House of Commons standing Committee on Official Languages, which oversees the application of the *Official Languages Act* and regulations and policies arising thereunder. By virtue of its mandate the Committee undertook to study and hear witnesses relevant to the issues raised by Mr. Quigley in his action before the Federal Court. It published a report in this regard in May of 2001. In light of his knowledge and past experience in Parliament, Mr. Bélanger has been joined as an intervener for the purposes of presenting arguments that focus on the constitutional obligations of the House of Commons under section 133 of the *Constitution Act, 1867*,

[128] *Id.* at paragraph 55. The presiding judge suggested that one way the House could respect its linguistic obligations under section 25 would be to negotiate a contractual clause with CPAC that would regulate the latter's relationship with BDUs: "By way of example, in the contract between the Speaker of the House and CPAC, if CPAC undertook to negotiate in its agreements with BDUs that the latter would broadcast CPAC programming in both official languages, then the problem facing the applicant would be avoided." See paragraph 56

as well as the relevance of the unwritten constitutional principle of the protection of minorities to the resolution of issues raised on appeal.

5.2 Bilingualism in the RCMP

SAANB v. *Canada*

Legal action has been undertaken by the Société des Acadiens et Acadiennes du Nouveau-Brunswick (SAANB) to contest the validity of decisions made by the RCMP regarding official language requirements attached to various positions within its "J" Division situated in New Brunswick.

By way of background, the RCMP operates as a police force for the general administration of justice within New Brunswick and for the enforcement of laws within its territory. Federal-provincial agreements for the use of the RCMP as a provincial police force are provided for under statutes adopted in both jurisdictions. In addition to an agreement in that regard with New Brunswick, provincial legislation provides that a member of the RCMP acting on behalf of the province has all the statutory powers, authority, privileges, rights and immunities as a constable or peace officer under provincial statutory provisions.

The dispute giving rise to legal action by the SAANB came about as a result of an administrative reorganization of RCMP Divisions in the Atlantic provinces designed to reduce the overall number of administrative positions. During the reorganization it was recognized that an adequate level of bilingualism was necessary in the new administrative framework for the Atlantic region to ensure that members in "J" Division could continue to work in the official language of their choice. However, consultations on an appropriate level of institutional bilingualism revealed a perception in three other Divisions affected by the reorganization that unilingual officers would be unfairly disadvantaged with respect to promotions to regional administrative positions. Further inquiries by an internal committee led to the conclusion that "J" Division had perhaps been overly zealous in the past regarding language requirements it imposed on various positions. In light of its finding, the committee recommended that the RCMP review all administrative and operational positions to determine what bilingual requirements were in fact required. Accordingly, the RCMP engaged an outside contractor and gave him the mandate to review RCMP operations to determine necessary levels of bilingualism, as a function of requirements imposed by the *Official Languages Act* of Canada and relevant regulations of Treasury Board.

The SAANB alleges that the consultant's report unjustifiably recommends the reduction of language requirements imposed in the past on numerous policing positions within "J" Division. This is particularly true, claims the SAANB, with respect to the recommendation to reduce requirements relevant to speaking abilities in the other official language for the vast majority of law enforcement positions. In legal action commenced

before the Federal Court of Canada,[129] it argues that the RCMP is obliged to respect the principle set out in section 16.1 of the *Canadian Charter of Rights and Freedoms* when defining the mandate of the consultant hired to assess its official language obligations. That section declares that the "English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges..." The SAANB claims that at no time in the definition of the mandate of the consultant, in the execution of that mandate, or in subsequent decisions based on the report of the consultant, was the principle of equality of linguistic communities in section 16.1 of the *Charter* considered, let alone respected. The SAANB also points out that the right of members of the public in New Brunswick to communicate with, and receive available services from any office of an institution of the provincial government, guaranteed in subsection 20(2) of the *Charter*, is not in any way qualified by a notion of significant demand. As a result, it argues, any recommendations or decisions to reduce bilingual requirements for policing positions in New Brunswick based on a perception or evaluation of significant demand for minority language services are constitutionally defective.

In addition to the claim that the RCMP has violated ss. 16.1 and 20(2) of the *Charter,* the SAANB argues that the reduction of bilingual requirements with respect to speaking ability in the minority official language is inconsistent with the principle set out in subsection 16(3) of the *Charter*, which declares that nothing in the *Charter* limits the authority of Parliament (or provincial legislatures) to advance the equality of status and use of English and French. In its view, any lowering of language requirements would be contrary to the commitment to advance official language equality. Moreover, reasons the SAANB, the unwritten constitutional principles of respect for minorities and the rule of law require the RCMP to ensure that its policies fully reflect the unique constitutional obligations of New Brunswick (under ss. 16.1 and 20(2) of the *Charter*), especially when it operates as a provincial police force.

In light all the above reasons, the SAANB seeks a declaration from the Federal Court that the Federal Government and the RCMP must take into account, when determining bilingual requirements within "J" Division, all constitutional obligations under ss. 16.1, 16(3) and 20(2) of the *Charter*. It also seeks a declaration to the effect that the mandate conferred on the outside consultant and his report (in particular as it applies to

[129] *La Société des Acadiens et Acadiennes du Nouveau-Brunswick c. Sa Majesté la Reine et Gendarmerie Royale du Canada; Federal Court of Canada* (Trial Division), File no. T-1996-01. Legal action was first commenced in the Court of Queen's Bench of New Brunswick, which determined that the Federal Court had exclusive jurisdiction to grant the relief sought pursuant to subsection 18(1) of the *Federal Court Act*. It found that the RCMP was a "federal board, commission or tribunal" within the meaning of section 2 of the *Federal Court Act*, and that such status was not altered when the RCMP performed policing functions for a province. As the plaintiff sought both declaratory relief and specific court orders against the RCMP directing it to halt implementation of the consultant's report, reinstate previous linguistic requirements, and respect its obligations under ss. 16, 16.1 and 20 of the *Charter*, the nature of the remedies sought fell squarely within the terms of ss. 18(1) of the *Federal Court Act*. The Court of Queen's Bench pointed to Supreme Court jurisprudence to the effect that jurisdiction to grant a remedy under ss. 24(1) of the *Charter* must emanate from a source other than the *Charter* itself. In the case at bar that was ss. 18(1) of the *Federal Court Act*. For the decision on the jurisdictional issue see: *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc.* v. *Canada (Royal Canadian Mounted Police)*; New Brunswick Court of Queen's Bench, May 7, 2001; [2001] N.B.J. No. 390.

"J" Division) violate the constitutional obligations under these *Charter* provisions. Furthermore, the SAANB requests the court to issue orders nullifying all measures taken by the RCMP that relate to implementing within "J" Division the report's recommendations, and requiring the re-establishment of language requirements regarding speaking abilities in the minority official language that existed before the preparation of the consultant's report.

The Federal Government denies a number of factual allegations made by the SAANB and proposes to establish various other facts relevant to the impact on official languages of the administrative reorganization undertaken by the RCMP. It also argues that any assessment of language requirements done by the RCMP constitutes an administrative process that conforms completely to policies established by Treasury Board. As such, the assessment of language requirements does not raise any question of law that needs to be resolved. Policies of Treasury Board also reflect the statutory requirements of the *Official Languages Act* of Canada and constitutional obligations under ss. 20(1) of the *Charter of Rights and Freedoms*. The Federal Government argues further that the RCMP is not an institution of the legislature or government of New Brunswick and is not, therefore, subject to any constitutional obligations found in ss. 16.1 or 20(2) of the *Charter*. As to ss. 16(3) of the *Charter,* it takes the view that the provisions therein merely confirm the authority of Parliament (or a provincial legislature) to enact measures that advance official language equality.

5.3 Access to Employment Services under a Federal/Provincial Agreement

Lavigne v. *Canada*

The Federal Court has recently considered an alleged breach of language rights (with respect to government services) arising under a Canada/Quebec agreement relevant to labour market.[130] Pursuant to the *Canada-Quebec Labour Market Agreement in Principle* (the Labour Market Agreement) and the *Canada-Quebec Labour Market Implementation Agreement* (LMIA), the federal government withdrew from a wide range of activities related to labour market training in favour of Quebec's delivery and administration of similar services. Quebec's labour market programs are related to provincial legislative provisions found in *An Act respecting the Ministère de l'Emploi et de la Solidarité and establishing the Commission des partenaires du marché du travail*.[131] In the process of negotiating the terms of the Labour Market Agreement (LMA), ministerial letters were exchanged between the two levels of government defining the nature and extent of services that would be made available in English, the substance of which was

[130] *Lavigne* v. *Canada* [2002] 2 F.C. 164.

[131] R.S.Q. c. M-15.001. As a further source of Quebec's activities in this area, the provincial government points to: *An Act respecting income support, employment assistance and social solidarity*, R.S.Q. c. S-32.001.

ultimately reflected in the LMIA. The English-language services so described were said by the relevant Quebec Minister to exist already with respect to current employment programs in the province. The federal Minister confirmed the bilingual nature of these services in the following words:

> *"With respect to the language of service and delivery for the active employment measures covered by the agreement, your government will make these services and measures available in English in accordance with the same parameters as currently apply to employment, income security and related active measures. Thus, individuals will be served in English, both verbally and in writing, as soon as they so request. Computer information will be made available in English, on a different screen from the French version. Pamphlets, brochures and the like will be made available in English and readily accessible on separate displays. Voice mail messages will provide for a number that can be dialled to continue the menu in English."*[132]

It was also confirmed that reasonable access to active employment measures such as courses and training sessions would be made available in English, and that those functions of the National Employment Service (NES) for which the province assumed responsibility would be available in both English and French.

In June of 1999, a complaint was made to the Commissioner of Official Languages (COL) that the Labour Market Agreement should be subject to Part IV of the *Official Languages Act* and that any suggestion otherwise (allegedly contained in the exchange of ministerial letters) was *ultra vires*. The complainant also alleged that the LMA violated provisions in the *Canadian Charter of Rights and Freedoms*, notably section 20 regarding federal government services. The complainant did not allege any specific denial of access to services in English he might have suffered with respect to the employment programs offered and administered by Quebec. Following its review of the allegations, the COL decided to discontinue any further investigation and so informed the complainant. In a letter to him, the COL stated:

> *"...[I]n the context surrounding the Canada-Quebec Agreement, Part IV of the* OLA *concerning the language of communications and services to the public did not apply once the agreement was in place, save for the national employment service which remains a federal responsibility pursuant to the* Employment Insurance Act*. The federal government has the discretion, in compliance with the Canadian Constitution, to withdraw from the provision of services to the benefit of a province which, within its own jurisdiction, undertook to provide these services."*[133]

[132] For this and other extracts from the minister's letter see the Federal Court decision, *supra*, note 152, at p. 172.

[133] See Federal Court decision, *ibid.* at p. 174.

The COL sent to the complainant a report in which she concluded that, in its view, the LMA preserved any language rights regarding the services in question under the OLA and regulations that existed prior to the agreement being signed and implemented. Dissatisfied with the decision, the complainant initiated action in the Federal Court against Human Resources Development Canada for a remedy pursuant to section 77 of the OLA.

Central to the applicants case before the Federal Court was his allegation that section 25 of the OLA (services offered by a third party) applied to the LMA, in the sense that the federal government had delegated its administrative authority to a provincial agency to act on its behalf. In this regard, the Federal Court determined that the applicant had misconstrued the underlying constitutional reality. It found that Emploi-Quebec did not carry out any of its functions pursuant to a mandate received from the LMA, the Canada Employment Insurance Commission (CEIC) or the Minister of Human Resources Canada. Emploi-Quebec operated under provincial statutory provisions the constitutional validity of which was unassailable. While the federal government also had undoubted legislative authority to enact the Employment Insurance Act (EIA), provisions of which underpin the LMA, this did not negate concurrent provincial authority over the same subject matter. In the case at bar, reasoned the Court, the federal government had simply withdrawn from a field of concurrent jurisdiction and, in lieu of carrying out certain functions, had funded Emploi-Quebec under the terms of the LMIA.

The Federal Court also pointed out that the use of the federal spending power in an area of provincial jurisdiction is widespread, though controversial. Nevertheless, its use "...through conditional grants or otherwise, does not transform provincial legislation into a federal one or make a provincial government recipient of federal funds, a federal institution for the purpose of the OLA. To accept such propositions would subvert Canadian federalism as we know it. It would annihilate provincial jurisdiction."[134] For all of these reasons, the applicant's arguments concerning the applicability of section 25 were rejected.

The Federal Court also addressed the allegation made by the applicant that the federal Minister in his exchange of letters with his Quebec counterpart had asserted that the OLA did not apply to the LMIA. It pointed out that the federal Minister was clearly concerned at the time to ensure that provisions in the EIA regarding services in both official languages would be respected.[135] Ultimately this was reflected in provisions of the LMIA setting out the scope of services in English that would be provided.

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[134] *Id.* at pp. 199-200.

[135] In this regard, the Court declared: "The federal Minister, in his response to the Quebec Minister, did not decide that the OLA did not apply to the LMIA. What he did was describe the services to be provided by Quebec and concluded that such services satisfied Canada's legislative requirements. In saying this, he was referring to paragraph 57(1)(d.1) of the EIA which provides that the employment benefits and support measures under Part II of the EIA must be provided in either official language where there is a significant demand for that assistance in that language." *Ibid.* at p. 201.

As to the arguments based on section 20 of the *Canadian Charter of Rights and Freedoms*, the Court found that there was an insufficient factual basis to support any declaration of constitutional invalidity. The Court pointed out that the applicant had not alleged any breach by Quebec of language obligations it assumed under the LMIA. Moreover, the *Charter* arguments of the applicant were to a large extent founded upon the assertion that the federal Minister had delegated his authority to Quebec, an assertion that the Federal Court rejected. Mr. Lavigne has appealed this decision to the Federal Court of Appeal.

5.4 Language requirements for positions in the federal public service

Official language requirements for bilingual positions in the federal Public Service are related to both a linguistic profile and a designation of whether that profile is imperative or non-imperative. A linguistic profile is composed of three types of linguistic skills: reading, writing and oral interaction. To each skill a level of ability is assigned represented by the letters A, B, C, with A being the lowest and C being the highest levels. (With respect to the linguistic evaluation of individual employees, the same three levels are applied but with the addition of the letter E, which means an exemption from future evaluation is accorded in light of an individual's demonstrated superior performance in any skills category.) A position which is designated imperative means that an individual must meet its language requirements before appointment; whereas a non-imperative designation allows the position to be filled by a candidate who undertakes to pursue language training in order to meet the requirements at a later date.

Language requirements in the federal Public Service are necessary in order to respect obligations of federal government institutions to communicate with, and provide services to, the Canadian public in both English and French; as well as to respect the right of public servants to work in either official language (Parts IV and V of the *Official Languages Act*). However, the application of language requirements is subject to the statutory rule set down in section 91 of the *Official Languages Act*, which reads:

> *"Nothing in Part IV or V authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the function for which the staffing action is undertaken."*

Two Federal Court's decisions involving the same employee have dealt with the meaning of this section in the context of legal action taken under ss. 77(1) and (4), which allows a person to apply to the Federal Court for a remedy where a complaint to the Commissioner has been made with respect to (amongst other things) any right or duty under section 91.

REMEDY AFTER IMPROPER DESIGNATION

Rogers v. *Canada (Correctional Service)*

After 23 years in the Public Service, Mr. Rogers was declared surplus following the abolition of the position he then occupied at the Royal Military College in Kingston, Ontario. Surplus status made him subject to the Treasury Board Work Force Adjustment Directive (WFAD), which gave him priority for appointment to any available position at the same level and the right to at least one reasonable job offer. Surplus status also made him eligible for up to two years retraining to acquire the necessary qualifications for available positions, including language training for non-imperative bilingual positions. However, a surplus employee appointed to an imperative bilingual position was required as a prerequisite to possess (as were others) the level of language skills applied to the position. All efforts by Mr. Rogers to find a suitable position proved unsuccessful, in part because he lacked the language skills necessary to meet the imperative requirements attached to positions of interest to him, and he was ultimately informed that he would be placed on unpaid surplus status. To avoid that eventuality, Mr. Rogers accepted (reluctantly) the terms of an Early Retirement Incentive plan then being offered by the federal government. He subsequently sought court remedies against two different departments that had, in his view, caused him to suffer financial loss as a result of unreasonable language requirements imperatively applied to positions for which he would otherwise have been qualified to compete.

The first decision issued concerns the action Mr. Rogers brought against Correctional Service Canada (CSC).[136] In the course of job searching, Mr. Rogers became aware of an AS-02 level position as Administrative Assistant to the Deputy Commissioner (Ontario) of CSC, a level for which he had been assessed qualified by the Public Service Commission (PSC). The competition poster regarding the position had identified the language requirements as “bilingual imperative” at the CCC level, although the actual work description identified the staffing mode as “bilingual non-imperative”. At the time he became aware of the position Mr. Rogers’ linguistic profile for French had been assessed as ECB. Because his tested language skills did not meet the imperative requirements of the position, PSC did not proceed with Mr. Rogers’ stated interest in the job, nor did Mr. Rogers’s direct communication with CSC result in a favourable response. He subsequently filed a complaint with the Commissioner of Official Languages and requested that CSC delay any decision about staffing the position until his complaint had been investigated and a report issued, a request that was denied.

The final report of the Commissioner found that both the linguistic profile of the position and its designation as bilingual imperative were unfounded. Amongst other things, the report determined that management at CSC had not used the objective criteria established by Treasury Board in determining the language requirements of the

[136] *Rogers* v. *Canada (Correctional Service Canada)*, [2001] 2 F.C. 586. Docket: T-195-97.

position, which should have been assessed at CBC. Furthermore, there was no written record of the rationale for staffing the position in the imperative mode, nor any evidence that the objective criteria of Treasury Board regarding this issue had been used.

In assessing Mr. Rogers' application for a remedy against CSC, the Federal Court first considered whether the Commissioner's report regarding his complaint could be used as evidence supporting his claim. While the Court acknowledged that reports of the Commissioner are not binding, it emphasized that they were relevant in dealing with an application for a court remedy under the Act:

> *"In my opinion, the nature of the Act as quasi-constitutional legislation means that a report of the Commissioner, after the conduct of an investigation, can be accepted as evidence that a breach of the Act has occurred. The findings and conclusion of the Commission were not seriously challenged by the respondent. Accordingly, I confirm the findings of the Commission that the staffing mode for the position in question should have been bilingual non-imperative, with a linguistic profile of CBC. I find that the improper designation for the position breached the applicant's language rights."*[137]

The only matter remaining, therefore, was the determination of the appropriate remedy to award. In this regard, the Court pointed out that efforts to characterize the effect of the improper designation on Mr. Rogers as only a "loss of opportunity" (which does not give rise to compensation) were unfounded. Relying on a previous Federal Court of Appeal decision,[138] the presiding judge found "that there does not need to be a probable result that the wrong is connected to the loss, only a serious possibility that it is connected...[U]ncertainty as to the degree of the connection goes to the assessment of damages, and not to whether there is a connection between the wrong and the loss, provided that the connection meets the threshold of "serious possibility"."[139] On the facts of the case, the Court found that there was a serious possibility that Mr. Rogers would have been appointed to the position at CSC, that this was more that just a "loss of opportunity", and that the loss to Mr. Rogers demanded compensation. However, since there was insufficient evidence before the Court to allow for a meaningful assessment of damages, the presiding judge ordered that an assessment reference be conducted at some future date pursuant to Federal Court Rules, 1998 [SOR/98-106].

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[137] *Ibid.* at page 602.

[138] *Canada (Attorney General)* v. *Morgan,* [1992] 2 F.C. 401.

[139] *Supra*, note 136, p. 605.

OBJECTIVE CONSIDERATION FOR DESIGNATION

Rogers v. *Canada (National Defence)*

Mr. Rogers brought a further application for a remedy with respect to a staffing decision made by the Department of National Defence.[140] The position in which Mr. Rogers expressed interest was administrative in nature (AS-02) and located at the Royal Military College in Kingston. Its linguistic profile was CCC and was designated as bilingual imperative. Mr Rogers' exclusion from consideration for appointment to the position, based on his lack of the requisite linguistic skills, prompted him to file a second complaint with the Commissioner, claiming that the linguistic profile of the position and its imperative staffing were unjustified. The final report of the Commissioner found that both the linguistic profile and the imperative mode of staffing were based upon objective considerations relevant to the functions associated with the position. For example, the report found that the position in question (administrative officer of the Land Forces Technical Staff Course) required the incumbent to liaise with English and French speaking external agencies and institutions, to communicate orally and in writing with guest speakers and visitors, and supervise course materials for students in both English and French. In light of these responsibilities, the report concluded that it was necessary for anyone occupying the position to have knowledge of both official languages at the CCC level. These factors were also found to be relevant to the imperative mode of staffing, not to mention the immediate operational needs of the Royal Military College in dealing with the arrival of Francophone cadets, professors and staff from the military college in St-Jean, Quebec, which was slated for closure at the time.

In dealing with Mr. Rogers' application for a court remedy, which was brought despite the unfavourable findings in the Commissioner's report, the Federal Court emphasized that its only concern was to examine the objectivity of the linguistic requirements and the reasons for imperative staffing. It characterized much of Mr. Rogers' evidence and submissions as being related to allegedly unjust treatment by his employer, to the attitudes of colleagues towards him, to opinions about his level of French, to job performance evaluation by previous employers, to the manner in which interviews were conducted and various allegations of administrative errors of no great significance, all of which are extraneous to the issues a court must address under section 91 of the *Official Languages Act.* The Court found that any judicial modification of language requirements for breach of section 91 can only be made if there is "no evidentiary basis to the designation, ...the designation is unreasonable, or...the language requirements are imposed frivolously or arbitrarily. If there is a factual basis for the designation, the Court should not intervene."[141]

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[140] *Rogers* v. *Canada (Department of National Defence),* Federal Court Trial Division, February 16, 2001; Docket: T-2712-95.

[141] *Ibid.* at paragraph 27.

Since the applicant contested only the oral component of the linguistic profile, the Court examined in some detail the characteristics of C level skills for oral interaction which were set out in a document published by the PSC ("Determining the Linguistic Profile for Bilingual Positions"). It found that the duties of the administrative officer in question, as well as the number of Francophone students enrolled, reasonably required level C oral skills in the officer's second official language. It could not be said that the level C profile was frivolous or arbitrarily imposed.

As to the imperative mode of staffing, the Court made reference to the Treasury Board's Manual on Official Languages, in particular two criteria relevant to staffing a bilingual position on an imperative basis. First, the Manual provides that "[i]mperative staffing must normally be used for appointments or deployments to indispensable bilingual positions for providing service to the public or to employees in both official languages." Second, "[i]mperative staffing must normally be used for appointments or deployments to bilingual positions having significant operational impact." On the evidence heard, the Court concluded that it was "...not unreasonable to characterize the position as being an important point of contact with the public (external organizations and speakers) or with employees, and in this case, also students, including Francophone students."[142] The imperative staffing was therefore objectively justified and not contrary to the provisions of section 91.

Although Mr. Rogers stressed the fact that the investigator assigned to his file initially took the view that imperative staffing was not required, due to the past employment of a unilingual anglophone in the administrative position, the Court pointed out that this preliminary conclusion had been overruled by supervisors at the Commission. The final report issued by the Commissioner upheld the imperative staffing mode and dismissed the complaint. The Court also stressed that while it was in no way bound by the findings contained in the Commissioner's final report, it agreed with those findings based on the evidence it had heard.[143]

The Court's conclusion that the imperative staffing was objectively justified was not adversely affected by the lack of documentation prepared by the Royal Military College. However, the Court noted that the Treasury Board has recommended that "the rationale to impose imperative staffing taken at each stage of the process should be documented with particular care"[144] While the Court found that this would have been preferable in the case at bar, it concluded that the evidence in no way suggested that the decision to staff the position on an imperative basis was taken for frivolous reasons or imposed arbitrarily.

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[142] *Id.* at paragraph 39.

[143] The Court also took issue with the view expressed by the judge in the first Rogers decision involving Correctional Service Canada that a report issued by the OCOL "can be accepted as evidence that a breach of the Act has occurred." The Court here stressed that any conclusion that a breach of the *Act* has occurred "must be reached after the judge has heard and weighed the evidence advanced by both parties." *Ibid.* at paragraph 40.

[144] *Id.* at paragraphs 41-42.

DESIGNATION BASED ON NEEDS IN TERMS OF PUBLIC SERVICES

Marchessault v. *Canada Post*

In a recent decision involving a staffing decision at Canada Post,[145] the Federal Court re-affirmed that language requirements cannot be imposed frivolously or arbitrarily, but must be reached on a factual basis. The specific matter before the Court involved a 1992 decision of Canada Post to require that persons appointed to the position of postmaster in the town of Coderre, Saskatchewan be bilingual on an imperative basis. This decision was contested at the time and formed the basis of a complaint to the Commissioner of Official Languages by Kevin Marchessault, who had been occupying the position on a temporary basis. Upon investigation of the complaint, the Commissioner determined that the imperative bilingual designation had been made in order to meet requirements set out in government regulations on communications with and services to the public. Those regulations provide that services must be provided in both official languages within any Census Subdivision (CSD) that has fewer than 200 persons and where the official minority language population constitutes at least 30% of the population. The 1991 census data indicated that the population of the CSD of Coderre consisted of 55 persons, of whom 20 (or 33.7%, as calculated by Canada Post) had declared French to be their first official language. The Commissioner therefore concluded that the decision to designate the position of postmaster in Coderre as bilingual on an imperative basis had been adequately justified by Canada Post.

Though dissatisfied with the decision to reject his complaint, Mr. Marchessault did not formally engage any review procedures provided for in the *Official Languages Act*. However, seven years later he complained again to the Commissioner that the 1992 decision of Post Canada was unjustified. He took the position that the proper census data regarding language of service to the public at the time dated from 1986. As the 1986 census data indicated fewer Francophones than the data from 1991, he maintained that the position of postmaster should never have been designated as bilingual. In June of 2000, the Commissioner wrote again to Mr. Marchessault rejecting his claim that the 1992 decision was unjustified.

While it was argued before the Federal Court that the prescription period of 60 days under the Act for seeking review of a Commission decision had expired long ago, and there was no good reason to extend it, the Federal Court took the view that the "courtesy" response of the Commissioner to Mr. Marchessault in June of 2000 opened an opportunity to finally put to rest the questions raised by the complaint. First, as regards statutory provisions that apply to the case, the Court indicated that ss. 22(b) *Act* clearly establishes the duty of federal institutions to provide services in either official language anywhere in Canada where a significant demand exists. Leaving aside the

[145] *Kevin Marchessault* v. *Canada Post Corporation*, Federal Court Trial Division, November 22, 2002; Docket: T-1463-00; Neutral Citation: 2002 FCT 1202.

further definition of significant demand found in regulations under the *Act*, the Court determined that Canada Post had in fact used the 1991 census data to assess the demand for French-language services in Coderre. The Court found that a minority population of 33.8% (based on the 1991 census) was more than adequate to meet the requirements of significant demand within the meaning of ss. 22(b) of the *Act*. The decision of Canada Post to require a bilingual postmaster in Coderre was thus based on needs in terms of public services and on a reasonable assessment of significant demand.

The Court also acknowledged the difference of view regarding which census data to use in determining the level of demand for French-language services in Coderre. It ruled, however, that at the time Canada Post made its decision to classify the position in question as bilingual imperative, the Regulations defining significant demand were not formally in effect. As a result, provisions in the Regulations that govern which census data (1986 or 1991) will apply to decisions regarding significant demand could not be said to have any effect on the resolution of the dispute before the Court. Even assuming that the Regulations applied to the assessment of significant demand in Coderre when Canada Post made its decision, the Court ruled that the crucial date for determining the number of French-speaking persons was the time of release of the census data, as opposed to the date of formal publication. As the 1991 data was released in September of 1992 and the decision of Canada Post with respect to the position of postmaster in Coderre was taken in December of 1992, the Court rejected the claim that the 1986 census applied. Accordingly, the Court found that Canada Post had not failed to comply with the *Act* in reaching its decision to classify the position of postmaster in Coderre as bilingual. Mr. Marchessault has appealed this decision to the Federal Court of Appeal.

VI. LANGUAGE RIGHTS AND PROVINCIAL/ TERRITORIAL LAW

6.1 Bilingual signs in Quebec

A.G. of Quebec v. Les Entreprises W.F.H. ltée

The last language rights report reviewed a decision of the Quebec Superior Court that confirmed the constitutional validity of a Quebec statutory rule requiring the net predominance of French in public signage. The constitutional issue was raised in a prosecution involving two English-speaking antique dealers who ran a shop in the village of Lac-Brôme in the Eastern Townships. The shop name ("Lyon and the Walrus - La Lionne et le Morse) and type of business being conducted were announced on a bilingual sign that gave equal prominence to both the English and French languages. As this was in breach of the statutory rule requiring the net predominance of French, charges were laid.

The matter had come before the Superior Court on appeal from a lower court decision declaring the statutory provisions in question to be contrary to freedom of expression as protected under section 2 of the *Canadian Charter of Rights and Freedoms*.[146] The Court of Appeal has now upheld the decision of the Quebec Superior Court.[147]

The issues before the Court of Appeal are best situated by recalling statements made by the Supreme Court of Canada in 1988 when it considered the constitutional validity of the original provisions in the *Charter of the French Language* of Quebec requiring the exclusive use of French in public signage.[148] The prohibition of other languages on public signs was determined at that time to be contrary to the constitutional protection of freedom of expression. However, the Supreme Court took the view that the protection and promotion of French in Quebec was a legitimate government objective that could very well justify the mandatory concurrent use of French:

> *"In the opinion of this Court it has not been demonstrated that the prohibition of the use of any language other than French...is necessary to the defence and enhancement of the status of the French language in Quebec or that it is proportionate to that legislative purpose. Since the evidence put to us by the government showed that the predominance of the French language was not reflected in the "visage linguistique" of Quebec, the governmental response could well have been tailored to meet that specific problem and to impair freedom of expression minimally. Thus, whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "visage linguistique" in Quebec and therefore justified under the Quebec* Charter *and the* Canadian Charter*, requiring the exclusive use of French was not so justified. French could be required in addition to any other language or it could be required to have greater visibility than that accorded to other languages. Such measures would ensure that the "visage linguistique" reflected the demography of Quebec: the predominant language is French."*[149]

In line with this opinion, the *Charter of the French Language* (section 58) was eventually amended to allow the concurrent use of another language provided that the French language portion of a public sign, poster or commercial advertising was

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[146] See LANGUAGE RIGHTS 1999-2000, supra, note 1, at pp. 76-79. **N.B**. The Superior Court (which had sat on appeal from a trial level decision) was erroneously identified in our last report as the Court of Appeal of Quebec.

[147] *Attorney General of Quebec* v. *Les Entreprises W.F.H. Itée*, Court of Appeal of Quebec, October 24, 2001; [2001] J.Q. no 5021; JEL/2001-512.

[148] *Ford* v. *Quebec (A.G.)*, [1988] 2 S.C.R. 712.

[149] *Ibid.* at pp. 779-780.

"markedly predominant." Regulations were also adopted that define the latter expression as ensuring for the French text a much greater visual impact than the other language used. The regulations also establish that a much greater visual impact is achieved if the space occupied by the French text is twice as large as that accorded to the other language used, and if the same ratio of two to one is reflected in the size of the French text itself.

In prosecuting breaches of the rules regarding the language of public signage, the Attorney General of Quebec took the position that it is not obliged to present fresh evidence regarding the reasonable nature of the mandatory concurrent use of French, as well as its marked predominance. As this was established on the evidence considered by the Supreme Court of Canada in 1988, the conclusions reached by that court should be applied until such time as they are shown by a party so claiming to no longer be valid. The Court of Appeal has endorsed this view:

> *"[our translation] The appellant thus has the burden of showing that the situation disclosed by the documents considered by the Supreme Court in 1998 had so changed that the measure could no longer be justified in 1999. It presented certain evidence which was not accepted by the Superior Court judge. It declined the invitation to put forward complete evidence, considering that the burden still lay with the Attorney General."*[150]

While the appellant submitted a motion before the Court of Appeal to be allowed to submit further evidence relevant to current linguistic realities in Quebec, the Court ruled that it was too late to introduce elements to the case that were not present in the lower courts, especially since it had been the appellant who had defined the nature of the legal issues involved.

The Court of Appeal also felt that the opinion of the Supreme Court in 1988 regarding the then hypothetical concurrent use of French in public signage, though not strictly necessary to its decision about mandatory unilingualism, was nevertheless intended to be binding in future cases:

> *"[our translation] I conclude that in the case at bar the Supreme Court's* OBITER DICTUM *in Ford has the same weight as if it were part of the* RATIO DECIDENDI *and is binding on the Court of Appeal. It seems clear from analysis of* Ford *and* Devine *that the Supreme Court was measuring the scope of its conclusions on the delicate question of signage in Quebec and wished to resolve that question. The formulation of the clear predominance rule is certainly not an isolated phrase the repercussions of which were not considered."*[151]

[150] *Supra*, note 147, at paragraph 61.

[151] *Ibid.* at paragraph 58.

The Court of Appeal therefore applied past conclusions of the Supreme Court of Canada to the effect that the language policies underlying the *Charter of the French Language* were important and legitimate, and that there was a rational link between the need to protect the French language and a requirement that the predominance of French be reflected in public signage. It also reaffirmed as still valid the over-all assessment of the Supreme Court in 1988 that the French language in Quebec was vulnerable, even if progress had since been made in enhancing the use of French in the provincial economy and in slowing the linguistic assimilation of immigrants to Quebec into the English-speaking minority

The Court of Appeal also addressed the issue of whether equality rights under the Canadian *Charter* (section 15) or human rights legislation in Quebec (*Charter of Human Rights and Freedoms*) would be violated by legally requiring the concurrent use of French in public signage. The Supreme Court of Canada had considered in 1988 an alleged violation of equality rights by provisions in the *Charter of the French Language* (sections 57 at 89) that required the concurrent use of French in employment forms, invoices, order forms, receipts and quittances. In answering this question, the Supreme Court had applied the same reasoning as it had when assessing the reasonable nature (under section 1 of the *Canadian Charter*) of a mandatory concurrent use of French in public signage. It was this reasoning of the Supreme Court that the Quebec Court of Appeal adopted as its point of departure:

> *"The only question that remains to be answered is whether the application of s. 1 would be any different if there were a* prima facie *breach of s. 15 in this case. More specifically, the question becomes whether the proportionality test laid down in* R. *v.* Oakes*, [1986] 1 S.C.R. 103, and restated by Dickson C.J. in* R. *v.* Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, would yield a different result in this case if the* prima facie *breach in issue were a breach of the rights guaranteed under s. 15. We have already determined that the requirement of joint use of French is rationally connected to the legislature's pressing and substantial concern to ensure that the "visage linguistique" of Quebec reflects the predominance of the French language. Does the requirement impair as little as possible the right to equality before and under the law and the right to equal protection and benefit of the law without discrimination? Is it designed not to trench on the right so severely that the legislative objective is nevertheless outweighed by the abridgment of rights? By ensuring that non-francophones can draw up application forms and quittances in any language of their choice along with French, s. 57, read together with 89, creates, at most a minimal impairment of equality rights. Although, as the appellant contended, the requirement of joint use of French might create*

AN ADDITIONAL BURDEN FOR NON-FRANCOPHONE MERCHANTS AND SHOPKEEPERS, THERE IS NOTHING WHICH IMPAIRS THEIR ABILITY TO USE ANOTHER LANGUAGE EQUALLY."[152]

While the Court of Appeal considered this finding of the Supreme Court to be conclusive as regards the impact on equality of the mandatory concurrent use and marked predominance of French on public signs and in commercial advertising, it nevertheless considered briefly the merits of any claim of discrimination:

"[OUR TRANSLATION] IT IS CLEAR THAT S. 58 IMPOSES DIFFERENT TREATMENT ON A FRANCOPHONE AND A PERSON WITH A DIFFERENT MOTHER TONGUE. A FRANCOPHONE CAN SIMPLY DO HIS OR HER ADVERTISING EXCLUSIVELY IN HIS OR HER MOTHER TONGUE, WHILE A PERSON SPEAKING ANOTHER LANGUAGE MUST ADD TO THE TEXT IN HIS OR HER LANGUAGE A CLEARLY PREDOMINANT FRENCH VERSION. HOWEVER, LAW CLEARLY ESTABLISHES THAT A DIFFERENCE IN TREATMENT IS NOT NECESSARILY SYNONYMOUS WITH PROHIBITED DISCRIMINATION. AS LAID DOWN IN PARA. 83 OF LAW, THE FIRST QUESTION THE COURT MUST ASK IN EACH CASE IS WHETHER THERE HAS BEEN AN INFRINGEMENT OF HUMAN DIGNITY, IN VIEW OF THE HISTORICAL, SOCIAL, POLITICAL AND LEGAL BACKGROUND IN WHICH THE ALLEGATION IS MADE."[153]

When examined from this angle, the Court of Appeal concluded that the dignity of non-Francophones had not suffered as a result of the legal requirement for the concurrent use of French in public signage and commercial advertising.

As to the argument that the unwritten constitutional principle of the protection of minorities might be invoked to place in question the validity of section 58 of the *Charter of the French Language*, the Court of Appeal offered no other analysis than to say:

"[OUR TRANSLATION] FRENCH-SPEAKING CANADIANS ARE A MAJORITY IN QUEBEC, BUT ARE GENERALLY A MINORITY ELSEWHERE IN CANADA AND IN AMERICA. A PROVISION LIKE S. 58 IS INTENDED TO PREVENT THE LINGUISTIC PROFILE OF QUEBEC CONTINUING TO CHANGE UNTIL IT NO LONGER REFLECTS THAT REALITY. THIS IS A LEGITIMATE PURPOSE WHICH IN THE PRESENT CIRCUMSTANCES DOES NOT INFRINGE EITHER THE CONSTITUTION OR THE RULE OF LAW."[154]

An application for leave to appeal this decision to the Supreme Court of Canada was dismissed on December 12, 2002 (with costs).

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[152] *Devine* v. *Quebec (A.G)*, [1988] 2 S.C.R. 790, p. 820.

[153] *Supra*, note 147, paragraph 91.

[154] *Devine* v. *Quebec (A.G)*, [1988] 2 S.C.R. 790, p. 820.

6.2 Bilingualism in the NWT

Fédération Franco-ténoise v. *Canada*

Broadly based legal action was initiated in the Federal Court of Canada in January, 2000 by the Fédération Franco-ténoise and individuals representing the Francophone community of the NWT against Her Majesty the Queen, the Commissioner of the NWT, the Speaker of the Legislative Assembly of the NWT and the Languages Commissioner of the NWT. Amongst other things, the action seeks court declarations to the effect that the Government of Canada is not fulfilling its obligations under sections 16-20 of the *Canadian Charter of Rights and Freedoms*, as well as under the unwritten constitutional principle of the protection of minorities, insofar as it has delegated its legislative authority to the NWT without ensuring that language rights will be fully respected. The plaintiffs also seek a declaration that the Government of Canada has failed to respect its commitment under Part VII of the *Official Languages Act* to enhance the vitality of the French linguistic minority community in the NWT, to support and assist its development, and to foster the full recognition and use of French in Canadian society. As against the Territorial defendants, the action seeks a declaration that all three are subject to sections 16-20 of the *Canadian Charter*, as well as being obliged to comply with the *Official Languages Act* of the NWT. The latter Act constitutes an ordinance of the NWT adopted in 1984 following agreement with the federal government to abandon a Bill in Parliament designed to introduce a regime of legislative and judicial bilingualism. The abandonment of Bill C-26 was made contingent on the enactment of the ordinance in question. Parliament subsequently amended (in 1988) the *Northwest Territories Act* so as to provide that any amendment to the Territorial ordinance known as the *Official Languages Act*, or its repeal, required the concurrence of Parliament through legislative amendment to the *Northwest Territories Act*. However, the 1988 amendments to the latter Act also stipulate that nothing in it prevents the enhancement of language rights for the English, French or Aboriginal communities without the consent of Parliament, whether by amendment to the ordinance or otherwise.

The plaintiffs also seek a declaration the members of the public have a right to services in French from the head or central offices of NWT government institutions by virtue of section 16-20 of the *Canadian Charter* and section 14 of the *Official Languages Act* of the NWT; as well as a declaration that, with respect to a list of institutions named in the action, “there is a significant demand for the use of French...or it is reasonable due to the nature of the office” under sections 16-20 of the *Canadian Charter* and the *Official Languages Act* of the NWT. In addition, the plaintiffs seek a declaration of the court to the effect that the government institutions listed in the action are required to make an “active offer” of service in French by virtue of sections 16-20 of the *Canadian Charter* and section 14 of the *Official Languages Act* of the NWT. Finally, in light of what the plaintiffs qualify as a flagrant and ongoing breach of official language obligations and

rights of the public by NWT institutions and its government, the plaintiffs seek general, special and punitive damages.

Any hearing on the merits of these claims, taken under section 17 of the *Federal Court Act*, has been delayed by objections made by the Territorial defendants to the jurisdiction of the Federal Court. In addition, the Federal Government applied to have the proceedings stayed in the Federal Court in order to allow the action to proceed in a more appropriate forum, namely, the Supreme Court of the Northwest Territories. While the Federal Court Trial Division dismissed the jurisdictional arguments of the Territorial defendants as well as the application of the Federal Government for a stay of proceedings, the Federal Court of Appeal subsequently overturned the lower court's decision.[155]

In considering the position of the Territorial defendants, the Federal Court of Appeal reviewed the status of the Northwest Territories from a constitutional, legislative and jurisprudential point of view. It concluded that the Territorial defendants could not be said to fall within the notion of the federal Crown, which is "an expression used to refer to the executive power, which in practice is exercised by the prime minister and his cabinet. The expression does not cover the legislative power; nor does it cover the judicial power."[156] This notion is key to determining the scope of the Federal Court's concurrent jurisdiction under section 17 in cases where relief is claimed against the Crown. The Court could see no justification to viewing the Speaker of the Legislative Assembly or the Territorial Commissioner of Official Languages as part and parcel of the federal executive power. It also declined to characterize the Commissioner of the NWT, who is appointed by the federal Crown, as being a federal employee for the purposes of determining the Court's jurisdiction under section 17 of the *Federal Court Act*:

> *"To argue that he is an employee of the federal Crown would be contrary to the letter and spirit of the* Northwest Territories Act*, and contrary to the cases that have held that, in exercising delegated powers of responsible government, the Commissioner of the Territories enjoys full autonomy."*[157]

The Court felt that it would be incongruous to ignore the implementation of responsible government in the NWT and "...to make the Federal Court, in the Territories, a sort of instrument of federal judicial trusteeship over activities of a local nature in the Territories when the federal executive and legislative trusteeships have for all practical purposes disappeared."[158] It further pointed out that there existed a superior court in the

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[155] For the trial level decision see: *Fédération Franco-ténoise* v. *Canada,* [2001] 1 F.C. 241. For the decision of the Federal Court of Appeal see: [2002] 3 F.C. 641.

[156] *Ibid.* at page 673.

[157] *Id.* at page 675.

[158] *Id.* at page 677.

NWT, analogous to those that exist at the provincial level, which was capable of ensuring the proper implementation of Territorial law. Moreover, the Territorial court would have jurisdiction over all the defendants and in relation to all the remedies sought by the plaintiffs, thus eliminating jurisdictional, standing and procedural objections that had so far delayed a hearing on the merits of the claim. In light of its lack of jurisdiction with respect to the Territorial defendants, the Federal Court of Appeal also allowed the application of the Federal Government for a stay of proceedings against the federal Crown, agreeing that the proper judicial forum for the determination of the issues was the Supreme Court of the Northwest Territories.

Legal action was subsequently undertaken before the Supreme Court of the NWT. By way of interlocutory motion, the applicants applied to the Court to have a number of legal questions determined at pre-trial proceedings.[159] They relied on rules of procedures applicable to NWT courts that recognize the discretion of a superior court judge to order that certain questions of law or fact, or mixed law and fact, be adjudicated prior to a full hearing on the merits of a cause of action. They identified seven questions that they maintained should be determined at separate proceedings in order to limit the factual and legal complexity of any subsequent trial on the merits of the claims made by the plaintiffs. Those questions included the legal status of the NWT and its institutions (as being distinct from those at the federal level), the applicability of sections 16 to 20 of the *Canadian Charter of Rights and Freedoms* to the NWT and its institutions, and the compatibility of specific provisions in the *Official Languages Act* of the NWT with sections 16 to 20 of the *Charter.*

In rendering judgement on the interlocutory motion, the Court observed that none of the parties to the action had yet produced a list of pertinent documentary evidence, nor had any pre-trial discovery involving parties and witnesses taken place. There was in effect a complete factual vacuum underpinning the cause of action at that point. Nevertheless, the applicants maintained that the constitutional status of the NWT could be determined by reference to existing statutory provisions and various ordinances, and that the Court could take judicial notice of the legislative history in this regard without formal proof being submitted. Should some form of evidence be required, the applicants took the position that it could be supplied by way of affidavit. The Court rejected this argument, pointing out that a full appreciation of the constitutional status of the NWT required an understanding of the practical scope and meaning of letters of instruction issued by the Minister of Indian and Northern Affairs, and that further evidence would be required about the circumstances surrounding the adoption of federal and territorial laws relevant to official languages. It felt that these and other matters raised complex questions that could not be adequately answered at the pre-trial hearing requested, and that it was undesirable to attempt to fragment constitutional questions in the manner

[159] *Fédération Franco-ténoise, et al.* v. *Procureur général du Canada, Procureur général des Territoires des T.N.-O, et al.* Decision of the Supreme Court of the NWT rendered November 8, 2002; File No. S-0001-CV-2001000345.

proposed. Moreover, reasoned the Court, provisions in the *Official Languages Act* of the NWT mirrored to a great extent those found in sections 16-20 of the *Charter*, rendering any decision about the constitutional applicability of the latter to the facts of the case irrelevant to any breach of provisions set out in the former. Since the plaintiffs allege a violation of both, the Court ruled that all questions raised by the cause of action were best adjudicated at a full hearing on the merits of the action in light of all relevant evidence. The motion of the applicants was therefore dismissed and the matter will now proceed to trial.

VII. INVESTIGATION PROCESS UNDER THE *OFFICIAL LANGUAGES ACT*

Lavigne v. *Canada (Office of the Commissioner of Official Languages)*

THE SUPREME COURT OF CANADA HAS RECENTLY REVIEWED THE CONFIDENTIAL AND PRIVATE NATURE OF INVESTIGATIONS CONDUCTED UNDER THE *OFFICIAL LANGUAGES ACT* (OLA). THE SPECIFIC INVESTIGATION AT ISSUE RELATED TO COMPLAINTS MADE BY A FEDERAL EMPLOYEE (MR. LAVIGNE) THAT HIS RIGHT TO WORK IN THE OFFICIAL LANGUAGE OF HIS CHOICE (ENGLISH) HAD BEEN VIOLATED BY THE MONTREAL OFFICE OF THE DEPARTMENT OF NATIONAL HEALTH AND WELFARE (NOW THE DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT). DURING THE COURSE OF ITS INVESTIGATION OCOL CONDUCTED INTERVIEWS WITH SOME 25 EMPLOYEES OF THE DEPARTMENT, INCLUDING THE COMPLAINANT'S IMMEDIATE SUPERVISOR, SOME OF HIS CO-WORKERS, AND OTHER MANAGERS AND EMPLOYEES.

The investigator's final report concluded that Mr. Lavigne's complaints were well-founded and made five recommendations to the Department. The Department did not contest the findings of the final report and agreed to take the necessary steps to implement the recommendations.

During the course of court proceedings seeking a remedy under Part X of the OLA, Mr. Lavigne made a formal request under the *Privacy Act* to the Commissioner of Official Languages for the disclosure of any personal information about him contained in files relevant to the complaints that had been investigated. The purpose of the *Privacy Act* (as set out in section 2) is to protect the confidential nature of personal information held by federal government institutions and to provide to individuals a right of access to personal information about themselves.[160] Amongst other things, the *Privacy Act* defines personal information about an identifiable individual as including "the views or opinions of another individual about the individual." Pursuant to Mr. Lavigne's request, the Commissioner's office released most of the personal information contained in its files, except for copies of notes pertaining to an interview with Mr. Lavigne's immediate supervisor.[161] The latter had refused to give her consent to disclosure of the notes in question.

The Commissioner's office justified its decision to withhold the personal information in question by invoking section 22(1)(b) of the *Privacy Act*, which authorizes the head of a government institution to deny a request where the disclosure "...could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations..." The use of this exemption in the circumstances was successfully contested by Mr. Lavigne before the Federal Court Trial and Appeal Divisions.[162] The Court of Appeal determined that the exemption could not apply to investigations that had already concluded. In addition, it ruled that there was insufficient evidence to establish that disclosure could reasonably be expected to be injurious to the enforcement of any law of Canada.

On appeal to the Supreme Court of Canada, a number of provisions in the *Official Languages Act* were identified as supporting the confidential nature of information gathered thereunder. For example, ss. 60(1) explicitly provides that every investigation by the Commissioner under the OLA shall be conducted in private. Section 72 provides that the Commissioner or anyone acting on his behalf "...shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act." Provisions of this sort, when combined with the exemption

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[160] The exact wording of the statute is: "The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information." *Privacy Act*, R.S.C. 1985, c. P-21, section 2.

[161] Copies of notes pertaining to interviews with the district manager of the Montreal office and the regional coordinator of official languages were released with their consent

[162] For trial level decision see *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, (1998), 157 F.T.R. 15. For Federal Court of Appeal decision see (2000), 261 N.R. 19.

under the *Privacy Act* regarding the conduct of investigations, were said to support the refusal to disclose the personal information in question.

Before examining the specific circumstances of the case before it, the Supreme Court reaffirmed that the *Official Languages Act* "...belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it"."[163] The Court also recognized that the *Privacy Act* had "quasi-constitutional legislative roots" as well, pointing out that the protection of privacy is related to the preservation of a free and democratic society. While the quasi-constitutional status of both statutes was not conclusive when interpreting their meaning and scope, such status was nevertheless a factor to be considered.

The Supreme Court also emphasized that both the Privacy Commissioner and the Official Languages Commissioner exercise roles akin to that of an ombudsman, and hence deal with complaints in a manner different from that which characterizes the conduct of litigation before a court of law. It pointed out that "[a]n ombudsman is not counsel for the complainant. His or her duty is to examine both sides of the dispute, assess the harm that has been done and recommend ways of remedying it. The ombudsman's preferred methods are discussion and settlement by mutual agreement."[164]

Having made these general observations, the Supreme Court then turned to how the *Privacy Act* and the *Official Languages Act* could best be interpreted so as to harmonize their respective operations.[165] First, it recognized the importance of confidentiality in the conduct of investigations under the OLA (referring to ss. 60(1) and 72):

> *"THESE PROVISIONS ILLUSTRATE PARLIAMENT'S DESIRE TO FACILITATE ACCESS TO THE COMMISSIONER AND TO RECOGNIZE THE VERY DELICATE NATURE OF THE USE OF AN OFFICIAL LANGUAGE AT WORK BY A MINORITY GROUP. THE PRIVATE AND CONFIDENTIAL NATURE OF INVESTIGATIONS IS AN IMPORTANT ASPECT OF THE IMPLEMENTATION OF THE* OFFICIAL LANGUAGES ACT*. WITHOUT PROTECTIONS OF THIS NATURE, COMPLAINANTS MIGHT BE RELUCTANT TO FILE COMPLAINTS WITH THE COMMISSIONER, FOR EXAMPLE BECAUSE THEY ARE AFRAID THAT THEIR OPPORTUNITIES FOR ADVANCEMENT WOULD BE REDUCED, OR THEIR WORKPLACE RELATIONSHIPS WOULD SUFFER. AS WELL, THESE PROVISIONS ENCOURAGE WITNESSES TO PARTICIPATE IN*

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[163] *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, Supreme Court of Canada, June 20, 2002, paragraph 23; Neutral Citation: 2002 SCC 53. File No.: 28188. It should be noted that the Privacy Commissioner appeared as an intervener and presented arguments in favour of the disclosure of the personal information.

[164] *Ibid.* at paragraph 39.

[165] The Court acknowledged the primacy provision found in section 82 of the OLA, but indicated that it only applied to Parts I to IV of the *Act*. As the Commissioner's arguments relied on provisions found in Part IX of the OLA, the primacy clause could have no application to the case at bar. *Ibid.* at paragraph 40.

> *THE COMMISSIONER'S INVESTIGATIONS. THEY ARE LESS LIKELY TO BE AFRAID THAT THEIR PARTICIPATION MIGHT HAVE A NEGATIVE IMPACT ON THE EMPLOYER-EMPLOYEE RELATIONSHIP OR THEIR RELATIONS WITH OTHER EMPLOYEES, AND TO REFUSE TO COOPERATE FOR FEAR OF GETTING IN TROUBLE OR DAMAGING THEIR CAREERS."*[166]

The Court rejected arguments to the effect that the Commissioner's powers under the OLA to summon and compel the attendance of witnesses overrided the need for confidentiality in the conduct of investigations:

> *"THAT ARGUMENT CANNOT SUCCEED, BECAUSE USING THE PROCEDURE FOR COMPELLING ATTENDANCE COMPROMISES THE OMBUDSMAN ROLE OF THE COMMISSIONER. IT IS THE RESPONSIBILITY OF THE COMMISSIONER TO INVESTIGATE COMPLAINTS THAT ARE SUBMITTED TO HIM IMPARTIALLY, AND TO RESOLVE THEM USING FLEXIBLE MECHANISMS THAT ARE BASED ON DISCUSSION AND PERSUASION. THE COMMISSIONER MUST PROTECT WITNESSES AND ASSIST VICTIMS IN EXERCISING THEIR RIGHTS. REQUIRING THE COMMISSIONER TO HAVE REGULAR RECOURSE TO THE PROCEDURE FOR ENFORCING THE ATTENDANCE OF INDIVIDUALS BEFORE HIM IS INCONSISTENT WITH THE ROLE OF AN OMBUDSMAN. IN ADDITION, ENFORCING THE ATTENDANCE OF WITNESSES WOULD NEEDLESSLY COMPLICATE THE INVESTIGATIONS, AND WOULD BE INJURIOUS TO THEM. A PERSON WHO IS COMPELLED TO TESTIFY MAY BE RECALCITRANT AND LESS INCLINED TO COOPERATE."*[167]

Nevertheless, the need to ensure the confidentiality of information gathered under the OLA was not so absolute as to render the provisions of the *Privacy Act* inapplicable. Just like other government institutions, the Commissioner of Official Languages was obliged to establish a reasonable apprehension that disclosure of personal information could be injurious to the conduct of investigations. This did not mean, as argued by the respondent, that the relevant exemption under the *Privacy Act* applied only where an investigation was currently in progress. The Supreme Court found that the wording of the *Act* clearly established that the exemption applied equally to investigations underway, about to begin, or to those that might take place in the future. Indeed, it found that "[t]he disclosure of personal information may be as damaging to future investigations as to investigations that are underway."[168]

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[166] *Ibid.* at paragraph 42

[167] *Id.* at paragraph 45.

[168] *Id.* at paragraph 55.

The Court also provided guidance as to what factors should be considered when determining if a refusal to disclose personal information is based upon a reasonable expectation of probable harm to investigative processes:

> *"There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged. The sole objective of non-disclosure must be to facilitate the work of the body in question; there must be professional experience that justifies non-disclosure. Confidentiality of personal information must only be protected where justified by the facts and its purpose must be to enhance compliance with the law. A refusal to ensure confidentiality may sometimes create difficulties for the investigators, but may also promote frankness and protect the integrity of the investigation process. The Commissioner of Official Languages has an obligation to be sensitive to the differences in situations, and he must exercise his discretion accordingly."*[169]

In the case at bar, the Supreme Court found that the evidence submitted by the Commissioner regarding injury related in a very general manner to future investigations. With respect to the specific facts of the case, the Court noted that the refusal of Mr. Lavigne's immediate supervisor to consent to disclosure had essentially determined the decision of the Commissioner. The evidence did not establish what risk of injury to investigations might reasonably have occurred had disclosure been made in any event. In the eyes of the Court, the lack of evidence on this point rendered somewhat theoretical any analysis about possible injury to the investigative process. It then concluded:

> *"There are cases in which disclosure of the personal information requested could reasonably be expected to be injurious to the conduct of investigations, and consequently the information could be kept private. There must nevertheless be evidence from which this can reasonably be concluded. Even if permission is given to disclose the interview notes in this case, that still does not mean that access to personal information must always be given. It will still be possible for investigations to be confidential and private, but the right to confidentiality and privacy will be qualified by the limitations imposed by the* Privacy Act *and the* Official Languages Act*. The Commissioner must exercise his discretion based on the facts of each specific case."*[170]

[169] *Id.* at paragraph 58.

[170] *Id.* at paragraph 61.

Given the lack of evidence related to the specifics of the case before it, the Court found that the Commissioner had failed to show that it was reasonably necessary to maintain confidentiality in order to protect the investigative process and dismissed the appeal. In so doing, the Court limited its decision to the issues surrounding the investigative process, even though ss. 22(1)(b) of the *Privacy Act* also extends the exemption thereunder to cases where disclosure "could reasonably be expected to be injurious to the enforcement of any law of Canada." It declined to address the issue as to whether mediation and non-coercive recommendations, as provided for under the OLA, constituted "the enforcement of any law of Canada", arguing that the question of confidentiality arose in the case at bar only in respect of investigations.