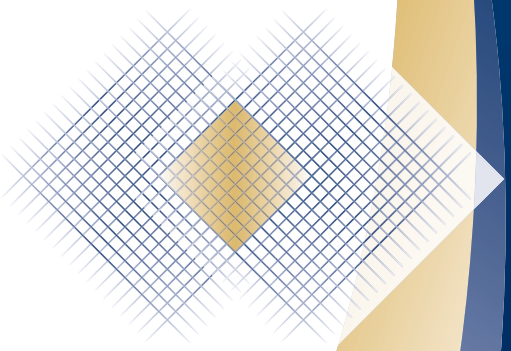
Office of the Commissioner of Official Languages
Commissariat aux langues officielles

Language Rights

2003-2004



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FOREWORD

This is a good time for taking stock, as we are celebrating the 35th anniversary of the adoption of the first *Official Languages Act*. The implementation of that legislation has transformed the linguistic landscape. In 1982, the *Canadian Charter of Rights and Freedoms* consolidated the progress made.

Since that time, the courts have played an essential part in interpreting the language rights guaranteed in the Constitution and in federal and provincial legislation. Not only have they helped to clarify the scope of the rights and obligations to which governments and their institutions are subject, but also in many cases they have been the guardians of the fundamental principles underlying language rights.

In the last two years, as illustrated by the judgments analysed in this report, there have been many new developments in the courts. Thus, they have had to rule on the right to education in the minority language, the Government of Canada's obligations in providing services to the public and the rights of litigants to be heard by the courts in the official language of their choice. In most cases, the landmark judgment rendered by the Supreme Court in *Beaulac* has guided the courts in their interpretation of the rights in question.

The judgment rendered by the Supreme Court in *Beaulac* in 1999 was certainly a turning point in the way we view language rights. It resolved the difference between two schools of interpretation. The first favoured a restrictive interpretation of language rights, based on the fact that they result from a political compromise. The second, which the Court adopted, wished to see a liberal interpretation based on the purpose of the language rights. Noting that in all cases language rights should be interpreted "purposively, in a manner consistent with the preservation and development of official language communities in Canada", the Supreme Court opened the way to a more generous approach to language rights.

The judgment handed down by the Supreme Court more recently in *Doucet-Boudreau* is another landmark that will help to clarify the approach the courts must take in awarding just and appropriate remedies. The Court confirmed that courts have the power to devise novel solutions to ensure that language rights are effectively implemented. They can also order a non-compliant government to take the necessary positive action, especially where—as with obligations contained in section 23—the language obligations of governments depend on "number". The Supreme Court properly observed that "the affirmative promise contained in s. 23 of the *Charter* and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected".

Of special note among the other judgments mentioned in this report are *Donnie Doucet* and *Tremblay v. Town of Lakeshore*. They raise the important and still unresolved question of the scope of the courts' power to control governmental action.

In *Donnie Doucet,* the Federal Court had to determine the constitutionality of the *Official Languages Regulations* defining the obligation of the RCMP to provide services based on the "significant demand" test rather than in accordance with the "nature of the office" test. The Court concluded that Parliament had given the Governor in Council the choice of deciding which institutions would be covered by the concept of "nature of the office", and it was not for the judiciary to make any ruling on that choice.

In *Tremblay*, also known as "SOS Église", a decision of the town council of the Town of Lakeshore was the subject of an application for judicial review because it had not taken the unwritten constitutional principle of minority protection into account. Although the case could be decided on other grounds, the Ontario Superior Court noted that there were limits to discretion and it had to be exercised in accordance with the fundamental values and principles of Canadian society, including the respect of the linguistic duality.

The question of judicial review of the government's discretion was also discussed by the Federal Court in *Raîche*. A challenge was made to a decision of the New Brunswick Electoral Boundaries Commission, in particular because it had not taken into account commitment mentioned in Part VII regarding the development of the Francophone community. Ruling on the legal scope of section 41 of the *Official Languages Act*, the Federal Court held that it was only declaratory and imposed no duty on federal institutions. In *Forum des Maires*, the Federal Court of Appeal came to the same conclusion and also noted that the way in which that commitment was given effect could not be the subject of judicial review. The Supreme Court has agreed to hear the latter case in order to rule on this fundamental point.

Although the courts have an essential part to play in clarifying the language rights guaranteed, our parliamentary representatives have the primary responsibility for acting when an ambiguity in legislation leads to inaction by the governmental and administrative structure. This responsibility results from the constitutional undertaking by Parliament and provincial legislatures to promote progress towards equal status and use of English and French. Additionally, the federal Parliament will have an opportunity to exercise its leadership in this regard, since a bill aimed at removing, once and for all, the ambiguities in the interpretation of Part VII of the Act has been tabled.

Finally, we should not forget that the judgments analysed in this report are the result of actions by individuals and communities who have devoted time and money to defending their linguistic and cultural heritage. These judgments also confirm that governments have a responsibility to take positive steps to smooth the long road that must still be travelled in order to attain equal status and use of English and French.

Though reference to the courts may sometimes be necessary, even inevitable, it is to be hoped that the direction indicated by court judgments will encourage political leaders to give more attention to dialogue with individuals. True equality of English and French can best be achieved by this kind of leadership and joint effort.

Dyane Adam
Commissioner of Official Languages

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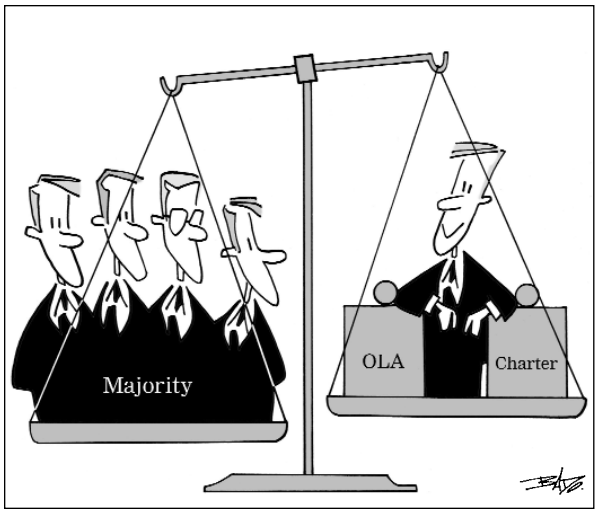
INTRODUCTION



This report analyses the principal decisions affecting language rights rendered during 2003 and 2004. Although this paper is not exhaustive, it is intended as a reference tool for everyone directly or indirectly concerned with such rights.

Our last report on language rights, covering the period 2001 and 2002, dealt with various decisions that, for the first time, had to consider and apply the new rules of interpretation developed in *R. v. Beaulac*.[1] According to these rules of interpretation, language rights should in all cases be interpreted purposively and be consistent with the preservation and development of official language communities.

This report illustrates the many areas affected by language rights. The decisions deal with subjects as varied as the minority language education right, language rights in the courts, language rights and service to the public, language rights in the Public Service, remedies provided in Part X of the *Official Languages Act* (OLA), the scope of the commitment in Part VII of the OLA, and the effect of certain administrative decisions on the vitality and development of minority communities.

Several judgments examined in this report also confirm the application of the rules of interpretation developed in *Beaulac*, as well as the importance of institutions for minority language communities. Other judgments, dealing more specifically with language rights in the courts, have once again made clear the ambiguities resulting from the wording of certain provisions and the need to have the scope of those rights interpreted or clarified by the courts. Finally, as some decisions in earlier reports have noted, *Parasiuk* notes the problems that continue to exist regarding interpretation of the rules governing eligibility for minority language education in Quebec. It should be noted, however, that a decision by the Supreme Court of Canada in the case of *Casimir*,[2] expected in the coming year, undoubtedly will throw light on certain aspects affecting this important matter.

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

[2] *Edwidge Casimir v. Attorney General of Quebec*, SCC File no. 29297. The analysis of this decision will be available in the next *Language Rights* publication. Please note that the decision from the Court of Appeal was analysed in the *2001–2002 Language Rights*, Minister of Public Works and Government Services Canada 2003, Cat. No.: SF31-34/2002, ISBN: 0-662-67119-8.

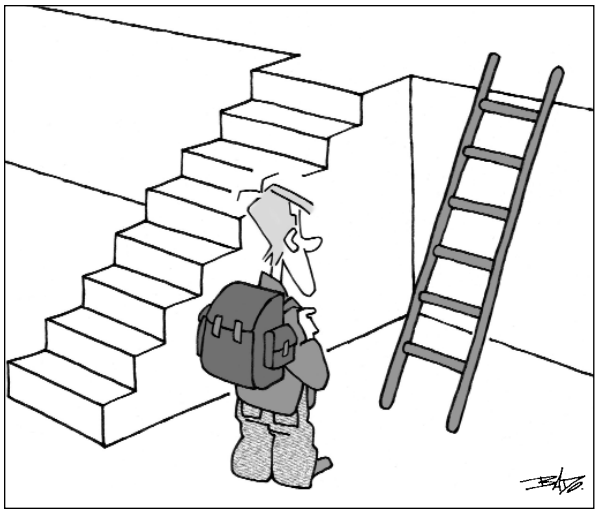
The Supreme Court judgment in *Doucet-Boudreau* provides new clarifications regarding the determination of the "appropriate and just remedy" in the event of language rights infringement. This is especially true in cases of infringement of section 23 of the *Canadian Charter of Rights and Freedoms* (the Charter), laying down principles that should guide the courts in exercising the remedial powers conferred on them by section 24 of the Charter. The broad and liberal interpretation that must now be given to language rights should also be reflected in a broad and liberal approach to remedies. The case of *East Central Francophone Education Region No. 3 v. Alberta* throws new light on the question of costs that may be awarded in court actions necessary to ensure compliance with section 23 of the Charter.

Several judgments analysed in this report indicate new concerns and incite further thought. The case of *Doucet v. Canada*, raises the question of the consistency of the *Official Languages (Communications With and Service to the Public) Regulations* (the Regulations) with the rights entrenched in the Charter. This is the first time since their adoption that the question of consistency has been raised. The case also considered new ways of ensuring that rights conferred are implemented.

Finally, two decisions have addressed some of the many questions raised about the declaratory or executory nature of the undertaking contained in Part VII of the OLA to promote the preservation and development of official language communities and ways of giving effect to that commitment. In *Raîche,* the Federal Court found there was a duty in these provisions, but only regarded it as declaratory in nature. In *Forum des maires,* the Federal Court of Appeal made a distinction between, on the one hand, sections 42 and 43 of the OLA that impose certain obligations on Canadian Heritage, and on section 41 of the OLA, which it said only contains an undertaking, and as in *Raîche*, confirmed that this provision is declaratory in nature. This decision, however, does not appear to have settled the matter. Although *Forum des maires* closes the door to any court remedy to implement the undertaking, *Raîche*, rendered some months earlier, is less categorical in this respect. Having said that, the controversy will continue in the coming year as *Forum des maires* has been appealed to the Supreme Court of Canada.

Language Rights 2003–2004 accordingly reaffirms the essential role the courts continue to play in clarifying language rights. It notes the great importance of the courts in implementing language rights and in developing just and appropriate remedies when there has been an infringement.

I- MINORITY LANGUAGE EDUCATION RIGHT



The principal purpose of section 23 of the Charter is to give parents belonging to a Francophone or Anglophone minority in the province where they reside the right to have their children educated in their own language. This right is intended to redress past injustices not only by ending the progressive erosion of minority official language cultures in Canada, but also by actively enhancing their vitality.[3]

This right also includes the right to "minority language educational facilities" and the right to "a degree of exclusive management and control."[4] Management and control are vital to ensure compliance with the purpose of section 23 of the Charter and are necessary because "a variety of management issues in education, for example, curricula, hiring, expenditures, can affect linguistic and cultural concerns."[5] Although these rights are conferred on the individual, they have a collective component, since they can only be exercised "where the number of those children so warrants."

In fact, the Supreme Court of Canada has interpreted section 23 of the Charter as taking a "sliding scale approach".[6] Each case depends on what "the number warrants" and, in theory, should correspond not to the number of persons who make use of this right but to the number who may reasonably be expected to make use of it. The requirements in each case will depend primarily on pedagogical and financial factors, but in all cases education in the majority and the minority language should be of comparable quality.

Depending on the number of students concerned, the establishment of separate minority classes in majority language schools could be considered, while in other cases the creation of separate minority schools entirely might be necessary. Depending also on the number of students concerned, section 23 of the Charter could justify the existence of separate school boards, whereas in other circumstances it would only justify a minority representation on

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[3] *Mahe v. Alberta*, [1990] 1 S.C.R. 342 [*Mahe*].

[4] *Ibid.*

[5] *Ibid.*

[6] Notably in the matters: *Mahe*, ***supra*** note 3; *Reference re Public Schools Act (Man.)*, [1993] 1 S.C.R. 839; and *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3 [*Arsenault-Cameron*].

the existing majority school board. In all cases, the minority language group should at least have control over "those aspects of education, which pertain to or have an effect upon their language and culture."[7]

It will be for the provinces, which have jurisdiction over education under the Constitution, to give effect to the rights conferred by section 23 of the Charter. In fact, provincial policies and legislation on minority language education vary significantly from one province to another. These laws contain different criteria for determining sufficient number, educational services offered, the number of hours or percentage of class hours devoted to minority language education or for the creation of educational institutions. They also contain differences regarding the degree of control given to official language minorities.

The various provincial legislation and the "sliding scale approach" resulting from the wording of section 23 of the Charter raise questions about the application of the minority language education right. Resort to the courts is often needed to clarify its scope or ensure it is observed and compel its implementation. In the two years covered by this report, the courts have had to consider such questions several times.

In particular, they have dealt with the questions of entitlement of beneficiaries and access to education, the criteria to be used to establish or create educational institutions, the remedial measures available when a government delays giving effect to the rights covered by section 23 of the Charter, and even the costs to be awarded in cases where court proceedings are necessary to ensure that the minority language education right is complied with.

1.1 Access to English education in Quebec

Parasiuk v. Ministre de l'éducation du Québec

In *Parasiuk*,[8] the Tribunal administratif du Québec and then the Quebec Superior Court had to interpret section 73 of the *Charter of the French Language* to determine whether the applicant, who wanted to enrol his son in an English school, had received [translation] "the major part of his instruction in English in Canada." This is one of the conditions for access to English education in Quebec.

[7] *Mahe*, ***supra*** note 3.

[8] *Parasiuk v. Ministre de l'Éducation du Québec*, (February 19, 2004), SAS-Q-094035-0212 (T.A.Q.); *Parasiuk v. TAQ et al.* (June 25, 2004), Montréal 500-17-019502-049, (C.S.Q.).

The applicant, originally from Manitoba, had taken his primary schooling in French immersion at an English school, from Grade 1 to Grade 8. According to the evidence, he had received 100 per cent of his education in French in the first year and 75 per cent of his education in French and 25 per cent in English in subsequent years. The applicant argued that in legal terms the Court should classify the education he had received as education in English, although he had taken an immersion program, as the education in question had been provided in an English school administered by the (English language) majority.

The Quebec Superior Court upheld the decision by the Tribunal administratif du Québec. The latter dismissed the application to review the decision of the Quebec Minister of Education, who had denied the applicant's son the right to receive English education in Quebec. The Court pointed out that the question of the inconsistency of section 73 of the *Charter of the French Language* with subsection 23(2) of the *Canadian Charter of Rights and Freedoms*[9] was not at issue and had not been raised by the parties in this case. The Court had therefore to interpret subsection 73(2) of the *Charter of the French Language*[10] on the facts in evidence.

In the Court's view, the method used to determine whether a person has received or is receiving most of his or her education in English at the primary level under subsection 73(1) of the *Charter of the French Language* is purely mathematical and consistent with the spirit and letter of section 23 of the Charter. The application of this method to the facts of the case [translation] "has the result that the applicant did not receive most of his primary schooling in English, and so he cannot give his child the right to education in English in Quebec."[11]

This judgment has been appealed to the Quebec Court of Appeal. The appeal should be heard early in 2005. In the meantime, Mr. Parasiuk has obtained the Court of Appeal's leave to enrol his son in an English school where he can be educated until the appeal is decided.

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[9] Paragraph 23(2) of the Charter provides 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."

[10] Paragraphs 73(1) and (2) of the *Charter of the French Language* provide that: "may receive instruction in English:
(1) a child whose father or mother is a Canadian citizen and received elementary instruction in English in Canada, provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada;
(2) a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers and sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada;
(...)"

[11] *Parasiuk*, ***supra*** note 8 at para. 20.

1.2 Implementation of minority language education program through interprovincial agreement

Chubbs et al. v. Newfoundland and Labrador

In *Chubbs*,[12] the Supreme Court of the Province of Newfoundland and Labrador considered the question of whether the province had performed its obligation to provide minority language education for children of rights holders on the south shore of Labrador when it concluded an agreement with Quebec for such children to be educated in a French language school located in Quebec.

The parents of 19 children in the L'Anse-au-Clair region on the south shore of Labrador were identified (by an expert report filed in the Court and accepted by the latter) as rights holders[13] under section 23 of the Charter. Based on this information, a recommendation was submitted to the provincial government for a French language education program to be established in the area. The province recognized there were enough children to justify a right to French language education, but it considered that the number of children did not warrant the creation of a separate school. It therefore chose to conclude an agreement with the province of Quebec for such children to be educated at the expense of the Province of Newfoundland and Labrador in a French school at Lourdes-de-Blanc-Sablon in Quebec, a border municipality located some eight kilometres away from L'Anse-au-Clair.

The parents who were rights holders challenged this decision in the Provincial Court because the French language education was offered outside the province, whereas under the wording of subsection 23(3) of the Charter the education should be provided "in the province." Additionally, the agreement with the province of Quebec was not an acceptable means of meeting the constitutional requirements imposed by section 23 of the Charter, since the parents had no real means to manage education provided in another province. In particular, that education could not, for example, include a special curriculum taking into account the social and historical uniqueness of the province of Newfoundland and Labrador. Finally, either province could terminate the agreement at any time.

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[12] *Chubbs et al. v. Newfoundland and Labrador*, 2004 NLSCTD 89. Newfoundland and Labrador Supreme Court – Trial Division (May 16, 2004) [*Chubbs*].

[13] We must remember that "rights holders" are the beneficiaries of rights recognized in section 23 of the Charter, that is, "parents," Canadian citizens, whose children are entitled to receive their primary and secondary education in the minority official language. These are parents whose first language learned and still understood is that of the English or French minority of the province in which they reside (section 23(1)(a)) **or** parents 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 of the province (section 23(1)(b)) **or** parents of whom any child has received or is receiving primary or secondary school instruction in English or in French (section 23(2)).

At the hearing, the Province of Newfoundland and Labrador argued that by making such an agreement and providing French language education for children in a Francophone community at its expense, it was meeting its constitutional obligations.

The Court accepted the expert evidence submitted by the province and concluded that the means chosen by the province to provide French language education for children of rights holders in this particular case met the constitutional obligations and was consistent with the purpose of section 23 of the Charter. First, it noted that section 23 of the Charter provided for a right to education with a "sliding scale approach," and that what was required in each case depended on what the "number warrants". It went on to add that what is required depends primarily on pedagogical and financial factors, but cultural and linguistic interests must be given still greater attention.

1) Requirements for accommodating a few children

Relying on the facts in evidence and the admission by the province itself, the Court first recognized that the number of children of rights holders justified the provision of French language education. Owing to the small number of children in the area, however, the Court went on to say that the rights holders could at best hope for the hiring of two teachers and the creation of two multi-grade classes. It recalled the fear expressed by the Supreme Court in *Mahé*[14] that the establishment of schools for isolated minorities could contravene the purpose of section 23 of the Charter by making the few number of children involved more vulnerable to assimilation.

The Provincial Court indicated that this reasoning could also be applied if a program provided only the minimum required to educate a small number of isolated children. The Court also took into account the position expressed by parents in their affidavit, namely that if they could obtain no guarantee that their children would receive French education of a quality comparable to that offered in English in the region, they would prefer to accept the agreement concluded with the school located at Lourdes-de-Blanc-Sablon.

The Court, therefore, considered that under the circumstances, the agreement was the means chosen by the province to provide the maximum protection conferred by section 23 of the Charter, offering a high level of French language education to children of rights holders and complying with the purpose of section 23 of the Charter, which was to provide protection

[14] *Mahe*, ***supra*** note 3.

for and fostering of the minority language and culture. It thus considered that, given the proximity of the school, the province had offered the children immersion in an entirely Francophone environment without creating hardships or entailing travel costs.

2) *Whether minority language education should take into account particular cultural and linguistic aspects of province*

The Court found that no evidence had been submitted to suggest that sending the children to Quebec for their education would affect their culture and language. Instead, it accepted the conclusions of the report by the province's expert witness, which considered that in its content and purpose the Francophone culture of the south shore of Labrador was essentially the same as that of their Francophone neighbours in Quebec. It acknowledged, though, that from a cultural standpoint the children of L'Anse-au-Clair beneficiaries remained Newfoundlanders and Labradoreans, not Quebeckers.

The Court accordingly concluded that the possible negative effects were only speculation and said it was satisfied that such travel would have no distorting effect on the specific historical and socio-political uniqueness of the province of Newfoundland and Labrador, as the influence of the Quebec educational system would be offset by the fact that the students would return home each day to their families and local communities.[15]

3) *Whether minority language education should be given in province of minority*

With respect to the argument that the actual wording of subsection 23(3) of the Charter, which uses the phrase "in the province", does not provide for education in another province, the Court noted that the purpose of section 23 in this particular case was to protect and promote the Francophone language and culture in the Province of Newfoundland and Labrador, and specifically in the south shore of Labrador. The Court pointed out that a broad interpretation should be given to section 23 and not to hesitate to breathe life into it. Noting that the means chosen by the province in the particular case at bar was a novel way of protecting and promoting French in the best way possible in this area and was consistent with the purpose of section 23 of the Charter, the Court took care to point out, however, that the circumstances of the case were unique.

Finally, the Court held that the solution suggested by the province was nevertheless contrary to the *Schools Act, 1997*. That Act gives the province's Francophone school board exclusive responsibility for managing the Francophone schools in Newfoundland and Labrador. The

[15] *Chubbs*, ***supra*** note 12 at para 49-50.

Court, therefore, concluded that it was necessary for the Board to be responsible for the administration of any agreement made on this matter between the Province of Newfoundland and Labrador and the Province of Quebec. It noted that the Board had at no time been a party to the agreement and concluded that the exclusion of the Board from its administrative role in the case at bar was contrary to the *Schools Act*.

The Court further considered that section 97 of that Act authorized the Board to conclude agreements directly with other boards or educational organizations in Canada, but it had not done so in the case at bar. Further, the Court concluded that the use of such agreements was consistent with provincial legislation, but any French language education program for the minority had to be administered by the Francophone school board. It noted that the management or control of minority education was an essential aspect of the right to education and it was not inconceivable that such a degree of control could be provided by an agreement. It observed that it was not for the Court to determine the nature of the relationship between the province and the Board. Nevertheless, it was essential for the province and the Board to develop an administrative protocol to guarantee respect for the management rights conferred by section 23 of the Charter when children of rights holders receive education outside their province.

1.3 Nature of "appropriate and just" remedies

Doucet-Boudreau v. Nova Scotia (Minister of Education)

In the case of *Doucet-Boudreau*,[16] the Supreme Court of Canada considered the question of the nature of the remedy that can be awarded under section 24 of the Charter[17] to ensure compliance with minority language education rights secured by section 23 of the Charter.

It will be recalled that Francophone parents from five Nova Scotia school districts had applied for an order directing the province and the Conseil scolaire acadien provincial to provide, out of public funds, homogeneous French language facilities and programs at the secondary school level. The trial judge had concluded that the government did not deny the existence or content of parents' rights guaranteed by section 23 of the Charter, but failed to priorize those rights and delayed fulfilling its obligations, despite the existence of reports showing that assimilation was "reaching critical levels". The judge found a section 23 violation and ordered the province and the Conseil to use its "best efforts" to provide school facilities

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

[17] Paragraph 24. (1) of the Charter provides that: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

and programs by specified dates. The judge also said he retained jurisdiction to hear "reports" on the status of such efforts.

The province had appealed the part of the order dealing with the judge's jurisdiction to hear the "reports". In a majority judgment,[18] the Court of Appeal allowed the appeal and struck down the impugned portion of the order, on the basis of the common law principle of *functus officio*. It concluded that the trial judge, having decided the issue between the parties, had no further power to retain jurisdiction over the case and section 24 of the Charter could not extend judges' jurisdiction enabling them to enforce their remedies.

The Supreme Court of Canada reversed the Court of Appeal judgment and the trial judge's order was restored. In a majority decision,[19] the Supreme Court noted, first, that the remedial provisions should be interpreted to provide "a full, effective and meaningful remedy for *Charter* violations."[20] *Inter alia*, it noted that this interpretation should promote achieving (1) the purpose of the right guaranteed; and (2) the purpose of the remedial provisions. To do this, the courts should order affirmative and suitable remedies to protect fully and meaningfully the rights and freedoms guaranteed by the Charter.

1) Purpose of right guaranteed by section 23 of the Charter

The Court noted the rights guaranteed by section 23 were designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by actively promoting their flourishing. It observed that while the rights were granted to individuals, they had a special implication for the community as they applied only if "numbers warrant." It added that the likelihood of assimilation, and consequently the risk that the situation would no longer meet the numerical justification requirement, increased with every school year in which government did not meet their obligations under section 23. If inaction or delays were tolerated, governments could progressively avoid the duties imposed upon them. Accordingly, it concluded that:

> *The affirmative promise contained in s. 23 of the* Charter *and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected*.[21]

[18] For an analysis of the decision from the Court of Appeal see the *2001–2002 Language Rights*, ***supra*** note 2.

[19] *Doucet-Boudreau*, ***supra*** note 16. The Court decided five against four.

[20] *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, as cited in *Doucet-Boudreau*, ***supra*** note 16 at para. 25.

[21] *Doucet-Boudreau*, ***supra*** note 16 at para. 29.

2) *Factors to be considered in determining whether remedy is appropriate and just*

The Court noted, first, that the discretion over remedies conferred on a superior court by section 24 of the Charter should be based on its careful perception of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles. The Court should also be sensitive to its role as judicial arbiter and not fashion remedies that usurp the roles of other branches of governance. Then, the Court noted that where there is a right, there is a remedy, and identified four factors or general principles that judges should take into account in determining whether a potential remedy is appropriate and just in the context of the Charter:

> *First, an appropriate and just remedy in the circumstances of a* Charter *claim is one that* ***meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant.*** *A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied.*
>
> *Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a* Charter *remedy must* ***strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary.*** *This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive.*
>
> *Third, an appropriate and just remedy is a judicial one which* ***vindicates the right while invoking the function and powers of a court.*** *It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited.*
>
> *Fourth, an appropriate and just remedy is one that,* ***after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made.*** *The remedy should not impose substantial hardships that are unrelated to securing the right.*
>
> *Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the* Charter. *As such,* ***s. 24, because of its broad language and the myriad of roles it may play in cases, should be***

> ***allowed to evolve to meet the challenges and circumstances of those cases*** *. . . In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.*[22] *[Emphasis added.]*

3) Was the remedy awarded just and appropriate in the circumstances?

Looking at the case at bar, the Court held that the remedy awarded by the trial judge was appropriate and just. It considered the judge had exercised his discretion to select an effective remedy that meaningfully vindicated the section 23 rights of the appellants, in view of a critical rate of assimilation and a history of delay in the provision of French language education. According to the Supreme Court judgment, the order granted was "a creative blending of remedies and processes already known [page 40] to the courts in order to give life to the right in s. 23".[23] In the Court's view, because of the critical rate of assimilation, it was appropriate for the trial judge to grant a remedy that would in his view lead to prompt compliance.

The Court further considered that the remedy vindicated the parents' rights while leaving the detailed choices of means largely to the executive. It noted that the reporting order was judicial in the sense that it called on the functions and powers known to courts. The *functus officio*[24] rule had not been contravened, since the reporting order did not include any power to alter the disposition of the case and did nothing to undermine the provision of a stable basis for launching an appeal. Finally, the Court held that the order was not unfair to the government, since it was not incomprehensible or impossible to follow, though it would have been desirable for the trial judge to provide more guidance to the parties as to what they could expect from the reporting sessions.

The dissenting judges, though disagreeing with the majority conclusion that the remedy granted was just and appropriate, did indicate that they agreed with their colleagues' analysis of "the nature and fundamental importance of language rights in the Canadian Constitution." They went on to say that "efficacy and imagination [are needed] in the development of constitutional remedies."[25]

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[22] *Ibid*. at para. 55-59.

[23] *Ibid*. at para. 61.

[24] The *Oxford Companion to Law* (1980) defines, on p. 508, the rule of functus officio as follows: "having performed his function; used of an agent who has performed his task and exhausted his authority and of an arbitrator or judge to whom further resort is incompetent, his function being exhausted."

[25] *Doucet-Boudreau*, ***supra*** note 16 at para. 94.

They concluded, however, that the judge's order requiring reporting was anything but clear and this uncertainty amounted to a breach of procedural fairness. Additionally, the order, by giving the judge jurisdiction over a sphere traditionally outside the province of the judiciary, breached the principle of separation of powers and the *functus officio* doctrine. In this connection, the dissenting judges noted that "if a court is permitted to continually revisit or reconsider final orders simply because it has changed its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding."[26]

1.4 Awarding of costs in court action alleging breach of section 23 of the Charter

East Central Francophone Education Region No. 3 v. Alberta (Minister of Infrastructure)

This judgment[27] discusses tests to be used in awarding costs to a party who has initiated a court action to compel compliance with the rights conferred by section 23 of the Charter, where an out-of-court settlement is reached before the case is heard.

The Francophone Board of Region No. 3 offers homogeneous education in French at the primary and secondary levels in three Alberta communities. In May 2002, the Board had made a financing request to the Alberta Minister of Infrastructure for its schools at St. Paul and Bonnyville, but this was not provided for the 2003–2004 fiscal year. In 2003, the Board renewed its request three times for the 2004–2005 fiscal year, but the financing was also denied. Nonetheless, in its releases the Board stated that the conditions in these two schools were not comparable to those of the neighbouring Anglophone schools. It also noted the problems associated with assimilation that confronted Francophones in Alberta and the obligations of the government under section 23 of the Charter.

In February 2004, counsel for the Board asked the Minister of Infrastructure to review his decision. Receiving no reply, on March 2, 2004, the Board filed an application for judicial review of the Minister's decision. On the eve of the deadline for disclosure of the file of the Minister of Infrastructure and the Minister of Education, the latter submitted an initial offer to settle out of court. Following considerable negotiation, the Board and the two Ministers agreed by a mutual settlement reached on April 1, 2004, that the financing requests would be sent back to the Minister of Infrastructure to be reconsidered in light of the provisions of section 23 of the Charter.

[26] *Ibid*. at para. 115.

[27] *East Central Francophone Education Region No. 3 v. Alberta* (*Minister of Infrastructure*), [2004] A.J. No. 630, (2004), ABQB 428.

This case was settled by mutual agreement before the hearing, however, the Board claimed costs for the application for judicial review on a solicitor-client basis[28] as of February 17, 2004, the date of the Minister of Infrastructure's decision to deny the financing. The argument submitted was that the constitutional rights in question were significant: the application for judicial review would not have been necessary if the Minister had not refused to take the provisions of section 23 of the Charter into account in making his decision. According to the Board, by agreeing to settle the case by mutual agreement, the Minister had acknowledged that he had not performed all the duties incumbent on him under section 23. The Minister challenged this claim, arguing that ordinarily costs are not awarded in cases of a mutual settlement, and in any case the settlement reached was not a recognition that the appellant's claims were valid.

In its decision, the Alberta Court of Queen's Bench first noted that the awarding of costs was at the Court's discretion and an award on a solicitor-client basis was exceptional. It recalled the rules laid down by the Court of Appeal, that [translation] "it is misconduct during the case, not the conduct which made it necessary, which justifies the awarding of such costs" and those laid down by the Supreme Court of Canada in Young that costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties."[29] Analysing the facts of the case at bar, the Court held that there had been no misconduct during the case.

The Court further indicated that raising questions relating to the Charter did not necessarily lead to the awarding of costs on a solicitor-client basis. Relying on certain cases cited by the Board, however, the Court noted that the persistent denial of rights guaranteed by section 23 of the Charter could justify the awarding of such costs. The intransigence of one of the parties was an issue in particular in *Arsenault-Cameron*[30] and *Doucet-Boudreau*,[31] as the case had to be appealed all the way up to the Supreme Court of Canada.

Analysing the facts in the case at bar, however, the Court held that the settlement in the case—which was reached one month after the application for judicial review was served—could be seen as proof of a speedy recognition by the Minister of the rights claimed. Finally,

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[28] We note that the **costs** serve, in principle, to indemnify and hold harmless a party who wins a case. They include legal fees and legal disbursements (stamps, costs of service, interpreter's fees, etc.) calculated according to set rates based on the amount in dispute or the type of intervention in the judicial system. **The costs on a solicitor and client basis** are additional amounts awarded at the discretion of the Court when there has been, as stated in *Young v. Young* [1993] 4 S.C.R. 3, p.134, " reprehensible, scandalous or outrageous conduct on the part of one of the parties."

[29] *East Central Francophone Education Region No. 3*, ***supra*** note 27.

[30] *Arsenault-Cameron*, ***supra*** note 6.

[31] *Doucet-Boudreau*, ***supra*** note 16.

the Court pointed out that it clearly could not award costs on a solicitor-client basis as the Court could not assess the merits of the Board's argument and, in any event, the argument had to be again considered by the Minister.

Judge Marceau, however, agreed to award increased costs to the Board. In his view, the background of the case showed that the government undoubtedly would not have seriously considered the Board's application by such time as would have allowed a decision to be made on the financing allocations for 2004–2005 if the Board had not initiated court proceedings. The judge also indicated that one clearly could not [translation] "underestimate the importance for the Francophone minority of the questions raised by the Board in this action, since they were questions of fundamental rights guaranteed by the *Charter*".[32]

[32] The judge has finally awarded the Council the costs greater than the fixed amount of $10,000 and $1,000 for the adjournment, for a total of $11,000, plus $1,466.59 in disbursements.

II- LANGUAGE RIGHTS IN THE COURTS

The use of French and English in the court system is based on several constitutional provisions applicable to certain courts across Canada. In fact, the use of both official languages is specifically guaranteed in the courts created by the federal Parliament and the provincial courts of New Brunswick, Quebec and Manitoba pursuant to section 133 of the *Constitution Act, 1867* and section 23 of the *Manitoba Act, 1870*. Although provincial courts in the other provinces are not subject to these provisions, this does not mean they have no obligations in this area.

The constitutional powers of the federal and provincial governments include the adoption of complementary legislation and policies on constitutional rights involving the use of both official languages in the courts.

In particular, for **criminal proceedings**, the federal government has used this power *inter alia* to make amendments to the *Criminal Code* to give accused persons the right to be tried in French or English throughout Canada. These amendments, which are found in sections 530 and 530.1 of the *Criminal Code*, apply to all provincial courts hearing criminal proceedings.

Essentially, subsection 530(1) of the *Criminal Code* gives accused persons the absolute right to have their trials in the official language they consider to be their own, provided they apply at the proper time. The right is an absolute one, not simply a procedural right that may be departed from. To allow an accused who is not represented by counsel to file such an application, the judge before whom the accused first appears is required to advise him or her of the right (subsection 530(3)). Finally, even when the accused makes no application or does so beyond the specified deadlines, the judge may use discretion to make such an order (subsection 530(4)). The purpose of section 530 of the *Criminal Code* is thus, as the Supreme Court of Canada pointed out in *Beaulac*, to "to provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity".[33]

The order made pursuant to section 530 of the *Criminal Code* has certain implications mentioned in section 530.1 of the *Criminal Code* regarding, *inter alia*, the right to use that language orally in pleadings or other documents during the preliminary inquiry and the trial, the right to give evidence in that language, the right to have the judge presiding over the hearing speak the same language as the accused, the right to have the prosecutor speak the same language as the accused, a requirement that the court shall make interpreters available, the right to have the record contain a transcript of everything that was said in

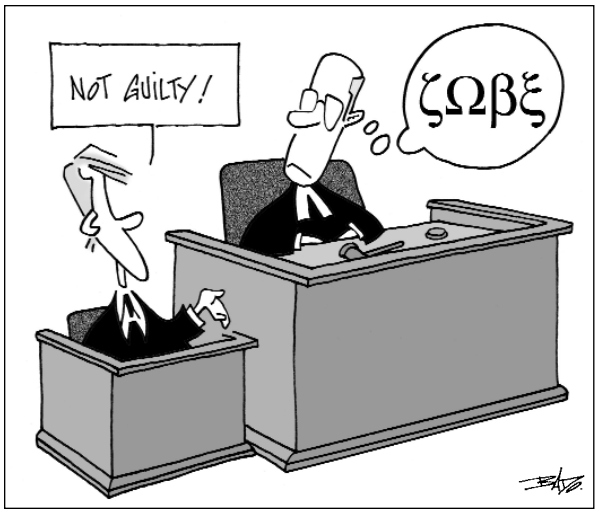
[33] *Beaulac*, ***supra*** note 1.

the original official language and a transcript of the interpretation, as well as any documentary evidence in the official language in which it was tendered; and a requirement that the court will make judgments, including any reasons, available in writing in the official language of the accused.

For **civil proceedings**, certain provinces have adopted specific legislation on the question of access to the courts in the minority language, but their content and the rights they confer on litigants vary widely.[34] For its part, the Parliament of Canada has adopted Part III of the *Official Languages Act*, which guarantees the use of both official languages in federal judicial and quasi-judicial tribunals. These provisions deal, *inter alia*, with the right of any person to use either official language in all cases before the courts and in the resulting pleadings, the right that the judge hearing the case will directly understand the official language of the parties, the right for any witness to be heard in the official language of his or her choice without suffering prejudice thereby, the right to interpretation services, the right that the federal government will use the official language of the civil party in pleadings and processes, and the right that decisions, including any reasons given therefore, will be made available simultaneously in both official languages in certain cases, and at the earliest possible time in other cases.

The rights and obligations contained in these constitutional and legislative provisions are designed to ensure that both official languages receive equal treatment in the administration of justice. Recourse to the courts has often proven necessary to clarify their scope and ensure that they are observed. In the two years covered by this report, several courts have had to rule in this area, both in criminal and in civil proceedings.

[34] For example, Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C-43; Saskatchewan's *Language Act*, S.S. (1988-89) c. L-6.1; the Alberta *Languages Act*, R.S.A. 1988, c. L-7.5; the Yukon's *Languages Act*, R.S.Y. 1988, c.13; the Northwest Territories' *Official Languages Act*, R.S.N.W.T. 1988, c. O-1.



2.1 Criminal proceedings

Right to trial in language of accused

R. v. Potvin

Potvin[35] raises the question, which over the years has been considered by the courts on more than one occasion, of the scope of the right conferred by section 530.1 of the *Criminal Code* and the rights that result therefrom. Specifically, at issue was an order giving an accused the right to be tried before a judge and jury who speak French.

In that case, the Court had ordered that the accused be tried before a judge and jury who speak French. Nonetheless, the preliminary motions were largely heard in English and the judge intervened primarily in English, the appellant being given a translation. During the hearing of the preliminary motions, the accused several times mentioned that he was not satisfied with the way the trial was proceeding. At the end of the fifth day of hearing on the preliminary motions, counsel for the defence interrupted the discussion between the judge and counsel for the Crown to ask that they speak in French. The judge then indicated that the *Criminal Code* did not require every word to be said in French. Finally, he rendered his decision on the preliminary motions in English, and no translation was entered in the record.

During the first five days of the trial, the eleven witnesses spoke only in English and the judge intervened several times, chiefly in that language. Since there was simultaneous interpretation, no transcript of the interpretation was entered into the record. On the sixth day, counsel for the defence submitted that the accused had applied for a trial in French, not a bilingual trial, stating that he could not hear or understand everything that was happening in the courtroom, nor was he able to determine the accuracy of the translation.

The trial judge dismissed the application, stating that he was satisfied the accused had a judge and jury who spoke French, in keeping with the requirements of the *Criminal Code*. Subsequently, both counsel made their final addresses to the jury in French, but the judge continued to speak chiefly in English, even making his charge to the jury partly in English

[35] *R. v. Potvin* (2004), 69 O.R. (3d) 654 [*Potvin*].

and partly in French. Finally, the accused was acquitted of attempted murder but convicted on other charges. He appealed, claiming a breach of paragraphs 530.1(*e*) and (*g*) of the *Criminal Code*.[36]

In its judgment, the Ontario Court of Appeal noted that the failure by the accused to make an objection during the first five days of testimony had to be considered in the context of the trial as a whole. In view of the problems the accused and his counsel had to confront in the preceding days, at the time of the preliminary inquiry, it was not surprising that counsel made no objection at the start of the trial. Accordingly, the Court refused to regard this omission as consent by the accused to a bilingual trial. The Court of Appeal noted that once an order has been made that a trial will take place in the accused's official language, the proceeding must be consistent with requirements without the accused or his or her counsel being continually forced to argue the point. Consequently, it was up to the trial judge to ensure that the trial proceeded in French.

In the view of the Court, once an order is made pursuant to section 530 of the *Criminal Code*, paragraph 530.1(*e*) requires that the trial judge and counsel for the Crown speak the official language chosen by the accused, not simply have the ability to understand it. The Court said:

> *If it were enough for the judge and prosecutor to understand French, without it being necessary for them to use it during the proceeding, there would be little difference between, on the one hand, the right to a unilingual trial in the official language of one's choice, and on the other, the right to the assistance of an interpreter already provided for in s. 14 of the* Canadian Charter of Rights and Freedoms. *The right to the assistance of an interpreter ensures that the accused will be able to understand his or her trial and make himself or herself understood, and that the trial will thus be fair: see R. v. Beaulac, at para. 41. However, as noted by the Supreme Court in Beaulac, at paras. 25 and 41, "language rights are . . . distinct from the principles of fundamental justice. . . .Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English."*[37]

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[36] Paragraphs 530.1(e) and (g) of the Criminal Code provides as follows: " Where an order is granted under section 530 directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language that is the language of the accused or in which the accused can best give testimony, (...)
(e) except where the prosecutor is a private prosecutor, the accused has a right to have a prosecutor who speaks the official language that is the language of the accused;
(g) the record of proceedings during the preliminary inquiry or trial shall include
(i) a transcript of everything that was said during those proceedings in the official language in which it was said,
(ii) a transcript of any interpretation into the other official language of what was said, and
(iii) any documentary evidence that was tendered during those proceedings in the official language in which it was tendered."

[37] *Potvin*, ***supra*** note 35 at para. 32.

Consequently, the Court of Appeal concluded that the language rights of the accused set out in paragraph 530.1(*e*) had been infringed. As no transcript of the interpretation was entered in the record during the first five days of testimony, allowing the accuracy of the interpretation to be determined, the Court of Appeal concluded that the language rights set out in paragraph 530.1(*g*) of the *Criminal Code* had also been infringed. Based on these conclusions, and the fact that the rights set out in sections 530 and 530.1 of the *Criminal Code* are important substantive rights, the Court of Appeal quashed the conviction and ordered a new trial.

Finally, with respect to the accused's submission that the warrant regarding DNA analysis should have been in French, as the order for the trial to be held in French was made prior to the warrant being authorized, the Court held that this warrant was not part of the trial and, in any case, an accused does not have an automatic right to the translation of such documents filed at the trial.

Right to approach Court in language of accused at pre-trial proceeding

R. v. Schneider

In *Schneider*,[38] the Supreme Court of Nova Scotia dealt with the question of whether the right to be tried in either official language set out in section 530 of the *Criminal Code* also included the right to address the Court in that language in a preliminary proceeding such as an application to adjourn.

Ms. Schneider had been charged on two counts: assault and disturbing the peace. She asked that her trial be in French pursuant to section 530 of the *Criminal Code*. The Court allowed this application and set May 17, 2001 as the trial date. Three times before her trial, the accused filed an application to adjourn: the applications were denied. On April 14, 2001 she appeared before Beach J., speaking in English, to request an adjournment, and the application was dismissed for lack of evidence to support the reasons for the application. The accused had consulted her physician on April 27, 2001 and the latter indicated in a note that she would not be capable of attending her trial due to stress. This note was forwarded to counsel for the Crown and the latter indicated that her new application to adjourn would be heard on May 14. Beach J., who was sitting on that occasion, indicated that she should apply to adjourn her trial to the Francophone trial judge, since she had applied for a trial in French. Consequently, on the day of the trial the accused for the third time submitted her application to adjourn to the Francophone trial judge.

[38] *R. v. Schneider*, [2003] N.S.J. No.497; 2003 NSSCF 209 [*Schneider*].

The trial judge dismissed the application to adjourn on the ground that it would entail a waste of financial resources, as the Crown's witnesses had travelled from Calgary to attend the trial. Since the date of the trial had been set four months earlier, the Court considered that the accused had had enough time to prepare or to seek an adjournment. The trial accordingly took place on the date scheduled and the accused was convicted on both counts.

On appeal, the accused alleged that the trial judge had made an error of law when he refused to postpone the trial date. In her submission, she stated that the judge did not take into account that she had submitted a medical certificate to the Court indicating that she was ill before May 17, that she had no counsel, that she could not properly prepare her case, that she had made her application to adjourn at least one month before the trial and that Beach J. had not acted on her application in time because he did not understand French. In short, the accused alleged that her inability to apply in French for an adjournment of the trial before the trial date itself was not fully taken into account by the trial judge when he made his decision on the application to adjourn.

In its judgment on this appeal, the Nova Scotia Supreme Court first noted that section 530 of the *Criminal Code* did not indicate whether the right to a trial or a preliminary inquiry also included the right to apply to the Court about preliminary matters in the language chosen for the trial. It also pointed out that, according to the jurisprudence, the meaning of the word [translation] "trial" could vary depending on the *Criminal Code* provision cited, since the various sections protect different interests and the time when a trial begins may also vary depending on the circumstances.

The Court indicated that reference should be made to the wording of section 16 of the Charter and section 530 of the *Criminal Code* to determine the interests that the latter seek to protect, in assessing the start, and thus fix the time when the accused's right to a trial in French takes effect. Further, in defining the scope of section 530 of the *Criminal Code*, the Court should use a broad interpretation based on the purpose of the right guaranteed. In particular, this involved giving an accused equal access to the courts in the official language of his or her choice and the preservation and fostering of official language communities in Canada.

The Court also recalled the comments by Bastarache J. in *Beaulac*: administrative inconvenience, such as limited resources, should not be a relevant factor in applying subsection 530(4) of the *Criminal Code* "because the existence of language rights requires that the government comply with the provisions of the *Act* by maintaining a proper institutional infrastructure and

providing services in both official languages on an equal basis".[39] The Court then noted that these comments should be kept "against the background",[40] in cases involving whether the accused should be given the right to be heard in French on preliminary motions such as applications to adjourn.

The Court concluded that the fact the accused was unable to apply to the Court in French on May 14 to make her application to adjourn infringed her constitutional rights and her rights set out in section 530 of the *Criminal Code*, since the right to a trial in French covered by that provision should be understood in its broad sense and in light of the interpretation by the Supreme Court in *Beaulac*. Bearing in mind the interests which that section seeks to protect (equality, preservation and flourishing of official language communities), the Court held that the "trial" mentioned in that section necessarily included essential preliminary motions such as an application to adjourn.

The Court pointed out that the trial judge had the discretion whether to grant or deny an adjournment, however, provided that discretion was exercised reasonably and judiciously. In the case at bar, the Court first recognized that the trial judge had the discretion to take into account expenses incurred by prosecution in dealing with the question of an adjournment. Nonetheless, the Court considered that the trial judge had not exercised this discretion reasonably since he had not attached sufficient weight to the accused other arguments. In particular, it indicated that, "in weighing the factors described by the appellant, the trial judge did not dismiss any of the reasons she advanced. He did not comment on whether she had a bona fide basis for claiming she was ill . . . nor did he take into account that Ms. Schneider, who was self-represented, had not been able to seek an adjournment before Judge Beach on May 14, 2001, and that the day of the trial was her first opportunity to present such a motion before a French-speaking judge".[41]

Finally, the Court indicated that, "once Ms. Schneider elected to be tried in French, it was incumbent on the Provincial Court to arrange for her to appear in person or through an on-the-record telephone contact with the trial judge prior to the actual trial date".[42] Additionally, "to state that an accused has a right to be tried in French without giving the accused the opportunity to make pre-trial applications in French would infringe the fundamental rights of the accused".[43] Consequently, the Court quashed the conviction and ordered a new trial.

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[39] *Beaulac*, ***supra*** note 1.

[40] *Schneider*, ***supra*** note 38 at para. 28.

[41] *Ibid*. at para. 39.

[42] *Ibid*. at para. 46.

[43] *Ibid*. at para. 46.

Appropriate remedy when an accused is not told of his or her right to a trial in the official language of choice

R. v. Mackenzie

The Nova Scotia Court of Appeal's judgment in *Mackenzie*[44] confirmed and restated the obligation that a justice of the peace or provincial judge has under subsection 530(3) of the C*riminal Code* to inform the accused of his or her right to a trial in the official language of choice. It also indicated the circumstances in which this right is applicable and the conditions of its application, and ruled on the remedies available if the right is infringed. Finally, it placed its analysis of the scope of subsection 530(3) of the *Criminal Code* in the more general context of the right to have a trial in one's own language, set out in section 530 of the *Criminal Code*, and it summarized the way in which the right is to be treated.

Ms. MacKenzie was charged with speeding. When she appeared in the Provincial Court she was not represented by counsel and the Provincial Court judge did not tell her of her right to be tried in her own language. The Provincial Court proceedings took place in English and Ms. MacKenzie was convicted and sentenced to pay a fine.

Ms. Mackenzie subsequently appealed to the Nova Scotia Supreme Court as the court of appeal for summary convictions. That Court concluded there had been an infringement of subsection 530(3) of the *Criminal Code* and that the infringement contravened sections 15, 16 and 19 of the Charter. Consequently, it held that the appropriate remedy under section 24 of the Charter was a stay of proceedings.

Subsequently, the Crown applied for leave to appeal this judgment, citing an error of law as to the remedy granted. The Crown acknowledged that there had been a breach of subsection 530(3) of the *Criminal Code*, but argued that the judge had not granted the appropriate remedy and that the holding of a new trial should have been ordered instead of a stay of proceedings.

1) *Conditions for subsection 530(3) of* Criminal Code *to apply*

The Crown admitted that subsection 530(3) of the *Criminal Code* had not been observed, but suggested at the appeal hearing that it was understandable that the Provincial Court judge did not take it into account since he possessed no documents indicating that Ms. Mackenzie was a Francophone.

[44] *R. v. MacKenzie* (2004), 221 N.S.R. (2d) 251, 2004 NSCA 10 [*MacKenzie*].

The Court of Appeal made a point of noting that this argument is not relevant in applying the right conferred by subsection 530(3) of the *Criminal Code*. The only relevant condition for informing an accused of this right is that the accused is not represented by counsel. The Court of Appeal pointed out that an accused is not required to profess being Francophone before being informed of his or her right. The Court indicated that what makes it necessary to inform the accused under subsection 530(3) is that an unrepresented person is probably not aware of his or her right that the trial be held in either language. Accordingly, once this single condition—appearance without representation—exists, it is up to the judge to take the initiative in informing the accused of the right.

After analysing the applicable precedents, including *Beaulac*,[45] the Court of Appeal indicated how the more general right set out in section 530 of the *Criminal Code* should be treated and applied:

1. *Ms. MacKenzie has an* ***absolute right under s. 530(1) to a trial in her own language.*** *If "circumstances warrant" the court may order that the judge or jury be bilingual further to the concluding words of s. 530(1).*

2. *Her right is not subsumed into her separate right to a fair trial. Section 530(1) states an* ***independent right to access a public service that is responsive to her linguistic and cultural identity.***

3. *It is for* ***Ms. MacKenzie to decide whether English or French is her "own language" for trial*** *provided only that she is capable of instructing counsel in her chosen official language.*

4. *Ms. MacKenzie's assertion of language is the prerequisite to the application under s. 530(1) for a trial in French.*

5. ***Effective notice is prerequisite to the assertion of language by an unrepresented accused.*** *Because Ms. MacKenzie was unrepresented, the court was required to notify Ms. MacKenzie under s. 530(3) of her right to apply for a trial in either official language and the time within which that application must be made. Ms. MacKenzie's right to notice is as absolute as are Ms. MacKenzie's rights which flow from that notice. In Beaulac Justice Bastarache (para. 37) noted "the questionable value" of s. 530(3) because even when accused have counsel, the counsel may fail to advise their client of a right to a trial in either official language. Obviously there is no basis to dilute the required notice to unrepresented persons.*

[45] *Beaulac*, ***supra*** note 1.

6. *On her first appearance, at the time of the required notice under s. 530(3),* ***it was unnecessary that Ms. MacKenzie identify herself as French-speaking, or state her preference for French.*** *If she was unrepresented, she was entitled to notice regardless of her actual or apparent proficiency in either French or English.* ***If the Provincial Court judge neglects the notice then, if the Crown wishes to avoid the trial process inefficiency which has occurred here (two appeals, and a stay or new trial), Crown counsel should consider reminding the Provincial Court judge of s. 530(3).***

7. *If Ms. MacKenzie applied for a French trial under s. 530(1), then the judge may determine whether French is "the language of the accused".* ***When the accused chooses French or English, the inquiry is limited to whether she can instruct counsel in her chosen language. This is the only point when a judge assesses language proficiency.*** *There is no such assessment before the notice under s. 530(3).*[46] *[emphasis added]*

2) *Appropriate remedy where subsection 530(3) not observed*

As the Nova Scotia Supreme Court granted the remedy pursuant to section 24 of the Charter (the provision dealing with remedies in the event of a breach of any provision of the Charter), the Court of Appeal considered whether there had been a breach of the Charter. The Court of Appeal concluded in this regard that there had been no breach of the Charter, and, in particular, of the right to equality guaranteed in section 15, since "language" is not an analogous ground to the grounds mentioned in subsection 15(1).[47] As to the language rights guaranteed in sections 16 to 23 of the Charter, the Court of Appeal held that subsection 19(1)[48] had not been infringed, as the latter only applied to courts "established by Parliament" and that the Provincial Court which tried Ms. Mackenzie was not a court "established by Parliament". The same is true of subsection 16(1),[49] which only applies to "institutions of the Parliament and government of Canada", and the Provincial Court is not an institution of Parliament or of the executive. Finally, the Court of Appeal considered there had been no infringement of subsection 16(3) of the Charter,[50] because, although

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[46] *Mackenzie*, ***supra*** note 44 at para. 15.

[47] Paragraph 15(1) of the Charter provides as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[48] Paragraph 19(1) of the Charter provides as follows: "Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament."

[49] Paragraph 16(1) of the Charter provides as follows: "English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada."

[50] Paragraph 16(3) of the Charter provides as follows: "Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French".

this made *intra vires* the provisions of legislation by Parliament or a provincial legislature to promote progress towards equality of status or use of French or English, such as section 530 of the *Criminal Code*, it did not thereby give them constitutional status or incorporate them into the Charter. Finally, despite the quasi-constitutional nature of section 530 of the *Criminal Code*, which requires broad and liberal interpretation, its infringement is not a basis for relying on subsection 24(1) of the Charter.

As there had been no infringement of the Charter, only an infringement of subsection 530(3) of the *Criminal Code*, the Court of Appeal noted that the available remedy would lie either in section 686 of the *Criminal Code* or in the rules laid down by the courts regarding the discretion to stay proceedings in cases where there had been a breach of the rules of natural justice.

Regarding section 686 of the *Criminal Code*, the Court noted that this provision sets out possible remedies where an appeal is allowed (directing a judgment or verdict of acquittal to be entered or ordering a new trial), and it contains no express reference to a stay of proceedings. On the rules laid down by the courts regarding the discretion to stay proceedings where there has been a breach of the rules of natural justice, the Court of Appeal noted that nothing in the record suggested that the Provincial Court had deliberately failed to give a notice pursuant to subsection 530(3), or that Nova Scotia judges acted in this way systematically. It confirmed there had been a breach of subsection 530(3) of the *Criminal Code*, but there had been no abuse of process or denial of Ms. Mackenzie's rights to fundamental justice and a fair trial under section 7 and paragraph 11(*d*) of the Charter. It accordingly concluded that a stay of proceedings was not an option and the Court should have ordered a new trial to be held. Consequently, the Court of Appeal quashed the stay of proceedings and ordered a new trial.

2.2 Civil proceedings

Right to an interpreter and language rights when client and counsel are not using same official language

Taire v. Canada (Minister of Citizenship and Immigration)

The judgment of the Federal Court in *Taire*[51] raises *inter alia* the question of the right to an interpreter under section 14 of the Charter and of the language rights under section 19 of the Charter and Part III of the *Official Languages Act* where clients and counsel are not using the same official language.

[51] *Taire v. Canada (Minister of Citizenship and Immigration)*, (2003), 238 F.T.R. 223, 2003 FC 877 [*Taire*].

Ms. Taire filed an application for judicial review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board that she was not a Convention refugee. Ms. Taire alleged that, in addition to the members of the Division erring in assessing her credibility, she had not been given a fair hearing because of the absence of an Uvwie-French interpreter.

The hearing took place in English, a language Ms. Taire understands and in which she had done her primary and secondary schooling in Nigeria. Further, Ms. Taire and her counsel did not object to the hearing being in English. However, with the approval of the Court and his client, counsel for the applicant chose to make his oral arguments in French.

In her application for judicial review, the applicant alleged she had made a request for an Uvwie-French interpreter. The lack of such an interpreter created an awkward situation for herself and her counsel and she was subsequently denied a fair hearing. She said that the breach of her rights seriously undermined her credibility and the potential assistance of counsel in this case. Finally, she noted that under section 133 of the *Constitution Act, 1867* her counsel had the right to use English or French in court.

In its judgment, the Federal Court acknowledged that the applicant's counsel did have the right to use the official language of his or her choice in court, but the failure to provide the interpreter requested in this case did not deprive the applicant of a fair hearing. The Court in fact accepted the respondent's arguments that the applicant's claims confused the right to an interpreter, guaranteed in section 14 of the Charter for a party or a witness, and the language rights conferred on everyone by section 19 of the Charter and Part III of the OLA.

1) *Right to interpreter guaranteed in section 14 of Charter*

The Court first expressed the view that the applicant suffered no prejudice because of English being used at the hearing, since she spoke and understood that language. In its view, "the adverse credibility findings are due not to language, but to the content and form of the applicant's testimony." The Court accepted the respondent's position that it was not the applicant who needed a French interpreter, but her counsel, and the latter did not have such a right under section 14 of the Charter or under Rule 17(1) of the *Convention Refugee Determination Division Rules*, as this right applies to a party or a witness, not counsel, who does not understand or speak the language of the hearing. Consequently, the Federal Court concluded that section 14 of the Charter had been observed in the circumstances.

2) Right to use official language of choice in courts established by Parliament

Regarding the right to use the official language of choice in courts established by Parliament, guaranteed by Part III of the OLA and section 19 of the Charter, the Court held that counsel and his client had waived these rights. In support of this conclusion, it accepted the respondent's arguments. In the submission of the respondent, under section 15 of the OLA, the applicant could have requested simultaneous French-English interpretation for the part of the hearing in which her counsel was addressing the Court in French. She could have also chosen to proceed in French and requested interpretation from French into English. Finally, the applicant clearly chose not to exercise either of these rights before the proceedings were conducted so the panel could make the necessary arrangements. Consequently, the Court dismissed the applicant's arguments relating to language rights. As it also dismissed all the arguments regarding assessment of the applicant's credibility by members of the Division, the Court dismissed the application for judicial review.

"Institutions" with language obligations in New Brunswick courts

Charlebois v. Saint John (City)

In *Charlebois*[52] the New Brunswick Court of Appeal had to interpret section 22 of the *New Brunswick Official Languages Act* (NBOLA).[53] In particular, it had to decide whether the City of Saint John was an "institution" subject to the duty to use, for oral or written pleadings or any process issuing from a court, the official language chosen by the appellant in the civil proceeding that he brought against the town.

It also had to determine the scope of the obligation imposed on the Government of New Brunswick and its "institutions" by that section.

Mr. Charlebois had brought his principal action against the City of Saint John to oblige it to offer equal services in both official languages. In that action, Mr. Charlebois had chosen to use French, while the representatives of the City of Saint John had chosen English and the Attorney General of New Brunswick, intervening, had chosen French. At the hearing, the City of Saint John and the New Brunswick Attorney General by motion asked that Mr. Charlebois' application be struck out. The latter at once objected to these motions, raising preliminary

[52] *Charlebois v. Saint John (City)*, [2004] NBCA 49 [*Charlebois*]. The decision from the Trial Division was analysed in the *2001–2002 Language Rights*, ***supra*** note 2.

[53] *Official Languages Act*, S.N.B. 2002, c.O-0.5.

objections in terms of section 22 of the NBOLA. He particularly objected to the City of Saint John having filed its processes, pleadings and affidavits only in English and that the Attorney General had submitted, in support of an affidavit, an evidentiary document written only in English and had cited case law in English without providing a translation.

In an interlocutory judgment, the judge hearing the application in the Court of Queen's Bench concluded that the City of Saint John was not an "institution" within the meaning of section 1 of the NBOLA and consequently had no duty under section 22 of the NBOLA to file its processes, pleadings and affidavits in French. He further held that the New Brunswick Attorney General did not have to provide a translation of the decisions cited nor of the documents (evidence in support of affidavit), as these were not "pleadings or processes." In reaching this conclusion, he referred to *Lavigne*[54] and drew a parallel with section 18 of the federal OLA. In the judge's view, if it were to be concluded that section 18 of the OLA required the translation of evidence, this would be contrary to the rights of witnesses.

Mr. Charlebois appealed this interlocutory decision. In his grounds of appeal, he argued that the judge had made an error of law by giving the word "institution" in sections 1 and 22 of the NBOLA a limiting interpretation that did not take into account the purpose of the language rights guaranteed by the Charter, and by concluding that the City of Saint John was not subject to the language requirements of section 22 of the Act.

In its judgment, the Court of Appeal noted that the question of interpreting section 22, which was the subject of the case at bar, should not be confused with a constitutional challenge to that provision based on the principles and values governing the language rights and guarantees contained in the Charter. The parties had not submitted the constitutional question to the Court of Appeal, and the particular rules of procedure in such a case had not been observed. For this reason, in its analysis the Court dismissed the argument made by the *amicus curiae* (the Association des juristes d'expression française du Nouveau-Brunswick), namely that the legislature could have intended to give the word "institution" a narrower meaning in the Act than that which it would have in the Charter. Such reasoning raised the constitutional question whether non-inclusion of municipalities in section 22 of the NBOLA infringed a right guaranteed by the Charter or the equality principle within the meaning of section 16 of the Charter.

The Court of Appeal, at the start of its analysis of interpretation of the word "institution" used in section 22 of the NBOLA, was careful to note all the interpretation points or factors that it had to consider in the particular case to determine the legislative intent. It noted

[54] *Lavigne v. Canada (Human Resources Development)* (1995), 96 F.T.R. 68 [*Lavigne*].

that in principle "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[55] It also pointed out that the Supreme Court had noted in this regard that it was not necessary to apply all the interpretation factors in each case, but the factors were closely related and interdependent.

1) *Ordinary and grammatical meaning of section 22 of* New Brunswick Official Languages Act

The Court noted that section 22 of the NBOLA clearly set out the nature of the language requirement and the resulting right, but a problem arose in interpreting who was covered by that requirement. The definition of the word "institution" contained in section 1 was first given as a list of public bodies, but the words "municipality" and "city" were not part of that list, although the same words were defined in section 1 of the NBOLA and were covered by specific provisions in the Act. It further noted that the definition of the word "institution" also included a descriptive clause intended to cover public institutions or bodies that were created to carry out certain governmental functions under a provincial statute or under the powers of the Lieutenant Governor in Council. Finally, it observed that the legislature had organized the Act under sub-headings for areas of activity or service that were the responsibility of the province's governmental structure.

In view of this legislative background, therefore, the Court concluded that the legislature had "undoubtedly structured the legislation in this manner with a view to establishing separate and varying language rights, or regimes having regard either to the very nature of such rights, or the bodies that would be subject to the language obligations therein prescribed."[56]

2) *Ordinary meaning of the word "institution"*

In this regard, the Court noted that the word "institution" used in section 22 of the NBOLA was vague and general. It is often difficult to determine the limits of provincial governmental functions based on this concept, as the modern government of a state or province, such as New Brunswick, takes many forms in a number of public or quasi-public bodies. These bodies carry out the traditional governmental functions with greater or lesser functional independence. Accordingly, even the strictly governmental mission was increasingly performed through public and quasi-public agencies. Consequently, the Court of Appeal felt that "the fact that a significant portion of services to the public are provided by public bodies favours a broad interpretation of the term."[57]

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[55] The Court cited E. A. Driedger in his works entitled *Construction of Statutes* (2e ed., 1983, p.87) at para.18 of its decision in *Charlebois v. Saint John (City)*, ***supra*** note 52.

[56] *Charlebois*, ***supra*** note 52, at para. 21.

[57] *Ibid*. at para. 24.

To analyse the two criteria of the descriptive clause in the definition of "institution" used to limit its scope and determine whether an agency should be regarded as an institution (namely, functions or activities of a governmental nature and the legal sources of the powers), the Court referred to *Moncton (City) v. Charlebois*.[58] In that case, the Court had applied criteria to identify the structures and functions of governmental entities within the meaning of paragraph 32(1)(*b*) of the Charter and concluded, in accordance with a broad and liberal interpretation based on the purpose of that provision, that the municipalities of New Brunswick were institutions of the government within the meaning of subsection 16(2) of the Charter. In short, the Court had held that New Brunswick municipalities were subject to the Charter as they were creatures of the province, they exercised governmental powers conferred on them by the legislature or the government and they held all their powers under the Act.

Based on this precedent, the New Brunswick Court of Appeal concluded that the descriptive part of section 1 of the NBOLA and the criteria stated therein for defining the word "institution" were broad in scope and the criteria essentially corresponded to those identified in *Moncton (City) v. Charlebois*.

Accordingly, relying only on the analysis of the ordinary meaning of the wording of the definition of "institution" the Court indicated that the interpretation suggesting that "institution" covered municipalities and cities seemed, at first sight, to be a plausible one. That interpretation was not conclusive, however, since it was also necessary to see whether the interpretation was consistent with the purpose and structure of the Act and with the legislative intent.

3) General context and purpose of Act

The Court of Appeal noted that section 22 of the NBOLA formed part of a number of provisions creating institutional bilingualism in the courts in New Brunswick. It further noted that the preamble to the Act confirmed the aims and values underlying the guaranteed rights both in the Act and in the Charter. In short, this legislation was intended as a legislative response by the province to the language obligations respecting institutional bilingualism in New Brunswick imposed on it by the Charter. The Court also considered the quasi-constitutional status of this legislation. It noted that the effect of this status was not to alter the traditional approach to statutory construction, but made it possible to recognize the particular purpose of the Act. Referring to *Beaulac*[59] and *Arsenault-Cameron*,[60]

[58] *Moncton (City) v. Charlebois* (2001), 242 N.B.R. (2d) 259.

[59] *Beaulac*, ***supra*** note 1.

[60] *Arsenault-Cameron*, ***supra*** note 6.

the Court concluded that language guarantees should be interpreted "with an emphasis on the protection and flourishing of official language communities; they should also be construed remedially for the purpose of redressing past inequalities."[61]

4) Structure of Act and legislative intent

The Court of Appeal examined the relations existing between the various provisions of the NBOLA, bearing in mind the principle of internal coherence of legislation. According to this principle, the legislature cannot have intended absurd consequences, that is, an interpretation which would be illogical or incoherent. In doing this, the Court of Appeal considered the definition of the word "institution" used in section 1 of the NBOLA together with, *inter alia*, sections 27 and 36 of that Act.

Section 27 provides that the public is entitled to communicate with and receive services from any "institution" in the official language of its choice. Section 36 is part of the sub-heading "municipalities" and provides that "municipalities and cities to which subsection 35(1) and 35(2) of the *Act* applies" (cities and municipalities whose minority language population is at least 20 percent of the total population) are required to offer communications and services specified by regulation in both official languages. In this connection, the Court noted that the latter provision was intended to give different treatment to municipalities serving a population with a language minority of at least 20 percent and those not serving such linguistic minorities, and held that the effect of section 36 was to create a language regime separate from that of section 27 (which also deals with service to the public by an "institution," but makes no distinction based on the minority language percentage of the population).

In view of this analysis, if the word "institution" were to include municipalities and cities and make them subject to the language obligation set out in section 27, the application of the provisions in sections 27 and 36 would be inconsistent. For example, it would be inconsistent for all municipalities to be required to provide all services and communications in both official languages under section 27 while under section 36 municipalities with a minority official language population of 20 percent or more were required to provide in both official languages only communications and services specified by regulation.

At the conclusion of its analysis, the Court found that an interpretation whereby the word "institution", defined in section 1, included municipalities and cities would lead to inconsistent and illogical results in the application of several provisions of the Act. It added that a plausible and liberal interpretation of the word "institution," based on analysis of the ordinary

[61] *Charlebois*, ***supra,*** note 52 at para. 36.

meaning of the wording of the provision, was not consistent with the legislative intent and so had to be rejected. Finally, the Court considered that contextual and teleological analysis of the disputed provision had removed all ambiguity as to the meaning of "institution" and the scope of section 22. As there was no ambiguity, there was no basis for referring to the values and principles enshrined in the Charter as a means of determining the legislative intent.

5) "Pleadings" and "processes"

Finally, as there was no dispute that the New Brunswick Attorney General was clearly covered by section 22 of the NBOLA, the Court of Appeal also proceeded to consider the interpretation of the expressions "pleadings" and "processes" appearing in section 22 of the NBOLA, to determine the scope of the obligation imposed. Referring to the judgment of Noël J.A. in *Lavigne*[62] on section 18 of the federal OLA, which uses the same phrase, the Court of Appeal considered that the trial judge had not erred by concluding that the words "pleadings and processes" did not include evidence or testimony in the form of affidavits. Consequently, the applicant could not require that the Attorney General submit his evidentiary document in French. The Court of Appeal also indicated that the phrase "pleadings and processes" did not, in any case, apply to case law cited in a memorandum or a book of authorities, the applicant, therefore, could not require that the Attorney General submit his authorities in French or to provide a French translation. It noted, however, that it would be natural to expect the province and its institutions to use a translation of case law where it existed.

In sum, the Court of Appeal dismissed the appeal, concluding that the word "institution" defined in section 1 of the NBOLA did not cover either municipalities or the City of Saint John. Consequently, that town was not subject to the obligation imposed by section 22 of the *Act*. Finally, the phrase "pleadings and processes" did not apply either to evidence or case law, so that the New Brunswick Attorney General was not required to file an evidentiary document in support of an affidavit, or authorities, in French and was not obliged to provide a translation of these documents.

[62] *Lavigne*, ***supra*** note 54.

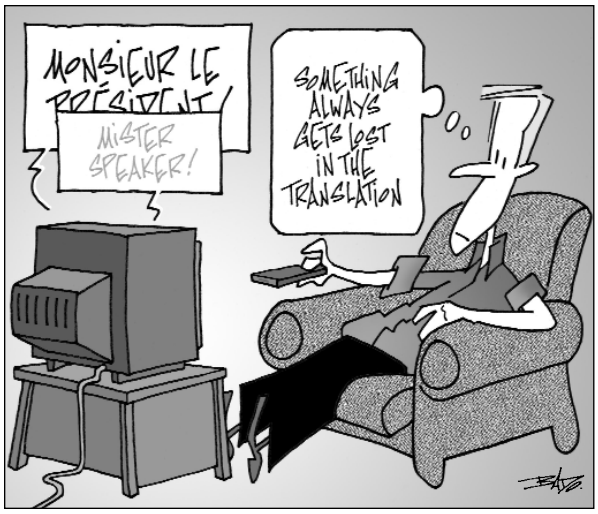
III- LANGUAGE RIGHTS AND SERVICE TO THE PUBLIC

Section 20 of the Charter enshrines the fundamental right of the public to receive services from federal institutions and from those of New Brunswick in either official language. Where federal institutions are concerned, however, this right is limited to services received from the head or central office of the institution in question, offices located in regions where there is a significant demand for use of French and English or offices of the institution where, due to their nature, it is reasonable that bilingual services be offered. Similar limits are not placed on New Brunswick institutions, so that services may be offered in both languages by all "institutions" of New Brunswick, regardless of where they are located in the province.

Part IV of the *Official Languages Act* codifies this constitutional requirement for services to the public by federal institutions with the same limits, and adds a provision regarding what is termed active offer. Thus, under section 28 of the OLA, federal institutions are required to ensure that appropriate measures are taken to actively offer services to the public in both official languages.

The *Official Languages (Communications With and Service to the Public) Regulations* define the concepts of "significant demand" and "nature of the office" used in the OLA and indicate the situations in which services must be given in both official languages. Essentially, these Regulations make a distinction between communities of at least 100,000 inhabitants and smaller towns, localities and rural regions. For the minority population in each category, it sets the various thresholds necessary to create a duty to provide federal government services in both official languages.

During the period covered by this report, several questions arising from the duties of federal institutions and of New Brunswick in providing services to the public have been before the courts.



3.1 Broadcasting of House of Commons debates

Quigley v. Canada (House of Commons)

The preceding report on language rights dealt in detail with the judgment of the Federal Court Trial Division in *Quigley*.[63] That case raised the question of the scope of the language obligations of the House of Commons when it chooses to have its debates broadcast by third parties. In particular, it raised the question of whether the House of Commons had a duty under section 25 of the OLA to ensure that the Cable Public Affairs Channel (CPAC)—and, ultimately, the broadcasting distribution undertakings (BDUs) with which CPAC did business—broadcast debates in both official languages. That case also raised the question of whether the Federal Court had jurisdiction to apply the OLA to the House and to order a remedy, or whether the latter could rely on its inherent constitutional privilege with respect to publication of its proceedings.

On the question of privilege, the Federal Court concluded that although a privilege existed for control of publication of House of Commons debates and proceedings, that privilege did not apply in the particular case. "Since the House has in the past and is continuing to provide the CPAC with all three audio signals, floor sound plus English-only and French-only sound signals, the issue of parliamentary privilege relating to the control of the publication of the debates does not arise in this case. The CPAC has all of the above-mentioned feeds available for the BDUs and the BDUs choose which feeds they wish to distribute."[64] Accordingly, the Federal Court concluded that it had jurisdiction to apply the OLA to the House.

With respect to the scope of the House of Commons obligations, the Federal Court concluded that the CPAC was the vehicle used by the House to communicate its debates to the public, the CPAC was acting "on behalf" of the House for the public broadcasting of debates, and agreements concluded between the speaker of the House and the CPAC were quite clearly covered by section 25 of the OLA. It also concluded that section 25 of the

[63] *Quigley v. Canada (House of Commons)*, 2002 FCT 645 [*Quigley*]. The decision rendered by the Trial Division was analysed in our *2001–2002 Language Rights*, ***supra*** note 2.

[64] *Ibid*. at para. 49.

OLA had not been observed in the particular case, since the "CPAC, in its agreement with the House, did not undertake to ensure that its distribution contracts with various BDUs would guarantee broadcasting in both official languages."[65]

Finally, the Court held that section 25 of the OLA required that "any agreement between the House and CPAC, based on the facts of this case, must 'ensure' that the eventual broadcasting of the proceedings already provided by the House be in both official languages."[66] It therefore ordered that the House and its administration take the necessary measures to comply with section 25 of the OLA within a year of the judgment.

The Attorney General of Canada appealed this judgment to the Federal Court of Appeal. That appeal was dismissed as being moot.[67] The Court held that the appeal was devoid of any practical significance, as the method currently used to provide public television broadcasting is different from that used when the order at trial was made. It also relied on the fact that Mr. Quigley was now receiving CPAC in the official language of his choice as a result of this new method, made applicable by the new CRTC Regulations that required cable broadcasters, as a condition of their licenses, to distribute House proceedings in both official languages.

Although the Court could have exercised its discretion and decided to hear the appeal on a moot point, it concluded from a "concern for judicial economy" that it would not hear the case. It mentioned the absence of the CRTC and the CPAC in support of its choice, for "any decision made in the absence of these parties would not bind them, so that the same issue could be relitigated at a later date."[68] The Court added that "to the extent that the Court must be attentive that it not stray into the legislative domain, it must be particularly careful not to do so in relation to the rights and privileges of Parliament itself. Parliament is not above the law, but the Court ought not to delve into its internal operations except where it is clearly necessary to do so. In this case, it is not".[69]

In short, the Court held that "no useful order may be made by this Court in an area where evolving technology plays such a great part without the participation of the CRTC and of the broadcasting industry".[70]

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[65] *Ibid*. at para. 55.

[66] *Ibid*. at para. 56.

[67] *Quigley v. Canada (House of Commons)*, 2003 FCA 465 [*Quigley CA*].

[68] *Ibid*. at para. 12.

[69] *Ibid*. at para.12.

[70] *Ibid*. at para. 13.

3.2 Services provided by the RCMP

R. v. Desgagné

The judgment of the Saskatchewan Provincial Court in *Desgagné*[71] raises two questions, namely (1) that of the linguistic obligations in that province regarding the drafting of municipal tickets; and (2) that of the language obligations of Royal Canadian Mounted Police officers when they are performing provincial duties, in particular when an officer is addressing a motorist to issue him a ticket for a breach of the highway code, especially his obligations regarding the active offer.

In that case, Mr. Desgagné was charged with speeding on two occasions. On the first occasion, he allegedly infringed the *Highway Traffic Act* when he was driving on the highway near Moose Jaw and was stopped by an RCMP officer. On the second occasion, he allegedly infringed a municipal by-law of the city of Regina and was apprehended by a municipal police officer.

1) Language obligations regarding municipal tickets

This question concerned the incident in Regina. The Court was careful to note that unlike section 530 of the *Criminal Code*, section 11 of the Saskatchewan *Language Act*[72] does not confer a right to decide the language of a trial, it simply states that French may be used in the provincial courts. In addition, unlike section 849 of the *Criminal Code*, this Act contains no provision regarding the language used on forms; in so far as section 11 can be applied to ticket offences, the choice of language belongs to the person writing the ticket. Finally, it held that no provision guaranteed access to a bilingual municipal police officer.

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[71] *R. v. Desgagné*, 2003 SKPC 102 [*Desgagné*].

[72] Section 11 of the *Language Act* of Saskatchewan, L.S. 1988, c. L-6.1 provides as follows:
11(1) Any person may use English or French in proceedings before the courts entitled as:
(a) the Court of Appeal;
(b) the Provincial Court of Saskatchewan;
(c) Her Majesty's Court of Queen's Bench for Saskatchewan;
(d) **Repealed**. 2001, c.9, s.12.
(e) the Traffic Safety Court of Saskatchewan; or [?]
(f) **Repealed**. 2001, c.9, s.12.
(2) The courts mentioned in subsection (1) may make rules for the purpose of carrying into effect the provisions of this section or for the purpose of providing for any matters not fully or sufficiently provided for in this section or in their rules already in force.
(3) Where the courts mentioned in subsection (1) make rules pursuant to subsection (2), those rules shall be printed and published in English and French.
(4) The rules of the courts mentioned in subsection (1) and the rules of tribunals are declared valid notwithstanding that they were made, printed and published in English only.
(5) The rules of the courts mentioned in subsection (1) shall be printed and published in English and French not later than January 1, 1994.
(6) Before the date mentioned in subsection (5), the courts mentioned in subsection (1) may cause to be printed and published their rules, other than rules made pursuant to subsection (2), in English only.
(7) Where the rules of a court mentioned in subsection (1) are printed and published in English and French, the English version and the French version are equally authoritative.

2) Language obligations of the RCMP

This question concerned the incident that occurred near Moose Jaw. The Court considered the testimony given at the trial and concluded that Mr. Desgagné had been arrested for speeding, he had addressed the constable in French and the latter asked him if he could answer in English. Mr. Desgagné replied that he understood that language and the conversation proceeded in English. It also noted that Mr. Desgagné had not asked for service in French and the constable had indicated that if that had been the case, he could have served Mr. Desgagné in halting French. If that proved unsatisfactory, the RCMP could have provided this service, as there was an officer at the detachment assigned to that specific duty.

In its judgment, the Court concluded that [translation] "Whatever the RCMP's duties are when performing provincial functions, there is no requirement that the force offer service in French if it is not requested".[73] Consequently, the Court held that the two arguments made did not constitute a defence and convicted Mr. Desgagné on both counts. It should be noted that the accused did not invoke section 28 of the *Official Languages Act* regarding the duty imposed on federal institutions, such as the RCMP, to make an active offer. If that had been the case, the decision might have been different.

R. v. Doucet

As in *Desgagné*, the judgment of the Nova Scotia Supreme Court in *Doucet*[74] raises, in addition to the question of a reasonable delay in the holding of the trial, the question of the linguistic obligations of RCMP officers when they are performing provincial duties, particularly their active offer obligations.

While travelling along the Trans-Canada Highway in the Amherst region, Mr. Doucet was arrested for speeding by an RCMP officer. At the time of the arrest and throughout the conversation that followed, Mr. Doucet addressed the RCMP officer in French and the latter spoke to him only in English. It further appeared from the evidence that the officer was a unilingual Anglophone, that Mr. Doucet understood English and that he made no express request for services in French.

The trial was held in the Provincial Court in November 1999. In his judgment, the trial judge considered *inter alia* that section 20 of the Charter did not apply to the RCMP when it was offering services under a provincial contract and that, therefore, this provision could

[73] *Desgagné*, ***supra***, note 71 at para. 22.

[74] *R. v. Doucet*, [2003] N.S.J. nº. 516 [*Doucet*].

not be applied in the circumstances. Accordingly, he convicted the accused of a breach of the Nova Scotia *Motor Vehicle Act*.

Appealing the Provincial Court judgment, Mr. Doucet alleged that the trial judge erred in law and in fact, specifically in three respects: (1) by not taking into account that the RCMP is a federal institution, whatever the nature of the service it is providing, and so subject to the Charter; (2) by giving an erroneous interpretation of the concept of "active offer" in deciding that using French as a language of communication did not amount to requesting service in that language; and (3) by deciding that the appellant's request for service was not a significant demand within the meaning of the Act.

1) Application of section 20 of the Charter to the RCMP

Considering first the question of language rights under the Charter, the Nova Scotia Supreme Court judge indicated that [translation] "there was no doubt members of the RCMP were bound to uphold both provincial and federal statutes under the *RCMP Act*"[75] and that in his opinion [translation] "members of the RCMP do not lose their federal status when they act under a contract with a province or give effect to provincial legislation".[76] Accordingly, the RCMP remained a federal institution. He added, referring to *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)*[77] that [translation] "federal institutions are not allowed to avoid their linguistic responsibilities by means of contracts or other arrangements transferring or delegating some of their functions".[78] Consequently, he concluded that section 20 of the OLA applied to the case at bar.

2) Whether section 20 of the Charter was breached in this particular case

Going on to analyse the circumstances of the arrest, the judge concluded that the appellant had not made a specific or express request to the officer for services in French and accepted the officer's testimony that he had not realized the appellant wished services in French. The judge was careful to indicate, however, that if he had been satisfied that the officer realized the appellant wanted services in French, the fact that the officer thought the appellant understood English would not have been an excuse.

The judge further indicated that he was [translation] "not satisfied that RCMP officers patrolling Nova Scotia highways must actively inquire into whether the accused wish services

[75] *Ibid*. at para. 29.

[76] *Ibid*. at para. 31.

[77] *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)*, (2001) 194 F.T.R. 181, 2001 FCT 239.

[78] *Doucet*, ***supra*** note 74 at para. 33.

in either official language."[79] Consequently, he held that it [translation] "was not necessary for members of the RCMP to notify the accused that they can select the language of communication."[80] He noted, however, that an accused did not have to persist if met with indifference by an arresting officer, but more was necessary than what the appellant had done in the case at bar. The judge accordingly relied on the view taken on the facts by the trial judge. He therefore could not [translation] "conclude that the trial judge made an error in finding that the appellant had not submitted enough evidence to show a specific or explicit demand, or even implicit demand, for services in French."[81] He consequently dismissed the appeal.

The judge also ruled on the question of the significance of the demand. He concluded that the appellant had not submitted any evidence to show that needs were different on the Trans-Canada Highway from other highways. Accordingly, it could not be concluded that the RCMP's mission when it was patrolling the Trans-Canada Highway could justify use of French and English. Finally, although French might be the subject of significant demand on the Trans-Canada Highway in the Amherst region, the appellant did not submit sufficient evidence to show a significant demand for service in French within the meaning of paragraph 20(1)(*b*) of the Charter in that region, although the burden of proof was upon him to do so. The Court cannot take judicial notice of such demand, even though it is a Maritime province where many Francophones live and the Amherst region is a principal point of entry between New Brunswick and Nova Scotia.

Noting these comments on the evidence, Mr. Doucet subsequently filed a proceeding in the Federal Court on the same facts, accompanied this time by evidence of "significant demand" for the use of French on the Trans-Canada Highway in the Amherst region. A summary of this proceeding follows.

3.3 *Official Languages Regulations* criteria used to determine "significant demand" and their consistency with section 20 of the Charter

Doucet v. Canada

In his action before the Federal Court,[82] Mr. Doucet was no longer asking that his conviction for speeding be quashed owing to the circumstances of his arrest, which allegedly infringed his language rights, but he alleged a breach of those rights, involving inconsistency of a

[79] *Ibid*. at para. 36.

[80] *Ibid*. at para. 39.

[81] *Ibid*. at para. 41.

[82] *Doucet v. Canada*, 2004 F.C 1444.

provision of the *Official Language Regulations* with section 20 of the Charter, and sought a remedy pursuant to section 24 of the Charter. He asked the Court to rule that subparagraph 5(1)(*h*)(i) of the Regulations was inconsistent with section 20 of the Charter, in that it did not recognize the special mission of RCMP officers patrolling the Trans-Canada Highway. Alternatively, he asked the Court to rule that at the Fort Lawrence point of entry near Amherst, the Trans-Canada Highway is a region of significant demand for the use of French. By establishing a duty of service in that region based on the percentage of the local Francophone population rather than in terms of the volume of Francophones using the Trans-Canada Highway at that location, the Regulations are inconsistent with section 20 of the Charter. The decision accordingly raised the question of the consistency of the Regulations with section 20 of the Charter.

It will be recalled that section 20 of the Charter and Part IV of the OLA set out the right to communicate with and receive services from federal institutions, in particular where there is a "significant demand" or "due to the nature of the office." The Regulations are intended to determine the circumstances in which a "significant demand" exists within the meaning of the OLA and to determine the offices that must offer bilingual services because of their special mission. It will be recalled that the RCMP offices are not on this list, where the mission justifies services in both languages within the meaning of the Regulations. It will also be recalled that under subparagraph 5(1)(*h*)(i) of the Regulations, "significant demand" exists for services in the minority official language in rural areas if the minority population attains the threshold of 500 persons, or 5 percent of the total population. Applying this rule, no "significant demand" existed in the Amherst region. In his pleadings, Mr. Doucet maintained that significant demand existed in that region within the meaning of section 20 of the Charter and that, by not covering the special situation at Amherst, the Regulations were infringing his language rights. In his submission, while it is true that the demographic weight of Francophones in Amherst does not justify the RCMP offering bilingual service, it is clear that the number of Francophones using Highway 104 justifies it. This factor should have been taken into account in the Regulations.

In his judgment, Blanchard J. of the Federal Court first noted that it was not for the Court to question the government's political decisions in drafting the Regulations when they set the figures for "significant demand" or applied the national mandate to certain offices. Those decisions, he noted, "reflect both the desire to comply with the provisions of the Charter and the OLA and the need to apply some rationality to offering bilingual services in a country where the two languages do not always co-exist in the same area."[83] For this reason, it appears that the judge preferred to leave it to the legislator to decide which institutions should be

[83] *Ibid*. at para. 21.

covered by the concept of "nature of the office" since he chose not to rule on this question even though it was raised by the applicant. He agreed to consider the question of "significant demand" however, noting that the Court had a duty to intervene if the application of these decisions, even though political, had the effect of infringing the right guaranteed by the Charter. Accordingly, in the case at bar, the Court had to determine whether the rules applicable to the notion of "significant demand" in the Regulations, as written, infringed the rights guaranteed by the Charter and the OLA.

The Federal Court judge went on to confirm, as the Nova Scotia Supreme Court and Court of Appeal had, that when it is patrolling Nova Scotia highways or responding to a call from an individual, the RCMP is a federal institution offering services to the public, and as such, is bound by the provisions of the OLA and the Charter regarding the provision of services in the official language of choice. He also confirmed that although the RCMP performs policing duties in Nova Scotia under a contract with the province, this does not in any way alter its status as a federal institution. Finally, he indicated that it had to be determined in the case at bar whether a "significant demand" existed on the Trans-Canada Highway in the Amherst region within the meaning of the Charter.

1) *Whether the concept of "significant demand" defined in the Regulations should take into account public travelling on the Trans-Canada Highway*

Analysing the facts of the case, the judge concluded that Amherst had a limited Francophone population, but was located near New Brunswick, where 32 percent of the population was Francophone (2001 Census), and more importantly, near a region where, according to the evidence, 38 percent of the population was Francophone. He also noted that the evidence showed a large amount of traffic from New Brunswick in the Amherst region. The applicant's expert witness had persuasively established the probability that a significant number of Francophones from New Brunswick would be travelling on highways in the Amherst region, especially on the principal artery that was part of the Trans-Canada Highway.

In view of these facts, the judge concluded that the Regulations did not deal with the "situation of a busy highway, patrolled by the RCMP, on which a large number of members of the minority language group are likely to be travelling."[84] In his view, the evidence showed, on a balance of probabilities, "that there is a 'significant demand' for minority language services in French on the section of Highway 104 crossing the service area of the RCMP, Amherst detachment."[85]

[84] *Ibid*. at para. 46.

[85] *Ibid*. at para. 46

Justice Blanchard added that the demographic data for the town of Amherst (the only data used by the Regulations) bore no relation to the actual situation of a large population travelling on the highway, which according to the evidence came from outside the province—essentially from New Brunswick—and consisted of a large proportion of Francophones. The judge also considered section 23 of the OLA, concerning the provision of services to "the travelling public," and the provision in the Regulations which stated that in the case of airports and ferry terminals, significant demand was deemed to have been established once a certain level is reached in the number of travellers. He held that similar criteria had been applied in the case of highways. In his view, the significant number of vehicles annually crossing the border at Fort Lawrence constituted a "powerful counter-argument to the idea that demand should only be based on the demographics of the area."[86]

Accordingly, the judge concluded that the Regulations contained a deficiency in that "the Regulations do not provide for services to a linguistic minority travelling on a major highway."[87] Consequently, he concluded that, "the Regulations do not comply with subsection 20(1) of the *Charter*, because they infringe the right of individuals to communicate with a federal institution in the official language of their choice, although a 'significant demand' exists."[88] He also concluded that the Regulations thereby did not meet the requirements of sections 22 and 23 of the OLA.

2) *Whether the infringement of rights guaranteed by section 20 of the Charter is justified under section 1 of the Charter*

Considering this point involving section 1 of the Charter, the judge concluded that it was reasonable and legitimate to limit the offer of bilingual services when demand did not justify it and the objective of rationalization was also legitimate. A logical connection existed between this objective and the infringement of rights, since limiting the offer of French services enabled the services to be rationalized. In the case at bar, the infringement of rights was not minimal. In the judge's view, the defendant "did not demonstrate how the Regulations as drafted minimally impair the rights of the travelling public belonging to the minority official language group."[89] According to the evidence, the rights of a large number of persons had been infringed.

In his view, the beneficial effects of the Regulations depend solely on the savings that the Treasury Board is likely to make by not accepting the obligation of providing bilingual

[86] *Ibid*. at para. 48.
[87] *Ibid*. at para. 49.
[88] *Ibid*. at para. 49.
[89] *Ibid*. at para. 56.

officers on Highway 104 in the Amherst service area. This economic advantage has to be weighed against the prejudicial effect of the infringement, in view of the values enshrined in the Charter. Consequently, the judge concluded that the infringement of the rights guaranteed by section 20 of the Charter was not justified under section 1 of the Charter.

3) Remedy that was appropriate and just in the circumstances

Referring to the Supreme Court of Canada's judgment in *Doucet-Boudreau*,[90] the judge first noted that the broad and liberal interpretation that should be given to the Charter should also be reflected in a broad and liberal approach to remedies. The "principal purpose of remedies is to provide an effective solution to the problem raised by the impairment of a right guaranteed by the *Charter*."[91] In the case of the Regulations at issue, the judge observed that they contained a very serious defect and the Court had a duty to intervene when it found an infringement of the Constitution.

As the evidence in the record dealt solely with the Regulations in general and with the territory served by the Amherst RCMP detachment, the judge refused to make a specific ruling on the government's obligations to provide bilingual police services along the entire length of the Trans-Canada Highway.

After being careful to note that it was not his function to decide what form amendments to the Regulations should take, the judge thought it proper to point out the defects that should be corrected to make the Regulations consistent with the OLA and the Charter:

> *An RCMP detachment is regarded as an "office" for the purposes of the* Charter *and the* OLA. *When an RCMP detachment provides policing services in Canada, it is important to consider the function it is charged with in the community in which it is located. In the case at bar, one of the RCMP's important duties is to patrol a busy highway, where there is undoubtedly a demand for services in French.*[92]

Consequently, the judge concluded that "the Regulations should, therefore, be amended to take into account circumstances such as those present in this case: a major highway, used significantly by people of a minority official language, and patrolled by a police force under the authority of the Canadian government."[93] He noted that in such a case, defining

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[90] *Doucet-Boudreau*, ***supra*** note 16.

[91] *Doucet v. Canada*, ***supra*** note 82 at para. 69.

[92] *Ibid*. at para. 76.

[93] *Ibid*. at para. 77.

"significant demand" in terms of the demography of the location where the detachment is situated was clearly inadequate, since "the RCMP is expected not only to deal with residents of the area,"[94] but "to serve all non-residents who use the highway."[95]

The judge further concluded that it was the function of the Governor in Council to find suitable wording to resolve this problem. He indicated, however, that in his opinion the words "travelling public" in the meaning of section 23 of the OLA "must be defined more broadly than to include only travellers using airports, railway stations or ferry terminals, and that travellers using major highways must also be considered when they number in the millions."[96] Equal access to services in both official languages simply meant equal treatment. For this reason, he considered that, contrary to what had been indicated by the Nova Scotia Supreme Court judge and Court of Appeal, the procedure set up by the RCMP for using a bilingual colleague via radio was not very satisfactory. A service that left much to be desired absolutely did not meet the objectives set out in section 2 of the OLA and was contrary to section 16 of the Charter, which recognizes the equal status of both official languages.

Finally, Blanchard J. allowed Mr. Doucet's application in part, finding subparagraph 5(1)(*h*)(i) of the Regulations inconsistent with paragraph 20(1)(*a*) of the Charter "in that the right to use French or English to communicate with an institution of the Government of Canada should not solely depend on the percentage of Francophones in the census district. Consideration must also be given to the number of Francophones who use or might use the services of the institution, as illustrated by the circumstances in this case, along Highway 104 near Amherst, Nova Scotia."[97] Consequently, he felt it was reasonable to give the Governor in Council 18 months (from October 19, 2004) to correct the problem identified in the Regulations. Mr. Doucet appealed this decision, primarily with respect to the question of "nature of the office."

[94] *Ibid.* at para. 77.
[95] *Ibid.*
[96] *Ibid.* at para. 78.
[97] *Ibid.* at para. 80.

IV- LANGUAGE RIGHTS IN THE FEDERAL PUBLIC SERVICE

There are essentially three aspects to the language rights applicable within the federal Public Service, namely: (1) the employees' language of work; (2) the staffing and language designation of positions; (3) equitable participation of both language groups in federal institutions.

The first aspect is covered by **Part V of the OLA**, which specifies the language obligations imposed on federal institutions regarding employees working in prescribed bilingual regions.[98] In particular, institutions must provide staff in these regions with both central and individual services as well as work instruments in both official languages. It also requires certain institutions providing central services to employees of other institutions to do so in both official languages.

The second aspect is covered by **section 91 of the OLA**, which deals with the language requirements applicable to the staffing of positions in the federal public service. Thus, certain positions are prescribed as bilingual, whether imperative or not, and others are designated unilingual. The requirements must be objectively necessary for the performance of the functions in question.

The third aspect is covered by **Part VI of the OLA**. In particular, subsection 39(1) indicates the two aspects covered by this provision: (1) equal opportunities for Francophone and Anglophone Canadians to obtain employment and advancement in federal institutions, without regard to their ethnic origins or first language learned; and (2) equitable participation by both official language communities in these institutions, taking into account the special characteristics of their mandates, the public they serve and their location. Subsection 39(2) states that implementation of these aspects must take into account the duties which federal institutions must carry out under Part IV (Communication with and Service to the Public) and Part V (Language of Work) of the OLA. Finally, subsection 39(3) states that selection of personnel continues to be in accordance with the merit principle.

Two judgments rendered during the period covered by this report deal with the scope of these provisions and their application to the situations raised by the actions. The first judgment deals with the question of equitable participation by both language groups in federal institutions, and in particular the means of attaining this objective in a hiring process. It clarifies the body of language rights that a candidate for employment in the federal Public Service

[98] Section 35(2) of the OLA states that these regions designated bilingual are set out in Annex B of the part of the Treasury Board and Public Service Commission Circular No. 1977-46 of September 30, 1977 entitled "Official Languages in the Public Service of Canada: A Statement of Policies." In addition to the National Capital Region, these regions include some parts of Northern and Eastern Ontario, the bilingual region of Montréal, some parts of the Eastern Townships, the Gaspé and Western Quebec, and New Brunswick. For more details, see the *Treasury Board Manual* on language of work.

can exercise. In particular, it emphasizes the importance of establishing positive measures for the use of official languages in a hiring process to attain the objective of equitable participation. The second judgment concerns staffing and confirms the need to take services to the public into account when determining the language designation of positions.

4.1 Language of the members of a board in a hiring process

Ayangma v. Canada

The judgment of the Federal Court of Appeal in *Ayangma*[99] raises the question of the language obligations applicable to a staffing process following a competition. In particular, it raises the question of the applicability of Part IV of the OLA (Services to the Public) in such a case, as well as the question of whether the commitment mentioned in section 39 of the OLA is executory (equitable participation by Francophone and Anglophone Canadians in federal institutions).

In this case, Mr. Ayangma had filed an action for damages for harm caused by the actions of Health Canada and the Public Service Commission, which, he said, made it impossible for him to be appointed to a position for which he had applied in a public competition. In fact, two of the three members of the selection panel had been unable to conduct the appellant's interview in French, although French was the appellant's mother tongue.

Mr. Ayangma's candidacy was not retained at the end of the selection process and he appealed to the Public Service [Commission] Appeal Board. The Board allowed his application and concluded that the members of the selection board did not have sufficient knowledge of French to communicate with the applicant during the interview, contravening subsection 16(2) of the *Public Service Employment Act* (PSEA). The Public Service Commission subsequently proposed corrective measures, which were refused by Mr. Ayangma. The Commission ultimately decided to cancel the entire process and proposed to conduct a new competition. The appellant, however, refused to be re-evaluated and re-interviewed for the position. The new competition went ahead without him and the position was filled.

[99] *Ayangma v. Canada* (2003), 303 N.R. 92, 2003 FCA 149.

In his statement of claim filed in connection with his action for damages, the appellant maintained that the respondent had contravened the OLA, the PSEA and section 15 of the Charter. He further argued that Her Majesty the Queen had contravened the order by the Public Service Commission Appeal Board. The Federal Court Trial Division judge expressed the view that the issue of an appropriate remedy was *res judicata*, in view of the fact that the appellant had been successful in the appeal he filed with the Public Service Commission Appeal Board and he had refused the proposed corrective measures.

The judge further indicated that the staffing process used in the impugned competition had not infringed the language rights conferred upon the appellant by Part IV of the OLA, since an internal competition could not be regarded as a "public service" within the meaning of the OLA. Relating to section 39 of the OLA, the judge observed that it was a statement of commitment by the government and the provision was not the basis for an action for compensation under subsection 77(4) of the OLA. Mr. Ayangma appealed this judgment.

The Federal Court of Appeal dismissed this appeal and held that the action for damages was inadmissible. In its judgment, it repeated the findings of the trial judge: the appellant had been successful in the appeal he filed with the Public Service Commission Appeal Board. The Court added that the appellant could not base his action for damages on the fact that he had been successful before that Board. It also confirmed the trial judge's conclusions that Part IV of the OLA had not been infringed since provision of services did not apply to a competition held under the PSEA. On section 39 of the OLA, it held that this was only a commitment and was not the basis for an action.

4.2 Bilingual designation of positions determined by the needs of service to the public

Marchessault v. Canada Post Corporation

In *Marchessault*,[100] the Federal Court of Appeal had to rule on the validity of criteria used to identify a position's language requirement according to the needs of service to the public.[101] To do this, it had to consider the basis used to establish the existence of "significant demand" for service in the minority official language in a given region, when the *Official Languages (Communications with and Service to the Public) Regulations* that define significant demand were not yet in effect.

[100] *Marchessault v. Canada Post Corporation* (2003), 315 N.R. 111, 2003 FCA 436.

[101] The decision rendered by the Trial Division was analysed in the *2001–2002 Language Rights*, ***supra***, note 2.

Mr. Marchessault had made an application to the Federal Court challenging a decision of the Canada Post Corporation to classify the position of postmaster at Coderre in Saskatchewan as a "bilingual imperative position". At the time of the competition, Mr. Marchessault was performing the duties of postmaster on a temporary basis, but because he did not speak French he did not meet the requirements for performing the duties permanently. Mr. Marchessault filed a complaint against the classification with the Commissioner of Official Languages. In his report, the Commissioner concluded the proportion of residents with French as their mother tongue was sufficient to constitute a "significant demand" within the meaning of the OLA, justifying the classification of the position as bilingual, and dismissed the complaint. Mr. Marchessault then filed an application in the Federal Court pursuant to section 77 of the OLA, alleging that under the Official Languages Regulations there was not a significant demand for services in French in that region. The trial judge dismissed his application, noting that the Regulations were not applicable at the time of the classification. In his appeal, Mr. Marchessault alleged that the trial judge made an error in basing his decision on this ground.

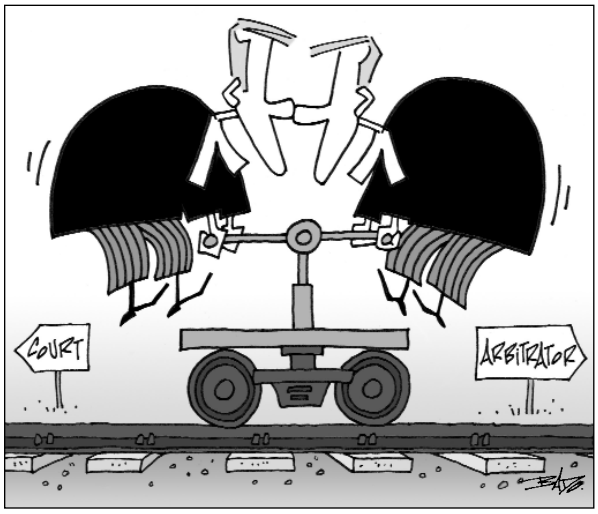
In its judgment, the Court of Appeal indicated that the trial judge had not made any error when he decided that the Official Languages Regulations did not apply when the position was posted, namely December 12, 1992, since the Regulations only came into effect on December 16, 1992. It added that, before the Regulations came into effect, federal institutions such as Canada Post had established their own criteria for determining whether a significant demand existed for services in the minority language. Finally, it pointed out that the criteria used had been drawn to the appellant's attention in a letter, and one of them was the "minority language population of 500 or 10 percent of the total population." Additionally, Mr. Marchessault himself had admitted that if significant demand could be determined based on these criteria, the position in question had been correctly identified as a "bilingual position." Consequently, the Court held that the significant demand had been correctly determined and dismissed the appeal.

V- REMEDIES PROVIDED IN PART X OF THE *OFFICIAL LANGUAGES ACT*

Part X of the OLA describes the conditions of and procedure for a court remedy, which may be filed in the Federal Court, to compel a federal institution to observe the OLA. Such an action may be brought against a federal institution by a complainant who has filed a complaint with the Commissioner of Official Languages, or by the Commissioner with the complainant's consent.

This part of the OLA also states that the right of action does not abrogate or derogate from any other right of action, so it is clear that, depending on the circumstances, other court remedies may be used when infringements of language rights are alleged. The remedy or remedies available are thus determined in accordance with the circumstances of each case.

One decision rendered during the period covered by this report looked at the feasibility of the action set out in Part X of the OLA when, following an investigation, the remedy sought is compliance with recommendations made by the Commissioner of Official Languages.



5.1 Jurisdiction of the Federal Court and Arbitrators in language rights disputes

Norton et al. v. Via Rail Canada Inc.

In this case,[102] the Federal Court had to rule first on the scope of the recommendations made by the Commissioner of Official Languages in her investigation reports, and second on remedies available in linguistic matters where the issue is covered by a collective agreement.

The applicants had filed a complaint with the Commissioner of Official Languages against Via Rail regarding the language of work, particularly the impact of the failure to observe their OLA rights regarding their opportunities for promotion. In her investigation report, the Commissioner of Official Languages concluded that the complaint was valid and made various recommendations.

[102] *Norton et al. v. Via Rail Canada Inc.* (2004), 248 F.T.R. 312, 2004 FC 406.

The applicants subsequently filed an application against Via Rail in the Federal Court regarding these infringements. They asked the Court to order Via Rail to comply with the Commissioner's recommendations. In his decision, Prothonotary Morneau considered the documents filed by the applicants as proceedings seeking a remedy in the nature of an injunction or *mandamus*. After noting that an order for *mandamus* or injunction could only be granted where the defendant had a specific legal duty to perform, he held that the recommendations made by the Commissioner of Official Languages imposed no legal obligation on Via Rail and their implementation was not executory. The prothonotary then indicated that, in any case, the Court did not have jurisdiction in the case at bar, as the dispute between the applicant and Via Rail was in the nature of a grievance that should be resolved by the arbitration procedure in accordance with the collective agreement.

The applicants appealed this decision to the Federal Court, asking it to quash the prothonotary's order. In support of their appeal, the applicants argued that as a federal institution, Via Rail had a legal duty to observe the OLA. They noted that section 77 allowed an action to be filed in the Federal Court to ensure compliance with the Act following a complaint to the Commissioner of Official Languages, to obtain an appropriate and just remedy. The Commissioner of Official Languages obtained the status of an intervener in the case to support the applicant in his argument, seeking to clarify the question of the Federal Court's jurisdiction under the express wording of the OLA. In her submissions, the Commissioner maintained that the applicants had a statutory right to appeal to the Court under the clear and express wording of subsection 77(1) of the OLA. Consequently, according to the Commissioner, the Court had to hear the application to determine whether there had been a breach of the OLA, and, if necessary, determine the appropriate and just remedy in the circumstances.

Rouleau J. of the Federal Court dismissed the appeal. First, he affirmed the decision rendered by the prothonotary, emphasizing the fact that the applicants' proceedings sought an order to compel Via Rail to carry out the Commissioner's recommendations. As those recommendations created no duty in law, there was consequently no cause of action against Via Rail for failure to implement the said recommendations.

This part of the judgment also noted that it was impossible for the Court to make an order in a specific case, like the one at bar, when the initial proceeding only pointed to the failure of implementing the recommendations of the Commissioner of Official Languages, without requesting a ruling dealing specifically with the infringement of OLA obligations.

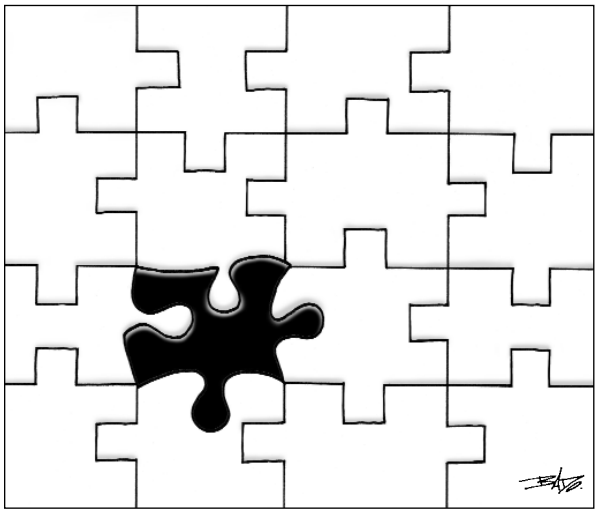
Rouleau J. also considered that the clauses of the collective agreement were responsible for the dispute between the parties, because the problems alleged by the applicants concerning their promotion opportunities resulted from the implementation of the company's language policy. He therefore concluded that the Court did not have jurisdiction to hear this case, on the same grounds as those given by the prothonotary.

This judgment has been appealed to the Federal Court of Appeal. The appellant and the intervener are essentially arguing that the Federal Court erred in dismissing the application on the basis that it was impossible to give effect to the remedy sought. They considered that section 77 of the OLA clearly provides for a statutory remedy in the Federal Court following a complaint under section 91 of the OLA (as was the case here). They are seeking a just and appropriate remedy, and submit that after hearing the case on the merits, the Court has discretion as to the remedy.

VI- SCOPE OF THE COMMITMENT OF THE FEDERAL GOVERNMENT IN PART VII OF THE *OFFICIAL LANGUAGES ACT*

Part VII of the OLA deals more specifically with the government's commitment to enhance the vitality of Francophone and Anglophone minorities in Canada, to support and assist their development, and to foster full recognition and use of both English and French in Canadian society. This part of the OLA raises many questions: whether the commitment given is declaratory or executory, how it is to be implemented, and the circumstances in which it should be applied.

Two decisions rendered during the period covered by this report dealt, for the first time directly, with this question of the scope of the commitment in Part VII of the OLA, particularly in section 41 of the OLA.



6.1 Setting electoral district boundaries in New Brunswick

Raîche v. Canada (Attorney General)

In *Raîche*,[103] the Federal Court considered *inter alia* to what extent a Federal Electoral Boundaries Commission should take section 41 of the OLA into account[104] when it sets new boundaries for an electoral district in which Francophone or Anglophone minorities reside. As in *Charlebois* and *Forum des maires*, analysed in this report, this judgment raises the question of whether Part VII of the OLA is declaratory or executory.

In this case, a Federal Electoral Boundaries Commission had been established for the province of New Brunswick to propose a redistribution plan for electoral districts in that province. Among other things, the Commission had recommended transfer of the parish of Allardville and part of the parishes of Saumarez and Bathurst from the federal electoral district of Acadie-Bathurst to that of Miramichi. The Commission had subsequently held public hearings and received submissions and comments from communities on the proposed changes.

[103] *Raîche v. Canada (Attorney General)* (2004), 252 F.T.R. 221, 2004 FC 679.

[104] Section 41 provides as follows: " The Government of Canada is committed to (a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and (b) fostering the full recognition and use of both English and French in Canadian society", *Official Languages Act*, R.S.C. 1985, ch. 31 (4th Supplement).

In the Acadie-Bathurst riding, all the interveners favoured maintaining the status quo, citing questions of community of interests and identity. Despite these submissions, the Commission maintained its recommendation on grounds of electoral parity, that is the establishment of a certain balance in the number of electors by riding.

The Commissioner of Official Languages had received three complaints regarding this recommendation by the Commission. After an investigation, she concluded that the commitment in Part VII of the OLA required the Commission to assess the harmful consequences and disadvantages of its recommendations to the Francophone community. The Commission's report had not persuaded the Commissioner that it had acted in this way. The Commissioner accordingly concluded that the Commission had not discharged the responsibilites upon it in this respect under section 41 of the OLA.

An order modifying the electoral boundary was nonetheless proclaimed. Before it came into effect, however, the applicants filed an application for judicial review, raising several questions regarding compliance with the voting right contained in section 3 of the Charter, section 15 of the *Boundaries Readjustment Act* and Part VII of the OLA. The decision on this application was finally handed down before the order came into effect.

1) Consistency of order amending electoral boundaries with voting rights

In its judgment, the Court first noted that section 3 of the Charter guaranteed the right not only to parity of the electoral power, but also the right to effective representation. It noted that although parity is important, absolute parity is clearly impossible and relative parity was not the only factor to be considered in ensuring effective representation. It indicated that other factors, such as "geography, community history, community interests and minority representation, had to be taken into account"[105] and that they "could justify departure from absolute voter parity."[106]

The Court also recalled a warning given by the Supreme Court of Canada in *Carter:*[107] courts should only conclude that there has been an infringement of section 3 of the Charter where "reasonable persons applying the appropriate principles . . . could not have set the electoral boundaries as they exist."[108] This hesitation obviously reflects the delicate nature of the drawing of electoral boundaries. The commissions in fact had to reconcile two principles: that of parity and that of community of interests.

[105] *Raîche*, ***supra*** note 103 at para. 30.

[106] *Ibid.*

[107] *Reference Re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 S.C.R. 158 "*Carter*".

[108] *Ibid.*

The Court went on to consider the facts in the case at bar, and in view of the contradictory evidence, chose to accept the applicant's evidence that there was a community of interests in Acadie-Bathurst. It also noted that the Commission had accepted that there was a community of interests in Acadie-Bathurst and it was aware that the parity of the electoral power was not the only point to consider in drawing the electoral boundaries. The Commission had decided that a variance of 21 percent was simply too great.

As the basic test for determining whether a population has effective representation is the equality of suffrage, and a commission only infringes section 3 of the Charter if "reasonable persons applying the appropriate principles . . . could not have set the electoral boundaries as they exist,"[109] the Court concluded that the Commission had not infringed that section when it decided to transfer parishes from Acadie-Bathurst to the Miramichi riding, since the decision was "reasonable".

2) *Compliance with section 15 of the* Electoral Boundaries Readjustment Act

On this point, the Court first noted that under paragraphs 15(1)(*a*) and (*b*) of the *Electoral Boundaries Readjustment Act*, commissions must consider a reasonable departure from the electoral quota to respect a community of interests, the identity of an electoral district in a province, its historical pattern or . . . so that the surface area of districts in sparsely populated, rural or northern areas of the province are not too large. It also noted that under section 15(2) of the *Electoral Boundaries Readjustment Act*, a commission could consider a larger departure if a community of interests or geographic features warranted it.

The Court noted that the Commission had applied subsection 15(1) when it recognized that there were many rural areas in New Brunswick and a variance of 10 percent from the electoral quota was therefore reasonable. It was careful to note, however, that the evidence showed that the Commission had declined to consider whether subsection 15(2) was applicable to the Acadie-Bathurst electoral district, since the figures were the only reason given for adding parishes to the Miramichi electoral district.

Finally, it concluded that while the Commission had observed paragraphs 15(1)(*a*) and (*b*) of the *Electoral Boundaries Readjustment Act*, in considering that a variance of 10 percent from the electoral quota was reasonable, it had not gone on to the second stage, which was equally significant: it "did not consider whether it was desirable to allow a variance

[109] *Raîche*, ***supra*** note 103 at para. 49.

provided for in the *Electoral Boundaries Readjustment Act* to preserve a community of interest in an electoral district."[110] For these reasons, the Court concluded that the Commission had not complied with section 15 of the *Electoral Boundaries Readjustment Act*.

3) Compliance with Part VII of the OLA

Looking at the legal scope of this part of the OLA, the Court said it agreed with the position taken by the Commissioner of Official Languages, namely that section 42 of the OLA expressly commits federal institutions to implementing the federal government's policy in section 41 of the OLA. The Court also said it agreed with the Commissioner's argument that the *Electoral Boundaries Readjustment Act* and the OLA have similar goals, namely the obligation to take into account a community of interests, including a community of interests defined by the French language, and the commitment to enhance the vitality of Francophone minorities. Accordingly, the case did not raise any questions as to which of the two statutes took priority, since there was no inconsistency between the duties they imposed.

After considering the differences between the terminology used in Part VII and the more imperative terminology used in the other parts of the OLA, however, the Court held that in its view, Part VII of the OLA was declaratory in nature, not enforceable. Though the Minister of Canadian Heritage should encourage governmental institutions to support the development of minorities, neither the federal government nor federal institutions were obliged to systematically give effect to Part VII of the OLA. Accordingly, the Commission had discretion to decide whether it was appropriate to rely on Part VII, but if it chose to do so it should comply with that Part. Then, relying on *Devinat*,[111] and contrary to what was subsequently held in *Forum des maires*,[112] the Court held that even if an infringement of Part VII of the OLA did not give rise to a court remedy under Part X of the OLA, it still had jurisdiction under section 18.1 of the *Federal Courts Act* to hear a judicial review regarding that part of the Act. It was careful to point out, however, that in view of the declaratory nature of Part VII of the *OLA*, it had to show considerable deference toward the Commission.

Finally, in analysing the facts of the case, the Court concluded that the Commission's decision on the transfer was wrong because it was made without regard for the evidence before it (that is, the evidence presented by the various interveners from the Acadie-Bathurst electoral district at the public hearings). The decision was taken contrary to the *Electoral Boundaries*

[110] *Ibid*. at para. 82.

[111] *Devinat v. Canada (Immigration and Refugee Board)*, [2000] 2 F.C. 212 (C.A.) [*Devinat*].

[112] The decision of the Federal Court of Appeal in *Forum des maires de la péninsule acadienne v. Canada (Canadian Food Inspection Agency)*, 2004 FCA 263 is analysed in the current *2003–2004 Language Rights*.

Readjustment Act. The Court acknowledged that the Commission had "tried to apply Part VII of the *OLA* in a manner in keeping with the intention of Parliament,"[113] but "it failed to do so because its findings of fact were erroneous".[114]

Accordingly, the Court set aside the Commission's decision, though it pointed out that it was the Commission's function to decide on what actions should be taken to give effect to this conclusion. The Court chose to suspend temporarily this invalidity declaration, for a maximum period of one year, to give the authority in question time to act.

Following the judgment, it was decided to create a commission to review the boundaries of the federal Acadie-Bathurst riding. This commission submitted its final report in December 2004. It recommended that the Francophone parishes of Allardville and Bathurst be returned to their original riding. It based its conclusion on the desire to respect a community of interests. To give effect to this recommendation, the House of Commons passed Bill C-36, which received Royal Assent on February 24, 2005.

6.2 Positions transferred by the Canadian Food Inspection Agency in New Brunswick without taking into account the needs of the local francophone community

Forum des maires de la péninsule acadienne v. Canada (Canadian Food Inspection Agency)

During the period covered by this report, the proceedings initiated by the Forum des maires resulted in a judgment by the Federal Court[115] and a judgment by the Federal Court of Appeal.[116] The case concerned the decision of the Canadian Food Inspection Agency to transfer certain positions from one region to another and raised *inter alia* the question of remedies available to penalize infringements of the government's commitment regarding the development of official language minorities.

In this case, the Agency in the fall of 1999 transferred four seasonal inspector positions from its Shippagan office, located on the Acadian peninsula in the northwest of the province of New Brunswick, to the Shediac office located in the southeastern part of the province. According to the Agency, this transfer was necessary to rationalize activities relating to inspection work in the Shippagan area, a rationalization due primarily to the decline in the fishing industry and the transfer of unprocessed fish products from Shippagan to processing plants in southeastern New Brunswick.

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[113] *Raîche*, ***supra*** note 103 at para. 104.

[114] *Ibid.*

[115] *Forum des maires de la péninsule acadienne v. Canada (Canadian Food Inspection Agency)*, 2003 FC 1048.

[116] *Forum des maires de la péninsule acadienne*, ***supra*** note 112.

Following that decision, the Forum des maires filed a complaint with the Commissioner of Official Languages, alleging that the administrative reorganization implemented by the Agency had been carried out to the detriment of the Francophone regions in northeastern New Brunswick. According to the applicant, this decision had an impact not only on service to the public and on the Agency's capacity to respect the rights of employees at the Shippagan office to work in French, but also on the region's economy.

In her investigation report, the Commissioner concluded that the complaint was valid, noting that, "the Agency's decisions did not allow it to fully meet its obligations under Part IV of the *OLA* (Services to the Public)." Further, in view of the particular regional and historic context of the Acadian peninsula, "Part VII of the *OLA* at the very least created an obligation on the respondent to consult the minority official language community before making its decision."

Relying on the Commissioner's conclusions, the applicant filed an action in the Federal Court. It alleged that the decision by the Agency was contrary to law as, first, it did not assist in resolving the situation concerning Part IV of the OLA, and second, the Agency had failed to consider Part VII of the OLA in making the decision.

1) Whether the Agency carried out its linguistic duties

In his judgment, Blais J. of the Federal Court relied primarily on the findings of the Commissioner's investigation and held that there had been an infringement of Part IV and Part VII of the OLA. It appeared from the evidence, based primarily on the Commissioner's investigation report, that the Agency did not take the linguistic preferences of its clientele into account at any time, and that Part IV of the OLA was still not being observed since the transfer of the positions in question. Regarding Part VII of the OLA, Blais J. concluded that the Agency had failed in its duty to consult the official language minority communities to ensure that its decisions took into account their special development and vitality requirements.

Relying on the decision in *Devinat*[117] and the comments he had made in the case involving the *Contraventions Act*,[118] Blais J. went on to answer the Agency's argument that Part VII did not create rights which could give rise to penalties. He noted that remedies under section 18.1 of the *Federal Courts Act* were always available for breaches of parts of the OLA not covered

[117] *Devinat*, ***supra*** note 111.

[118] *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)*, ***supra*** note 77.

by subsection 77(1) of the OLA, such as the provisions of Part VII of the OLA. Accordingly, the judge allowed the application by the Forum des maires and ordered that the positions be reinstated.

The Attorney General of Canada appealed this judgment, asking the Federal Court of Appeal to quash the order by Blais J. In its judgment, the Federal Court of Appeal first noted that the initial application filed by the Forum des maires was pursuant to section 77 of the OLA, not an application for judicial review under section 18.1 of the *Federal Courts Act*, as the trial judge had several times described it. Also, the remedies the applicant could seek were not limited to those set out in subsection 18.1(3) of the *Federal Courts Act*. The Court further observed that analysis of Part IV of the OLA and a finding that it had been infringed, sufficed to dispose of the case.

In this regard, the Court concluded that the Agency had reduced its services in Shippagan without considering the effect of that reduction on the Francophone minority's rights to receive services in French, and that the reduction of services had the effect of infringing the right conferred on that minority by section 21 of the OLA. It noted that the Agency did not dispute "the merits of the complaint at the time it was filed, in October 1999, but the choice of relief ordered by the judge in September 2003,"[119]

It also noted that at the hearing before the Federal Court a discussion had also arisen as to the scope of Part VII of the OLA, and the judge appeared to have agreed to treat part of the application as an application for judicial review in respecting breach of Part VII of the OLA. It therefore had to consider this question.

2) Whether breaches of Part VII of OLA can be dealt with by the courts

The Court first noted that subsection 77(1) of the OLA was quite clear: Parliament intended that "only those complaints in respect of a right or duty under certain sections or parts of the Act could be the subject matter of the remedy under Part X."[120] This remedy was accordingly limited to complaints based on the sections and parts set out in subsection 77(1) of the OLA, with Part VII not listed.

The Court then considered the argument based on the judgment in *Devinat*,[121] according to which, subsection 77(5) of the OLA authorized other actions, such as an application for judicial review pursuant to section 18.1 of the *Federal Courts Act* in the event of an

[119] *Forum des maires*, ***supra*** note 112.

[120] *Ibid.* at para. 25.

[121] *Devinat*, ***supra*** note 111.

infringement of OLA provisions other than those set out in section 77 of the OLA. It dealt with this argument by carefully distinguishing the facts of the case from those that existed in *Devinat*. In the Court's opinion, there was no doubt as to the existence of a duty in *Devinat*, since the latter dealt with section 20 of the OLA, imposing a duty ("shall") to publish a bilingual version of the decisions of federal tribunals. Section 41 of the OLA, at issue in this case, contained no similar language, however, and instead spoke of a political commitment. The Court further considered that the duties were actually to be found in sections 42 and 43 and, as these were of a most general and vague nature, they did not lend themselves to the exercise of judicial authority.

In the Court's view, the Supreme Court's many judgments on the broad and liberal interpretation of language rights in terms of their purpose[122] also could not have the effect that section 41 of the OLA imposed a duty. In its opinion, it is true that the protection of language rights is a fundamental constitutional objective and requires special vigilance by the courts. The latter should therefore interpret provisions conferring such rights generously, "but it is also necessary that these be rights to protect and not policies to define."[123] It added that, "however, it is not because a statute is characterized as quasi-constitutional that the courts must make it say what it does not say, especially when the statute, as in this case, has been careful not to say it."[124] Thus, the Court concluded that section 41 of the OLA was "declaratory of a commitment and that it does not create any right or duty that could at this point be enforced by the courts, by any procedure whatsoever,"[125] and that the argument regarding section 41 should take place in Parliament, not before the courts.

3) Remedy that was appropriate and just in the circumstances

Finally, considering the question of a remedy, the Court first noted that it was for the Court to decide whether the complaint was valid at the time it was filed, not whether it was valid at the time of the trial. If the judge considered it was valid, he or she should allow the application and undertake to define the "remedy he [or she] considers appropriate and just in the circumstances." It pointed out that if the alleged infringements had all been corrected at the time of the trial, the judge could decide that in the circumstances no remedy should be granted, except, for example, the awarding of costs.

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[122] Notably in the cases cited by the Courts: *Beaulac*, ***supra*** note 1; *Doucet-Boudreau*, ***supra*** note 16 analysed in the current *2003-2004 Language Rigths; Reference re Secession of Québec*, [1998] 2 S.C.R. 217; *Devinat*, ***supra*** note 111; *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373 (C.A.) as well as *Lalonde et al. v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505.

[123] *Forum des maires*, ***supra*** note 112 at para. 39.

[124] *Ibid*. at para. 40.

[125] *Ibid*. at para. 46.

The Court went on to recall the criteria applied by the Supreme Court in *Doucet-Boudreau*[126] to define the phrase "appropriate and just in the circumstances," adding that the solution applied had to be:

> relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied . . . effective, realistic, and adapted to the facts of the case . . . respectful of the relationships with and separation of functions among the legislature, the executive and the judiciary and the role of the courts, which is one of adjudicating disputes and granting remedies that address the matter of those disputes, and not leap into the kinds of decisions and functions for which [the] design and [their] expertise are manifestly unsuited . . . fair to the party against whom the order is made and not impose substantial hardships that are unrelated to securing the right.[127]

Considering the facts of the case, the Court concluded that the trial judge had accepted reasons "much too summary to satisfy the standards laid down in *Doucet-Boudreau*"[128] and that "his order for relief was pronounced in an erroneous legal context since he based himself primarily on Part VII of the *Act*, which is not executory,"[129] and that, in any case, the order contained "a number of uncertainties and difficulties."[130] Accordingly, the Court decided to review the remedy.

It noted that the first basis for the complaint, namely the lack of consultation, had been vitiated, as for four years, and throughout the trial, there had been numerous meetings and attempts to arrive at a satisfactory solution. The second basis for the complaint, however, the reduction of services in French, remained an issue. In light of the evidence, the Court concluded that essentially the problems that initiated the complaint had been dealt with through the intervention of the Commissioner and the pressure applied to the Agency by the filing of the action in the Federal Court. Finally, it noted that the provision of service in French certainly entailed "hiccups," but the evidence did not show that those "hiccups" were symptomatic of serious problems or deep-seated malfunctions in the Agency. Accordingly, there was no question of breaches that could be described as "collective." In other words, the Court held that it had not been established that reinstatement of the positions in Shippagan was an appropriate and just remedy in the circumstances.

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[126] *Doucet-Boudreau*, ***supra*** note 16 is analysed in the current *2003–2004 Language Rights*.

[127] The Court cited at page 39, at para 57 from its decision in the *Forum des maires* matter, a passage from the Supreme Court judgment in the Doucet-Boudreau case, ***supra*** note 16.

[128] *Forum des maires*, ***supra*** note 112 at para. 60.

[129] *Ibid.*

[130] *Ibid.*

In concluding, the Court of Appeal took care to note that the Forum des maires "was right to institute its proceedings since the Agency was not at the time complying with the obligations imposed on it by the *Official Languages Act* to serve the public in French in the Acadian peninsula"[131] and to "contest the appeal since the Agency was seeking to have set aside a judgment that had correctly held that the complaint was justified."[132] In view of the changes that had occurred since the complaint was filed and the remedial actions taken, the Court of Appeal granted no remedy other than to order the Agency to pay the costs of the Forum des maires at trial and on appeal.

Accordingly, the Court of Appeal concluded that the original complaint was valid and that the trial judge's decision to allow the application should be upheld and the appeal dismissed in this regard. In view of the fact, however, that the original complaint was no longer valid when the trial judgment was taken under advisement, and the remedies ordered by the trial judge were not appropriate and just in the circumstances, it allowed the appeal on that issue. It reversed the part of the Federal Court Trial Division judgment that set aside the Agency's decision to transfer the positions to Shediac and awarded monetary compensation.

It should be noted that the Supreme Court of Canada has accepted to hear an appeal of this decision.

[131] *Ibid*. at para. 83.

[132] *Ibid.*

VII- IMPACT OF CERTAIN ADMINISTRATIVE DECISIONS ON THE VITALITY OF OFFICIAL LANGUAGE MINORITY COMMUNITIES

The case involving the *Montfort* Hospital,[133] analysed in the previous report,[134] confirmed the importance of institutions for the vitality of official language minority communities in Canada. In its decision, the Court had to interpret and apply the unwritten principles on minority protection as set out in the *Reference Re Secession of Quebec*.[135] One decision considered in this report raises the application of those principles and examines the possible impact of certain administrative decisions that allegedly did not take into account the principles concerning the vitality of official language minority communities. The decision reached no conclusion on this point, as the matter could be resolved on another basis.

7.1 The importance of institutions to ensure the vitality of minority communities

Tremblay v. Lakeshore (Town)

In *Tremblay*,[136] the Ontario Superior Court had to consider a decision made by a town council. The latter refused to award a historical designation to a church under the *Ontario Heritage Act*, requiring that such a request be made by the owner of the property. This case raised the question of taking into account the unwritten constitutional principles of the protection of minorities in the context of this decision. The Court did not have to take this question any further, however, as it held that the case could be decided on the traditional rules of administrative law.

The Roman Catholic diocese of London, owner of the St-Joachim church in the town of Lakeshore, wanted the church demolished because it had fallen into disrepair. The parishioners, who belonged to an Ontario Francophone community, wanted to preserve the building,

[133] *Lalonde*, ***supra*** note 122.

[134] *Rapport sur les droits linguistiques 2001-2002*, ***supra*** note 2.

[135] *Reference re Secession of Quebec*, ***supra*** note 122.

[136] *Tremblay v. Lakeshore (Town)*, [2003] O.J. No. 4293.

which they regarded as an important symbol of their identity and vitality and a rallying point for their community. For these reasons, they formed the organization "SOS Églises" and asked the town of Lakeshore to designate the building under the *Ontario Heritage Act*.

After holding several meetings, the town council finally denied the designation. The town concluded that it could not grant the request without the consent of its owner, the diocese. The town council also adopted a resolution stating that "a request for heritage designation of a property be made . . . by the owner of the property." Soon afterwards, the diocese sold the church: its demolition was part of the conditions of sale. A demolition permit was granted, but it was stayed due to the proceedings filed by the applicants.

In their pleadings, the applicants argued that the town council was not empowered to impose such a condition on an application for historical designation. They also maintained that the town's decision was within its discretion, but it had to be made consistent with the Charter and the Constitution. When it denied the designation sought, the town did not take the unwritten principles of the Constitution regarding minority protection, set out *inter alia* in *Montfort*, into account.[137]

The Ontario Superior Court first considered the *Ontario Heritage Act*. It noted that the latter gave municipalities the power to designate certain properties located in the municipality as being of historical or architectural interest. In terms of procedure, this designation was a simple process and the decision to designate property was clearly discretionary. The Court observed that this discretion had limits, however, and had to be exercised "with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*."[138] It added that these principles included those articulated in *Montfort*, namely respect for and protection of the Ontario Francophone minority and respect for linguistic duality as a fundamental principle of Canadian society.

After noting the argument made by the applicants regarding the unwritten principles of the Constitution on minority protection, the Court indicated that it would not rule on this point because "this case is to be determined on traditional administrative law principles rather than the constitutional analysis."[139] In the Court's opinion, the request for consent by the owner to the historical designation of the church was not consistent either with general interpretation or the purpose of the *Ontario Heritage Act*. The Court indicated

[137] *Lalonde*, ***supra***, note 122 (commonly known as "*Montfort*").

[138] The Court referred, at para 18, of its decision in the *Tremblay* matter, (***supra*** note 135) to an excerpt from the judgment rendered by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[139] *Tremblay*, ***supra*** note 135 at para. 22.

that the Act provided only for a requirement that the owner be notified, possible objections be heard, and a hearing be held. It further provided that an owner may refuse consent, as the purpose of the Act was to establish a fair balance between the interest of the public, the community, and the owner.

Accordingly, the Court allowed the application for judicial review on the ground that the condition imposed by the town of an application by the owner for designation of historical property was unreasonable. The Court referred the matter back to the town council for reconsideration in accordance with the applicable principles.